Circuit Court for Baltimore City
Case No. 24-C-16-004891

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2351

September Term, 2017

LOUIS BEVERLY, ET AL.

v.

CARP-SECA CORPORATION, ET AL.

Fader, C.J.,
Shaw Geter,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 14, 2020

*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.

Appellants, Louis and Kim Beverly, filed suit in the Circuit Court for Baltimore City seeking to recover damages for personal injuries caused by the alleged negligence of appellees Carp-Seca Corporation, the Mayor and City Council of Baltimore, and other defendants. By the time of trial only Carp-Seca and the City remained as defendants.

A jury, finding both the City and Carp-Seca negligent, awarded $2,622,120.09 in damages in favor of the Beverlys, but against the City only, based on a finding that the City's negligence was an intervening, superseding cause to Carp-Seca's negligence. Thus, Carp-Seca was released from liability, and the damage award was reduced to $200,000 pursuant to the Local Government Tort Claims Act damages cap.[1]

On appeal, the Beverlys challenge (1) the court's superseding cause jury instruction and (2) the court's delay and framing of the verdict sheet.[2] In its cross-appeal, the City

[1] The Local Government Tort Claims Act is codified under Maryland Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), §§ 5-301 through 5-304. The damages cap for a local government's liability is found in CJP § 5-303(a)(1), which at the time of the injury provided a cap of $200,000 per individual claim. In 2015, the damages cap was subsequently amended, increasing the damages cap to $400,000 per individual claim. *See* 2015 Md. Laws, ch. 131.

[2] Questions on appeal and cross-appeal, as presented in the respective briefs, are:

The Beverlys, as appellants, ask:

1. Where A Jury Finds That Negligent Construction Created A Risk Of A Collision With A Steel Gate That Opens 15 Feet Into The Adjacent Street, Can The Superseding Cause Defense Relieve The Contractor Of Liability Because The Municipality Did Not Discover The Defects?

2. Was It An Abuse Of Discretion Under Rule 2-522 For The Trial Court To: (1) Delay Drafting The Special Verdict Until The Jury Deliberated For Three Hours; And (2) Frame Verdict Questions Which Were Not Consistent With Closing Arguments?

challenges the court's denial of its motion for judgment and, in the alternative, it incorporates the Beverlys' challenges to the superseding cause issues.

BACKGROUND

Wyman Park Project

In 2007, the City contracted with Carp-Seca to install a sewage collection system in the Wyman Park neighborhood. The contract was later revised to include restoration of a ballfield in that part of the park where the construction staging and storage area had been based. The ballfield restoration plan provided for, *inter alia*, the installation of wooden bollards along Wyman Park Drive with a barrier gate to allow restricted, authorized access into Wyman Park. The restoration plan, including installation of the gate, was completed in the fall of 2011.

The accident

The City, as cross-appellant, asks:

1. Did the circuit court err in denying the City's motion for judgment for failure to prove negligence when the evidence established that a City gate swung into a roadway, striking Mr. Beverly's car, but not when, if ever, the City had notice before the accident that the gate had ever swung into the roadway?

2. Assuming, *arguendo*, that the City was negligent, did the circuit court err by permitting the jury to find that such negligence could be an intervening, superseding cause of the accident, legally absolving the company responsible for the gate's installation?

(Footnote omitted).

On April 3, 2014, Louis Beverly sustained severe injuries when his car collided with the barrier gate which had swung open into the roadway of Wyman Park Drive, a two-lane public road that runs along part of the perimeter of the park. Beverly was injured when his vehicle struck the pointed end of the triangular gate, which pierced the passenger side windshield and struck him in the head.

The Litigation

The Beverlys' initial complaint named several defendants, asserting identical claims of negligent design, installation and maintenance of the gate against each defendant.[3]

At the close of all the evidence, following a five-day jury trial, Carp-Seca requested, and was granted over objection, a jury instruction on intervening, superseding cause.

Only after the jury had begun deliberations, the court prepared a proposed verdict sheet, to which all parties noted objections for various reasons. During the two hours of discussion on the subject, the court entertained some of the parties' proposed revisions to

[3] Their complaint named: Carp-Seca Corporation, the corporation that had contracted with the City to complete the Wyman Park project; John E. Lancey, an employee of Carp-Seca who was the project manager of the Wyman Park project; the City of Baltimore; and John Doe, representing the City employee responsible for inspecting, approving, and maintaining the gate.

