Circuit Court for Anne Arundel County
Case No. C-02-CV-19-003647

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1072

September Term, 2022

CITY OF ANNAPOLIS

v.

MATTHEW W. HAGER

Reed,
Ripken,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Reed, J.

Filed: November 2, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury sitting in the Circuit Court for Anne Arundel County found the City of Annapolis (the "City") liable for negligence for the injuries sustained by Matthew Hager ("Mr. Hager") while riding his bicycle on a newly designated bike lane on Chinquapin Round Road. On appeal, the City raises four questions for our review, which we have rephrased for clarity[1]:

[1] In its appellate brief, the City presents their questions as follows:

1. Appellee was injured riding against traffic without a helmet when his bicycle with ultra-thin tires encountered a 1 inch or less gap at Grate 207. He was in violation of Maryland laws requiring him to ride (1) to the right of traffic, (2) with traffic flow and the directional arrow of the bicycle lane, and (3) passing vehicles on the right. Does Appellee's actions in wrong way riding, without a helmet, opposite street arrows and markings, with a specialty bicycle on unusual ultra-thin tires into a grate-frame gap which he saw prevent recovery under Maryland's Contributory Negligence jurisprudence?

2. Since its placement in 1996, there have been no complaints or incidents recorded arising from bicycle wheels lodging in the space between the Grate 207 and its frame. Whether this accident was therefore foreseeable as a dangerous condition so as to establish a duty on the part of the City and thereby making it liable for Appellee's injuries?

3. Under Maryland law, a condition of less than 1 inch existing in a road or sidewalk is trivial and cannot serve as constructive notice. Did the City owe a duty to Appellee to correcting a trivial space between the Grate 207 and its frame for which the City had no actual or constructive notice of the condition being anything other than trivial?

4. Assuming the 2012 accident occurring 3 ½ miles and five years prior to Appellee's 2017 Occurrence, served as actual notice of the trivial 1 inch or less gap at Grate 207, was it unfairly prejudicial for the Court to allow the jury to hear about that accident?

I. Did the circuit court err in not granting the City judgment because Mr. Hager, who was committing three traffic violations at the time of the accident, was contributorily negligent and had assumed the risk of injury?

II. Did the circuit court err in not granting the City judgment because a gap of an inch or less on a 44-foot road was trivial and failed to place the City on actual or constructive notice of any danger posed by WR Replacement storm grate 207?

III. Did the circuit court err in admitting evidence of a similar accident that occurred five years earlier and several miles away because it was irrelevant and unduly prejudicial?

IV. Did the circuit court err in not granting the City judgment because Mr. Hager presented insufficient evidence of foreseeability?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

During the early evening hours of June 6, 2017, Matthew Hager was riding his bicycle in the newly designated bike lane on Chinquapin Round Road, a 44-foot-wide public road with two lanes of vehicular traffic and two bicycle lanes, one in each direction. As he approached the intersection at Lincoln Street and while riding toward oncoming traffic and against the directional arrow of the bicycle lane, his front wheel abruptly lodged in the gap between the frame and WR Replacement storm drain grate that was in the middle of the bike lane. Mr. Hager was thrown over his handlebars face first onto the grate and roadway, requiring medical treatment for deep lacerations to the right side of his face.[2]

[2] Mr. Hager was not wearing a helmet. Maryland law only requires a person under the age of 16 to wear a helmet while riding a bicycle. *See* Md. Code Ann., Transp. Art., § 21-1207.1.

Mr. Hager filed suit against the City in the Circuit Court for Anne Arundel County alleging that the City had been negligent in not properly installing or maintaining the storm grate.[3] The City did not dispute that it was responsible for the upkeep and maintenance of Grate 207 but answered that it was not liable for Mr. Hager's injuries because he was contributorily negligent and had assumed the risk of his injuries, and the City had no actual or constructive notice that Grate 207 was dangerous or defective. After discovery but prior to trial, the City moved for summary judgment on those grounds, which Mr. Hager opposed. The circuit court denied the City's motion.

Mr. Hager testified on his behalf as did, among others: Michael Hartsky, who had a similar accident five years earlier and a few miles away; Jason Boyd, PE, an expert in stormwater management and property maintenance; and Samuel Brice, the City's Chief Engineer.