The complaint was later amended twice to add Brian Goldman, the trustee of Louis Beverly's bankruptcy estate, as an additional plaintiff, and two additional defendants: Paul Burgee, a City employee, substituted for "John Doe" who, it was learned, was the City's construction project supervisor for the Wyman Park project; and Rummel, Klepper & Kahl, LLP (RKK), the engineering firm which the City had contracted to design various aspects of the project, including the gate. RKK then filed a third-party complaint against Phoenix Engineering, Inc., the engineering firm it had subcontracted with to design the gate. Prior to trial, the third-party complaint and all defendants, except for the City and Carp-Seca, were dismissed from the lawsuit.

the verdict sheet, but ultimately overruled their final objections and provided the revised verdict sheet to the jury. Shortly thereafter, the jury returned its verdict, finding both Carp-Seca and the City negligent but finding the City's negligence was the superseding cause of the accident.

The Beverlys' appeal was followed by the City's cross-appeal.

DISCUSSION

Standard of Review

In this appeal, we are asked to determine three issues: 1) whether the court abused its discretion in giving a superseding cause jury instruction; 2) whether the court abused its discretion in delaying the preparation and distribution of the verdict sheet; and 3) whether the City's motion for judgment ought to have been granted. Each issue creates separate and distinct standards for our review.

"Our review of a trial court's decision whether to give a requested jury instruction is conducted under an abuse of discretion standard." *Gasper v. Ruffin Hotel Corp. of Maryland, Inc.*, 183 Md. App. 211, 219 (2008) (citing *Thompson v. State*, 393 Md. 291, 311 (2006)). "Whether the evidence is sufficient to generate the requested instruction in the first instance, however, is a question of law that we review *de novo*." *Gables Constr., Inc. v. Red Coats, Inc.*, 241 Md. App. 1, 48 (citing *Fleming v. State*, 373 Md. 426, 433 (2003)), *cert. granted*, 464 Md. 25 (2019). We recently explained, "[a] trial court is required to give a proposed jury instruction when: (1) the requested instruction is a correct statement of the law; (2) the evidence supports giving the instruction; and (3) the substance of the instruction is not otherwise fairly covered by instructions that are given." *Anne*

Arundel County v. Fratantuono, 239 Md. App. 126, 142 (2018) (citing *Preston v. State*, 444 Md. 67, 81–82 (2015)).

With respect to the use of a special verdict sheet, we recently explained:

> In general, "the decision to use a particular verdict sheet 'will not be reversed absent abuse of discretion.'" *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 220 (2011) (quoting *Applied Indus. Techs. v. Ludemann*, 148 Md. App. 272, 287 (2002)); *accord S & S Oil, Inc. v. Jackson*, 428 Md. 621, 629 (2012). "Under the abuse of discretion standard," however, "this Court will overturn a trial judge's decision to use a particular verdict sheet if we find both that the trial judge committed an error and that the error prejudiced [the appellant's] case." *S & S Oil, Inc.*, 428 Md. at 629. Furthermore, "a 'court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case.'" *Schlotzhauer v. Morton*, 224 Md. App. 72, 84 (2015) (quoting *Arrington v. State*, 411 Md. 524, 552 (2009)).

Reiss v. Am. Radiology Servs., LLC, 241 Md. App. 316, 333, *cert. granted*, 466 Md. 217 (2019).

Finally, with respect to the City's argument raised in its cross-appeal, we have explained the analysis for reviewing motions for judgment:

> "[W]hen ruling on a motion for a judgment the trial judge must consider the evidence, including the inferences reasonably and logically drawn therefrom, *in the light most favorable to the party against whom the motion is made*. If there is any evidence, no matter how slight, legally sufficient to generate a jury question, the motion must be denied…. An appellate court reviewing the propriety of the grant or denial of a motion for judgment by a trial judge must conduct the same analysis."

Tate v. Bd. of Educ., Prince George's County, 155 Md. App. 536, 545 (2004) (emphasis in *Tate*) (quoting *James v. General Motors Corp.*, 74 Md. App. 479, 484–85 (1988)).

A. The Beverlys' Appeal

The Intervening, Superseding Cause Instruction

In their challenge to the court's superseding cause jury instruction, the Beverlys contend that "[t]he [court] should have applied the law to the evidence to determine if the evidence supported a six-part test of the evidence[,]" referring to the test advanced by the Court of Appeals in *Pittway Corp. v. Collins*, 409 Md. 218, 248 (2009). Further, they argue that "the court utterly bypassed the superseding cause test and erred as a matter of law by failing to conduct any analysis of the issue whatsoever." Therefore, they conclude, "the jury finding of superseding cause should be severed from the verdict, leaving intact the remainder of the verdict."

Carp-Seca responds that appellants failed to properly preserve the argument concerning the application of the six *Pittway* factors. We agree.

Carp-Seca moved for judgment on the basis of a superseding cause, thereby timely putting the parties on notice of the issue, but neither the Beverlys nor the City opposed the motion or presented argument as to the inapplicability of that defense. On two occasions, in denying Carp-Seca's motion for judgment, first at the close of the Beverlys' case-in-chief and later in its subsequent renewed motion at the close of all the evidence, the court recognized that:

> With respect to the intervening cause, you certainly raise a good point. I think -- looking at the evidence in the light most favorable to the Plaintiff at this juncture, I think I cannot grant the motion.
>
> We'll discuss this at the end of the case. And certainly as a jury instruction and legitimacy of that argument before the jury.

* * *

> You have posed a jury question about superseding and intervening cause. And we can discuss that at the appropriate time.

Immediately following the court's denial of Carp-Seca's renewed motion for judgment, its counsel[4] engaged in a colloquy with the court, adding clarity to the particular superseding cause argument it intended to pursue.

> [COUNSEL]: I know I don't need to, Your Honor, but I'd like to at least put a footnote in here because you're going to consider at a later date the lock argument, the superseding problem.
>
> And I just want to call the Court's attention so that it doesn't pop up later on for the first time to the design, which included not only a latch with a stop, but also a lock. And the testimony is that that wasn't there. So --
>
> THE COURT: Understood.
>
> [COUNSEL]: Great.
>
> THE COURT: Okay. So the superseding negligence argument is even if Carp-Seca was negligent in installing a gate that did not meet the specifications, thereby causing a [sic] unreasonable risk of harm to those driving on the roadway, that the negligence of the City was a superseding cause of the injury so to speak. And I think that's a fair understanding of the law.

This comment by the court put squarely before the parties the exact argument that Carp-Seca would be relying on in its ultimate request for a superseding cause instruction. And, it may well have tipped its closing argument. Despite having adequate notice from

[4] The transcript references the Beverlys' counsel as the speaker, but that is likely an error in the transcription, as the point being asserted is in reference to Carp-Seca's proffer that the superseding cause was the absence of the lock. That position would have been contrary to that being argued by the Beverlys.

both the court and Carp-Seca of the potential applicability of the superseding cause defense, the Beverlys failed to adequately articulate challenges before the trial court.

When later discussing the proposed jury instructions, the court said:

> THE COURT: So then we get to intervening/superseding cause, which was, I believe, proposed by Carp-Seca only, and I think we've heard argument on this is [sic] that irrespective of what, if any, negligence Carp-Seca committed, that the superseding cause of the accident was the acts of the City by not, you know, maintaining this gate in a proper manner or just simply locking it.
>
> [CARP-SECA'S COUNSEL]: Yes, Your Honor.
>
> [BEVERLYS' COUNSEL]: So [we] would object to using the intervening/superseding cause because, as the Court knows, there is no duty on the City to constantly go out and check these things. I feel strange making this argument at this point.
>
> * * *
>
> Well, that's all I'd say.

In denying the Beverlys' exception, the court explained:

> Well, it[5] says, "If an event or act is so extraordinary that it is not reasonably foreseeable, then defendants' conduct["] -- in this case, Carp-Seca -- ["]is not the legal cause of injury.["] So I guess it's really up to the jury to decide whether it was so not reasonably foreseeable that the City would not lock this gate, I guess is the argument. I think I'm going to allow this to be a jury question. Okay.

The Beverlys made no further exception to the superseding cause instruction, nor was their position argued with particularity. No new arguments were made. The City did not take exception to this instruction.

[5] The court's reference to "it" was to MPJI-Cv 19:11 (Intervening/Superseding Cause), from which the court then quoted to counsel.