Mr. Hager testified about the accident as related above. He also testified that about a week after the accident, he measured the gap between the frame and WR Replacement storm grate for Grate 207. He testified that he was able to place two fingers side by side in

[3] Mr. Hager alleged four counts in his amended complaint: Count I - negligence against the City and David Jarrell ("Jarrell"), who was sued in his official capacity as the Director of the Annapolis City Department of Public Works; Count II - negligence for failure to supervise against the City and Jarrell; County III - respondeat superior against the City and Jarrell; and Count IV - negligence and respondent superior against Reliable Contracting Company, Inc. ("Reliable"), with whom the City had contracted in 2016 to repave and add a bike lane to Chinquapin Round Road. The court granted motions for judgment as to Jarrell and Reliable Contracting. As a result, only the first count of negligence against the City went before the jury. Accordingly, this appeal focuses only on that count.

the gap, which he estimated was a 'little over an inch and a half." Although both of his bike tires were destroyed in the accident, he testified that his tires were ¾ of an inch wide.

Mr. Hartsky, by way of a de bene esse video deposition, testified that in late August 2012, he was riding his bicycle on Duke of Gloucester Street in downtown Annapolis (a few miles from where Mr. Hager was injured) when his front tire suddenly lodged in a gap between a WR Replacement storm grate and the frame that held the grate. Mr. Hartsky was similarly thrown from his bike due to the abrupt stop. He suffered bruises and scrapes and his front tire and rim were "destroyed." He testified that his tires were not the thinnest or biggest, that "[i]t's a bike tire."

After the accident, Mr. Hartsky advised the City by email about the accident. A short time later, he sent a follow-up email to the City that he had discovered another storm grate in the same area with a gap between grate and frame. Mr. Hartsky attached a picture of his bike tire in the gap. Mr. Hartsky suggested that the City inspect other storm grates for the safety of the residents, particularly in light of a bike race the City was hosting that weekend.

A few days later, Ms. Marcia Patrick, the City's Assistant Director of Public Works Department ("PWD"), sent the above email chain to the City's then civil engineer level II, Mr. Samuel Brice, asking, "What can we do here to make this safer?" He responded that same day with a several paragraph email. In his email he explained the history of storm grates in Annapolis and how the original storm grates were replaced with WR Replacement grates that were bicycle friendly but over time developed gaps between the old S frame and the WR replacement grate on the street side of the grate. He explained that the WR Replacement grates had two pre-drilled holes on the sidewalk side of the grate for

adjustment bolts, and that when the adjustment bolts were in place, the bolts pushed the grate away from the curb and filled the gap between the old frame and WR Replacement grate. He further stated that "[of] the six grates I just looked at, all six had bolt holes for the adjustment bolts [but] none had the bolts[.]" He attached to his email the 2001 State Highway Administration ("SHA") Standard No. 379.08 "**STANDARD TYPE S INLET & COMBINATION RETICULAR REPLACEMENT GRATE,**" a schematic diagram detailing the installation of a WR Replacement grate with adjustment bolts onto an S frame.

A few months later, Mr. Brice emailed a City employee about whether a plan had been devised to address the gap problem, to which the employee responded, "I believe that we have corrected the problem by installing spacers where needed." The next day, Mr. Brice emailed the employee again, advising that he had found another WR Replacement grate that "has not had the bolt installed and has a similar issue."

The maintenance history of Grate 207 was placed into evidence. Between 2012 and when Mr. Hager's accident occurred, the City inspected Grate 207 inside and outside six times, the most recent maintenance inspection occurring about four months before Mr. Hager's accident. The parties stipulated that there are 312 Replacement grates in the City and, as part of the litigation, the City provided Mr. Hager a list of those grates and their street addresses.

Mr. Boyd, a professional engineer with over 18 years of experience in civil and environmental engineering, was admitted as an expert in stormwater management, roadway design, and property management and maintenance. He testified that there are two purposes for a storm grate: to transmit stormwater runoff from the roadway and to keep

the surface safe for its intended use. About eight months after Mr. Hager's accident, Mr. Boyd measured the distance between the grate and frame of Grate 207, which did not have adjustment bolts affixed, and found that the gap measured "[a]lmost an inch and an eighth." He stated that the 2001 SHA Standard No. 379.08 permits only a ½ inch gap between a WR replacement grate and an existing frame.[4]

Mr. Boyd testified that every state develops engineering standards for stormwater inlets and it is "very common" for municipalities, like the City, to adopt their state's standard. Mr. Boyd testified that the American Association of State Highway and Transportation Officials ("AASHTO") standards for storm grates in bicycle lanes, which provides for a gap of one inch or less, was not the applicable "standard" but only a nationally developed "guideline."[5] The parties further stipulated that there are no replacement grate installation instructions contained in the AASHTO.