Maryland Rule 2-520 provides, in relevant part, that: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects *and the grounds of the objection*…." Rule 2-520(e) (emphasis added). The Beverlys failed to except to the jury instruction based on their appellate claim of the lack of sufficient evidence to generate the issue, excepting only on the issue of the City's duty, or lack thereof. Accordingly, the Beverlys' challenge on appeal based on the court's failure to apply the *Pittway* factors has not been preserved for our review.

Pursuant to Rule 8-131(a), we decline to decide an issue that was not properly "raised in or decided by the trial court." Similarly, since the City did not at any point object or take exception to the superseding cause jury instruction, it may not do so now, even in an alternative argument on its cross-appeal.[6] *John B. Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 64–65 (2014) (finding an issue raised by a party in its cross-appeal waived pursuant to Rule 8-131(a) when the issue had not been challenged or raised by that party before the trial court). *See also* Rule 2-520(e); Rule 8-131(a).

Verdict Sheet Delay

[6] Notwithstanding our conclusion that the issue was not adequately preserved for our review, we would find that the evidence was sufficient to support the superseding cause instruction. The City, having accepted the project as completed, was then responsible for the maintenance of the project, including the safety gate. The City had a continuing obligation to inspect and to replace or repair any part or mechanism instrumental to the proper functioning of the gate and to secure its purpose.

The Beverlys take issue with the court's delay in preparing the verdict sheet and in not distributing it to the jury until after deliberations had begun. They contend that it was an abuse of discretion for the court to delay preparation of the verdict sheet until after the parties made their closing arguments and the jury had begun its deliberations. That, they suggest, resulted in the verdict sheet questions being phrased differently from what counsel presented in closing arguments. They further argue that even though they were "aware of the possibility that the jury would in some manner consider either proximate cause or superseding cause, the manner in which the court crafted the issue in the verdict sheet was completely without notice and resulted in objections by both counsel for [the City] and [them]."

This argument, as well, has not been preserved for our review.

Rule 2-522(b) provides in relevant part:

> No party may assign as error the submission of issues to the jury, the instructions of the court, or the refusal of the court to submit a requested issue unless the party objects on the record *before the jury retires to consider its verdict*, stating distinctly the matter to which the party objects and the grounds of the objection….

Rule 2-522(b)(5) (emphasis added). With respect to the application of this Rule, the Beverlys assert that:

> In order to comply with the goal of fairness and the requirement of timely disclosure and to avoid an abuse of discretion, the court must provide the parties with a neutral expression of the issues raised by the evidence and the law at a time when they can properly respond.

Notwithstanding that assertion, the Beverlys did not note an objection to the trial court's proposed procedure at a time when the court could have properly addressed their

arguments, which would have been before the jury had begun deliberations. Having failed to do so, they may not now "assign as error the submission of issues to the jury[.]"

Even were we not to strictly apply Rule 2-522, our position would remain the same. On the third day (of five) of trial, the court recognized the need to timely address both the proposed jury instructions and verdict sheets, engaging in the following colloquy with the parties:

> THE COURT: … [The City] indicated that [it] would submit proposed jury instructions to the Court over the weekend, and [it] has. So what we've done is we've added to our list any instructions proposed by [the City] that had not been previously proposed by [the Beverlys] and Carp-Seca[.]
>
> So I think that, you know, it should indicate who has requested what. So please do disregard the last list that you received. While I know it is -- it is premature at this juncture to discuss these, I'm going to start -- based upon what I've heard, I'm going to start thinking about what should or should not be provided to the jury.
>
> Furthermore, do we have proposed verdict sheets? No? Yes? [Beverlys, yes]?
>
> [THE BEVERLYS]: Your Honor, [we] submitted one.
>
> [CARP-SECA]: We have not, Your Honor. Carp-Seca has not.
>
> THE COURT: Okay. And, again, I'm not forecasting anything with the proposed verdict sheets, but I would like to get your input into that. So if you have time this evening to draft one or -- that would be -- that would be --
>
> [THE CITY]: It's hard. I mean, we're still going here. And --
>
> THE COURT: I know, it's hard.
>
> [THE CITY]: But I don't have --
>
> THE COURT: You're the only lawyer here without any assistance, so -- so I understand.

[THE BEVERLYS]: Ouch.

THE COURT: Okay. Well, tell you what, have -- you have received the [Beverlys']; correct?

[CARP-SECA]: Yes.

[THE CITY]: Yes.

THE COURT: Okay. And, [Carp-Seca], if you'd be kind enough when you send us your proposed, you copy it to other counsel.

* * *

THE COURT: And then, [the City], what you can do is decide whether you propose a third version, or you like the [Beverlys'], or you like Carp-Seca's, or what have you.

[THE CITY]: Very good. Thank you.

Again, at the conclusion of the Beverlys' case-in-chief, the court addressed the status of its revisions of the jury instructions, noting that it had circulated to the parties the complete list containing all requested instructions for counsel to review for further discussion "at the appropriate time." Shortly thereafter, the City and Carp-Seca moved for judgment, at which point Carp-Seca focused its arguments on the superseding and intervening cause defense. The court denied both motions, leaving the City and Carp-Seca to present their evidence and renew their respective motions for judgment, which were also denied.

At that point, the court read the jury its instructions, including those with respect to the verdict and verdict sheet, explaining that:

> In this case, it is -- will be your duty to return a verdict on a written form of answers to written questions, which will be submitted to you by me.

> Your answers will constitute your verdict. Each answer is to be written in the space provided after each question.
>
> Now, before making each answer, all of you must agree upon it. It is your duty to answer each of these questions in accordance with the evidence in this case.
>
> So, you know, the first question, I'll just say: Do you find that the Mayor and City Council of Baltimore was negligent, you know, yes or no? And so forth and so on.
>
> So there will be multiple questions, and I will say also there may be parenthetical language in italics that might say: If you answered no to Question 1, skip to Question, you know, 4. So please do pay careful attention to those instructions within the verdict sheet….

The court then asked the parties: "Are we prepared for closing argument?" No objection was raised at that time to proceeding with closing statements before the verdict sheet was prepared.

There was no further discussion of the verdict sheet until the court took a brief recess following the Beverlys' closing argument. At that time, the court mentioned the status of the typed jury instructions, requesting that the City submit its proposed verdict sheet, and noted that: "When our jury leaves for its deliberations, we can discuss the verdict sheet." Again, no party objected to continuing with closing arguments absent resolution of the verdict sheet. Indeed, no objection to the delay in preparing the verdict sheet was made or addressed until the following day during an extensive two-hour discussion of the proposed wording of the issues. At that point, the Beverlys and the City expressed frustration with the court's decision to provide very narrow questions, rather than the general concepts that were argued at closing.

The jurors began deliberating late in the day and were excused after about one hour. On the next morning, the Beverlys' counsel was, for a valid reason, late arriving at court. Nonetheless, he had advised the court of his delay and his approval of the jury resuming deliberations, even in his absence.

B. The City's Cross-Appeal

Denial of the City's Motion for Judgment

In its cross-appeal, the City contends that "[t]he Beverlys failed to establish any negligence on [its] part …, and the circuit court thus erred in denying [its] motion for judgment." Specifically, the City argues that "the Beverlys failed to show that [it] breached its duty of care or that any act or omission by [it] was a proximate cause of the accident." In support of its contention, the City asserts that "the Beverlys offered no evidence that any aspect of the gate's construction created a dangerous condition that existed *at the time of the City's inspections*." (Emphasis in the City's cross-appellant brief). The City argues further that the Beverlys failed to prove any negligence on its part, "because there was no evidence that [it] had actual or constructive notice of the dangerous condition (i.e., that the slide bolt had become disengaged and the gate was open into the roadway) that contributed to the car crash."

The Beverlys disagree with the City's narrow characterization of negligence, contending that it "creates what amounts to a straw man by focusing on whether the city had notice of the latch being open, instead of whether the city had notice that the defective installation created a danger of the gate opening into the street." They assert that "[t]he issue is whether the City had actual or constructive knowledge that the gate was in a

defective condition which created an unnecessary risk of harm to travelers on the adjacent road."

It is well-established in Maryland tort law that

> a plaintiff must prove four elements to prevail in a claim of negligence: 1) the defendant owed the plaintiff a **duty** to conform to a certain standard of care; 2) the defendant **breached** this duty; 3) actual **loss or damage** to the plaintiff; and 4) the defendant's breach of the duty **proximately caused** the loss or damage.

Davis v. Frostburg Facility Operations, LLC, 457 Md. 275, 293 (2018) (emphasis in bold in original). *See also Torbit v. Baltimore City Police Dep't*, 231 Md. App. 573, 583 (2017) (quoting *McNack v. State*, 398 Md. 378, 394 (2007)).