Mr. Brice, now the City's Chief Engineer, testified there are 92 street miles in the City. He testified that after Mr. Hartsky's accident in 2012, he realized that the City had "a

[4] Transp. § 8-648. the current State standard regarding storm grates, provides: "Any new or replacement storm drain cover, installed on a street or highway in the State, after January 1, 1980, shall consist of:

(1) Bars running perpendicular to the flow of traffic on the highway;
(2) A grating composed of interesting bars; or
(3) Other designs approved by the Department of Transportation which meet safety design criteria as well as engineering and structural design demands.

[5] Section 4.12.8 of the 2012 American Association of State Highway and Transportation Officials ("AASHTO") "A Guide For The Development of Bicycle Facilities," which is a guide for building bike lanes, states that gaps between a drainage grate and its frame "should be 1 inch or less."

bigger problem" than just the one grate. He understood the City's DPW was addressing the gap issue – when maintenance crews inspected sewer grates and discovered there were no bolts, they were "putting in bolts[.]" Mr. Brice testified that although Mr. Boyd testified earlier that the WR Replacement grates involved in Mr. Hartsky and Mr. Hager's accidents were identical, he opined that installation of the same type of grate at different locations may cause different sized gaps because of different conditions. He opined that repairs in the City of Annapolis are "complaint driven," and the City had never received a complaint about Grate 207. It was not known how many WR Replacement grate gaps were corrected in the five years between Mr. Hartsky's and Mr. Hager's accidents.

Mr. Brice acknowledged that he did not consult AASHTO when he contracted in 2016 to have Chinquapin Round Road repaved, redesigned, and new bike lanes designated, work that was completed a few months before Mr. Hager's accident. He admitted that he gave no consideration to the WR Replacement grates that were already present on Chinquapin Round Road. Mr. Brice testified that he considered a one-inch gap across 44 feet of road "trivial."

The parties stipulated as follows:

1. Maryland State Highway Administration Standard Detail 379.08 is the standard for a WR Replacement Grate in the State of Maryland and is also used by the City of Annapolis Department of Public Works for installation of its WR Replacement grates.

2. After the 2012 accident of Michael Hartsky, members of the Department of Public Works purchased adjustment bolts and placed them in the maintenance trucks so that when crews discovered grates without the bolts, the bolts could then be installed.

3. The inspections of the City's WR Replacement grates conducted after Mr. Hartsky's accident in 2012 were to ensure debris was not covering the grates. However, the same inspections did not require personnel to ensure that adjustment bolts were present in the grates.

4. The installation of the adjustment bolts at the time of the installation of a WR Replacement Grate is not discretionary. For the WR Replacement Grate to be properly installed, the adjustment devices are required to be present.

5. On June 6, 2017, there were adjustment bolts located in the trucks belonging to the Department of Public Works.

After Mr. Hager rested his case, the City presented its case. The City called only one witness, Mr. James Folden, who was admitted as an expert in government contracts for roads, supervision of road design contracts, and understanding the standards applicable to building roads. He testified, among other things, that if the gap at Grate 207 was as testified to by Mr. Hager at one and ½ inches, it represented a dangerous condition.

The parties proceeded to closing argument, after which the court instructed the jury. After deliberation, the jury returned a verdict for Mr. Hager, finding that the City was negligent and that the negligence was the proximate cause of Mr. Hager's accident. The jury further found that Mr. Hager was not contributorily negligent and had not assumed the risk of harm.[6] The City subsequently moved for judgment notwithstanding the verdict ("JNOV"), which Mr. Hager opposed. The circuit court denied the motion in a 59-page memorandum.

[6] The jury awarded Mr. Hager $300,000 for pain, suffering, disability, and mental anguish sustained, but did not award anything for future damages or loss of enjoyment of life. *See* Md. Code Ann., Cts. & Jud. Proc. Art. ("CJP") § 5-303(a)(1) providing for a local government's liability damages cap of $400,000 per individual claim).

DISCUSSION

I.

The City argues on appeal that the circuit court erred in denying their motion for judgment (or JNOV) because Mr. Hager was committing three bike violations at the time of accident.[7] According to the City, by committing these violations, Mr. Hager was, as a matter of law, contributorily negligent and had assumed the risk of injury. Mr. Hager responds that the City has not preserved these arguments for our review because the City did not raise them below in its motion for judgment, and even if preserved, the arguments are meritless because the arguments raise factual questions that the jury was entitled to decide. We agree that the issues of contributory negligence and assumption of the risk are not preserved for our review, and even if preserved, they are without merit.