The City's motion for judgment addressed the three claims of negligence alleged in the Beverlys' second amended complaint as negligent design, negligent construction, and negligent maintenance. Noting that there was no evidence produced that there was a negligent design of the gate, the City focused its arguments on the negligent construction and negligent maintenance claims.

The City argued that it did not install the gate and was not contractually bound to the actual construction of the gate because Carp-Seca contracted directly with the installer. For support, the City referred to the testimony of the Beverlys' civil engineer expert witness, Richard Balgowan, noting that the purpose of his testimony "was to establish the duty and establish that there was a breach of a duty with regard to construction." The City contended, however, that Balgowan's opinion testimony "did not or w[as] not given to a reasonable degree of any probability." Thus, the City concludes, the Beverlys failed to establish that it had violated a standard of care.

As to the alleged negligent construction of the gate, the City, at trial, characterized Balgowan's testimony on the subject as having given three reasons:

> The first reason was because it wasn't constructed in conformance of the blueprints…. The second reason was the MUTCD[7] provision regarding gates.
>
> * * *
>
> And the third [reason] was that ASTM[8] standard, … having to do with single gate latches….

Addressing each of the three asserted reasons, the City first suggested that "nonconformance with blueprints is not negligence[;] [y]ou need to rely on some sort of standard, which he did in (reasons) two and three." Further, it contended that Balgowan's opinion "did not state that the City breached the standard of care, rather it was focused on Carp-Seca and/or Sparks Fence…." It also challenged Balgowan's testimony relating to the MUTCD and ASTM.

With respect to the MUTCD, the City contended that Balgowan relied on the version of the Maryland MUTCD that did not go into effect until December 2011, well after the gate had been installed, and that the provision relied on was "merely guidance" because the language used included "should," not "shall." That, the City argued, implied discretion rather than requirement. The City also pointed out that the ASTM standards provided only

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[7] The MUTCD stands for the "Manual on Uniform Traffic Control Devices," which Balgowan testified to as being "a federal document that … every state in the country, including municipalities and cities, must follow."

[8] Balgowan testified that "ASTM is another national organization that develops standards[,]" which formerly stood for "American Society of Material Testing" or "Association of Material Testing type of thing[ ]" until it changed its name to "ASTM."

that the gate's latch "'shall be capable of retaining the gate in a closed position and shall have provision for a padlock[,]'" not that the gate be locked. (Quoting ASTM F900-11, Section 6.3). The City contends that, on cross-examination, it had established that "the requirements of the ASTM section were met and agreed to by Mr. Balgowan."

The City then addressed the maintenance aspect of liability, focusing on the issue of the maintenance of the roadway and whether there was actual or constructive notice of the dangerous condition of the gate opening into the roadway. In support the City argued that

> the [*Smith v. City of Baltimore*, 156 Md. App. 377 (2004)] case states that in order … for liability to attach to the municipality, they [sic] must have actual or constructive notice of the dangerous condition.
>
> The dangerous condition in this case is that the gate has opened into the road. There was no evidence at all that the City actually knew that the gate had opened into the road on this particular day. That leads us to constructive notice.
>
> With regard to constructive notice, there was no evidence of how long the gate had been opened into the road on that particular day. It could have been 10 seconds; it could have been 10 minutes. There's no evidence in that regard.
>
> * * *
>
> The only other testimony in that regard is Mr. Goodenough…, [and] he stated that he lives in the 300 Block of Wyman Park Drive. He's lived there since 1998. He is very familiar with the construction and whatnot that went on.
>
> His testimony was from the time that that gate was installed until the time of the accident, so that's August of 2011 to April 2014. In all of that time period …, he talked about traveling down that road 10 times a week or more….

His testimony was, during that time period, one time, he saw the gate open. And what did he do? He shut the gate, and he didn't call anybody. So there are several things I'd like to point out with regards to that.

Number one, we don't know whether or not this happened before the City accepted it for maintenance. We don't know that. We don't know how long it existed on that particular day. And notice -- well, because he was a good citizen, quite frankly, and shut the gate, but he didn't call the City, well, how was the City supposed to know that that even happened.

And there certainly isn't an instance of multiple times that this occurred, which could impute constructive notice. But all we have is one time in a two-and-a-half-year period….

Unpersuaded, the court denied the City's motion for judgment, stating that:

[W]hat this comes down to is really what the City knew on the date of installation and construction.

Mr. Thomas testified he accepted the gate as meeting the standards or the specs in the drawings. In my view, that was clearly not the case.