Preservation

Md. Rule 2-519(a) provides that a party may move for judgment at the close "of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence[,]" stating "with particularity all reasons why the motion should be granted." The "[f]ailure to state a reason with particularity serves to withdraw the issue from appellate review." *Kent Vill. Assocs. Joint Venture v. Smith*, 104 Md. App. 507, 516-17 (1995) (quotation marks and citation omitted). After a verdict has been rendered, Md. Rule 2-532(a) provides that a party may move for JNOV "only if that party made a motion for judgment at the

[7] Although it is unclear from their appellate brief whether the City is appealing from the circuit court's denial of its motion for judgment or motion for JNOV, because the same standard of review applies in either event, we shall address the questions raised by the City as to both.

close of all the evidence and only on the grounds advanced in support of the earlier motion."

At the end of Mr. Hager's case, the City made a motion for judgment pursuant to Md. Rule 2-519. Citing *Bd. of Cnty. Comm'rs of Cecil Cnty. v. Dorman*, 187 Md. App. 443, *cert. denied*, 411 Md. 600 (2009), the City argued that it did not breach a duty of care to Mr. Hager because it lacked notice that Grate 207 would cause a foreseeable injury to him, given that it had been in place for 20 years without mishap. This was the City's only argument for judgment presented. The circuit court denied the motion, ruling that the jury could determine whether the City had actual or constructive notice based on the 2012 accident involving Mr. Hartsky.

The City then presented its only witness and rested. Mr. Hager moved for judgment on the issues of contributory negligence and assumption of the risk, after which the court asked the City whether it wanted to be heard. The City said it did not but stated that it had raised the issue of contributory negligence and assumption of the risk. The court ruled that the defense had generated sufficient evidence on contributory negligence and assumption of risk for those issues to go before the jury and denied Mr. Hager's motion for judgment.

The City then renewed its Md. Rule 2-519 motion, reasserting its prior argument regarding lack of notice and expanding its argument slightly by citing to *Mayor and City Council of Cumberland v. Turney*, 177 Md. 297 (1939). Again, the City never referred to contributory negligence or the assumption of the risk as grounds for judgment. The parties and the court agreed to reserve on the City's motion for judgment until after closing argument, due to time constraints. Jury instructions and closing argument followed, and

the jury was dismissed for deliberations. The City never addressed its judgment motion again during trial.

After the jury returned their verdict, the City moved for JNOV, raising several issues. Of the nine issues raised, three were related to notice. Of the remaining six issues, the City raised contributory negligence and assumption of the risk. The circuit court denied the City's JNOV motion in a 59-page memorandum opinion. In its opinion, the circuit court ruled that the City had failed to preserve its contributory negligence and assumption of the risk argument because the City had not raised those arguments in their Md. Rule 2-519 motion. The circuit court stated, however, that even if the City had preserved those arguments, it would deny the City's JNOV motion because "reasonable minds" could differ about whether Mr. Hager was contributorily negligent and had assumed the risk of injury. We agree.

The City never argued in its Rule 2-519 motions for judgment either contributory negligence or assumption of the risk. Moreover, the City has not identified as error on appeal the circuit court's ruling that the City had not preserved their contributory negligence and assumption of the risk arguments in the judgment motions. Accordingly, the City has not preserved on appeal argument as to those defenses of liability. Even if it had, however, we would find the arguments meritless for the simple reason that Mr. Hager had produced sufficient evidence that he was not contributorily negligent and had not assumed the risk of injury to allow those questions to go before the jury. We explain.

Standard of Review

When reviewing a circuit court decision denying a motion for judgment, we use the "same analysis that a trial court should make when considering the motion[.]" *C & B Constr., Inc v. Dashiell*, 460 Md. 272, 279 (2018) (quotation marks and citation omitted). We shall consider evidence and reasonable evidentiary inferences in the light most favorable to the party against whom the motion is made. *Id*. (citation omitted). A trial court's decision will be upheld if there is any evidence, no matter how slight, legally sufficient to generate a question for the jury. *Tate v. Bd. of Educ., Prince George's Cnty.*, 155 Md. App. 536, 545 (2004) (citation omitted).

"The standard of review of a court's denial of a motion for JNOV is the same as the standard of review of a court's denial of a motion for judgment at the close of the evidence, *i.e.,* whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (citation omitted), *cert. denied*, 427 Md. 65 (2012). *See Exxon Mobil Corp. v. Albright*, 433 Md. 303, 333 (when reviewing a JNOV we review the evidence and all reasonable inferences from it "in the light most favorable to the non-moving party.") (quotation marks and citation omitted), *cert. denied*, 571 U.S. 1045 (2013); *Barton v. Advanced Radiology P.A.*, 248 Md. App. 512, 524 (2020) (we will only find error in the denial of a motion for JNOV if the nonmoving party fails to offer evidence "that rises above speculation, hypothesis, and conjecture[.]") (quotation marks and citation omitted); and *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 86-87 (2007) ("[I]f there is any competent evidence, however slight, leading to support the plaintiff's right to

recover, the case should be submitted to the jury and the motion for . . . [JNOV] denied.") (quotation marks and citation omitted).