The gate was constructed in a wholly different manner than the drawing. Now that doesn't mean, as you said [counsel for the City], that using something different or doing it in a different way makes it negligent.

* * *

So what we have is a gate that is constructed in a manner inconsistent with the plans. It would not be unreasonable for a jury to find that there was no stop [on the gatepost]. And the only thing keeping us from disaster is whether or not Rec & Parks put a lock on it. It's very evident that … the end of the gate was rubbing up the interior to that pole.

And it [sic] terms of constructive notice, I think it's fair to argue that the City did have constructive notice. Because we all know that the gate was used by Rec & Parks to enter the park to cut the grass … or by DPW (Department of Public Works) to manage that -- examine the streams.

In concluding its findings and in denying the motion, the court explained:

> So if that's the case, it would not be unreasonable for the jury to say that the City traversed this with regularity, as opposed to Smith [sic] where it's unreasonable for us to say that the City is cognizant of every light.
>
> So in my view it's two-fold. It is negligence on the part of the City, based upon the evidence that's been presented thus far, in accepting a gate that was constructed in a manner that posed a potential -- a reasonable potential for hazard to those who would drive on that roadway.
>
> Okay. And … I think it would not be unreasonable for the jury, based upon the evidence looking at it in the most -- the light most favorable to the Plaintiff, to so find.
>
> Secondarily, with respect to the actual notice, I believe that it would not be unreasonable for a jury to believe that the City had actual notice, based upon what we understand the gate to have been designed and used for.
>
> So I'm denying the motion.

Thereafter, Carp-Seca offered the testimony of Steven Leius, its vice-president and co-owner, and read into the record excerpts from the deposition testimony of Anne Draddy, who, at the time of the gate installation, was an employee of the Baltimore City Department of Recreation and Parks. At that point, both Carp-Seca and the City rested.

At the conclusion of all the evidence, the City renewed its motion for judgment, noting that it was

> incorporating by reference the arguments that were previously made with regard to Mr. Balgowan and his testimony; the standard of care; the evidence that was presented; also the evidence with regard to maintenance of the roadway, whether or not there was actual [sic] constructive notice that the gate had opened into the roadway.

In its renewed motion, the City added alternative arguments relating to governmental immunity. The City first argued, with respect to non-proprietary government functions, that "to the extent that we're talking about the operation and maintenance of the

gate, which is part of Wyman Park, I would argue that the City is immune." Alternatively, the City conceded that "the maintenance of the roadway is proprietary[,]" and therefore, "no immunity [would be] attached." This, it asserted, would shift the question to whether there was actual or constructive notice of the hazard.

Focusing solely on the immunity issue, the court denied the City's renewed motion for judgment, explaining:

> So I would agree with you had the injury not occurred on a roadway, had this been a case where the injury occurred in the park. In other words, the gate wasn't locked, and it somehow swung open and … it hit someone or something of that affect.
>
> But under the circumstances, … I believe that [*Mayor & City Council of Baltimore v. Whalen*, 395 Md. 154 (2006)] certainly makes a distinction between park land and City land. But here we have a kind of a melding of the two. It's park land, which caused a hazard on a roadway. So I'm going to deny the motion.

While the gate was located and constructed within the confines of Wyman Park, Louis Beverly's injuries were sustained on the public roadway that bordered Wyman Park's perimeter. As we have explained, the maintenance of a public park is governmental and discretionary, *Bagheri v. Montgomery County*, 180 Md. App. 93, 97 (2008) (citing *Whalen,* 395 Md. at [165]), but "'a municipality has a private proprietary obligation to maintain its streets, as well as the sidewalks, footways and the areas contiguous to them, in a reasonably safe condition.'" *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 196 (2015) (quoting *Higgins v. City of Rockville*, 86 Md. App. 670, 679 (1991)).[9]

[9] For a more recent discussion of a municipality's proprietary obligations, see *Williams v. Mayor & City Council of Baltimore*, No. 3095, Sept. Term, 2018, ___ Md. App. ___ (filed April 7, 2020).

The *Whalen* Court reiterated the established principle that

> a municipality may be responsible for protecting individuals who are physically within the bounds of a public way from hazards caused by the governmental entity which may come from outside the boundaries of the public way onto the public way *that could have and should have been foreseen and prevented by the governmental agency*.

395 Md. at 167 (emphasis added). *See also Mayor and City Council of Baltimore v. Eagers*, 167 Md. 128 (1934); *Mayor & City Council of Hagerstown v. Crowl*, 128 Md. 556 (1916); *Mayor & City Council of Havre de Grace v. Fletcher*, 112 Md. 562 (1910).

In *Anne Arundel County v. Fratantuono*, *supra*, we addressed the history and evolution local government liability in various contexts relating to its negligent acts or omissions that resulted in injury on park property, on public roadways or sidewalks, and on areas contiguous to public roadways. 239 Md. App. at 134–40. Chief Judge Fader, writing for this Court, explained, as particularly relevant to the instant appeal, that Maryland precedent has "established that dangers that *originate* from within public parks could give rise to liability of a local government if they 'create actual hazards on the public way,'" while noting "that principle was limited to dangers that 'come from outside the boundaries of the public way onto the public way ….'" *Id.* at 138 (emphasis in *Fratantuono*) (quoting *Whalen*, 395 Md. at 167).

We have explained that "[a] case must be submitted to a jury for consideration if any evidence is legally sufficient to create a jury question." *Torbit*, 231 Md. App. at 587 (citing *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683 (2007)). Indeed, all that is required is "any evidence, *no matter how slight*, legally sufficient to generate a jury question[.]" *Tate*, 155 Md. App. at 545 (emphasis added) (citation omitted).

The City had contracted with an engineering firm, RKK, to design the ballpark restoration plan, including the gate at issue. It is undisputed that the gate's design, as provided in RKK's design plan, complied with industry standards and regulations. For reasons not explained, Carp-Seca's subcontractor did not construct the gate in a manner consistent with the RKK design. Deviations from the design, notwithstanding the absence of the lock, were: the gateposts used were wooden, rather than steel; the placement and choice of hinges used were not consistent with the design; the type of latch used did not match the latch called for; and there was an absence of "reflective object markers" on the gate as required by the MUTCD and as provided for in the design.

While the engineer's design plan did not specify the direction of the gate swing or the exact details of the latch used, other than a few sketches, the evidence was clear that there was no reason for the gate to open into the roadway and that the gate was not designed to open into the roadway. There was conflicting testimony offered from Darryl Thomas and Michael Hellman, two of the City's inspectors, about whether the gate was locked at or near the time of its inspection and subsequent acceptance, or at any time thereafter. There was no evidence offered of a lock being found at the scene of the accident.

There was also conflicting testimony as to whether there was a structure or device in place to prevent the gate from opening into the roadway if the latch was not in its closed position. There was testimony and photographic evidence of rub marks visible on the interior of the gate's latch post, indicating that the gate caused the rub marks from being opened towards the roadway. Finally, Balgowan testified that many of the deviations from the engineer's design plan in the gate's actual construction eliminated safeguards that

would have prevented the gate from opening into the roadway even if the latch were left open.

In summary, there was sufficient evidence presented from which reasonable inferences could be drawn "in the light most favorable to the party against whom the motion is made[,]" to establish a question of fact as to the City's negligence for the jury to consider. *Tate*, 155 Md. App. at 544 (citing *Nissan Motor Co. Ltd. v. Nave*, 129 Md. App. 90, 116–17 (1999)). The gate was installed at a point where the adjacent roadway was on a curve, within a few feet of the traveled portion of the roadway; the gate was capable of opening into the roadway; there were no safeguards to prevent the gate from opening into the roadway when the latch was open; and, when open into the roadway, the pointed end of the gate was against the direction of traffic, toward oncoming vehicles. Those factors, coupled with the deviations that effectively removed the design's safeguards, created a question for the jury to determine whether that "established [a] danger[] that originate[d] from within [a] public park[]" which then "create[d] actual hazards on the public way[.]" *Fratantuono*, 239 Md. App. at 138 (emphasis omitted) (internal quotations and citation omitted).

We find no error in the court's denial of the City's motion for judgment on the issue of its negligence.[10]

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[10] In an alternative argument on its cross-appeal, the City contends, "assuming *arguendo* that [it] was negligent, the circuit court erred by permitting the jury to find that the City's negligence was an intervening, superseding cause of Louis Beverly's injuries, absolving Carp-Seca of any liability." Having concluded that this argument was not preserved, *supra*, we need not address it further.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED 2/3 TO APPELLANTS AND 1/3 TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.