Negligence law and the defenses of contributory negligence and assumption of the risk

It is well-established in Maryland that a plaintiff must prove four elements to prevail on 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, 293-94 (2018) (citation and emphasis omitted). A plaintiff in a negligence action is completely barred from "recovery against a defendant who causes an injury where such injury is [the] result of the plaintiff's own failure to exercise due care." *Kiriakos v. Phillips*, 448 Md. 440, 474 n.38 (2016) (citation omitted). "Contributory negligence, if present, defeats recovery because it is a proximate cause of the accident[.]" *Batten v. Michel*, 15 Md. App. 646, 652 (1972). Assumption of the risk, a closely related affirmative defense, also bars recovery if the following three factors are present: (1) the person knows of the risk of the danger; (2) the person appreciates the risk; and (3) the person voluntarily chooses to encounter the risk of danger. *ADM P'ship v. Martin*, 348 Md. 84, 90-91 (1997) (citations omitted).

Both contributory negligence and assumption of the risk are generally decisions for the trier of fact. *S & S Oil, Inc. v. Jackson*, 428 Md. 621, 633 (2012). A trial court should rule on these defenses "*as a matter of law* only when reasonable jurors would not differ" as to them. *Id*. (citations omitted). *See also McSlarrow v. Walker*, 56 Md. App. 151, 161

(1983) ("Contributory negligence as a matter of law requires a finding that the negligent act of the plaintiff . . . relied upon must be prominent, decisive and one about which ordinary minds would not differ in declaring it to be negligence.") (citation omitted), *cert. denied*, 299 Md. 137 (1984) and *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 640 (2009) (In an assumption of the risk case, "[o]rdinarily, it is for the jury to determine whether a plaintiff knew of the danger, appreciated the risk, and acted voluntarily.") (citations omitted), *cert. denied*, 414 Md. 332 (2010).

The City argues that at the time of the accident Mr. Hager was violating three Maryland traffic laws that required him to ride: (1) on the right side of traffic; Md. Code Ann., Transp. Art. ("Transp."), § 21-301; (2) with the directional arrow of the bicycle lane, Transp. § 21-201; and (3) with passing vehicles on the right, Transp. § 21-302. *See Stephens v. State*, 198 Md. App. 551, 561 (2011) (stating that lane designation marks on a roadway are "traffic control devices" as stated in Transp. § 21-201) and Transp. § 21-1202 (vehicular traffic and pedestrian laws apply to bicyclists). The City argues that because Mr. Hager was violating these laws, he was the proximate cause of the accident and contributorily negligent. Therefore, according to the City, the circuit court erred in not directing a judgment in their favor as a matter of law. The City further argues that the circuit court erred in not directing a judgment in their favor because Mr. Hager assumed the risk of injury as an avid bicycle rider for 26 years and a licensed Maryland driver, who willfully ignored Maryland laws and rode into oncoming traffic.

There was indeed evidence presented that Mr. Hager was committing the above three road violations at the time of the accident, but there was also evidence that the

violations were not the proximate cause of Mr. Hager's injuries. Additionally, evidence was elicited that suggested that the assumption of the risk elements were not met. We note that the jury was instructed without modification on the Maryland Pattern Jury Instructions for civil proceedings ("MPJI-Cv") on contributory negligence, assumption of the risk, and that violation of a statute is evidence of negligence. *See* MPJI-Cv 19:12, 19:14, and 19:7, respectively. Accordingly, under the circumstances, whether Mr. Hager was contributorily negligent or had assumed the risk of injury were questions for the jury to determine, and we find no error by the circuit court in allowing those issues to go to the jury.

We shall now turn to the City's remaining three arguments, which relate to notice: triviality; admissibility of Mr. Hartsky's 2012 bicycle accident; and foreseeability. We shall address each in turn.

II. Triviality

The City argues that the circuit court erred in not granting its motions for judgment (or JNOV) because the doctrine of triviality applied. Citing *Martin v. Mayor & Council of Rockville*, 258 Md. 177 (1970), the City argues that it lacked constructive notice that Grate 207 posed a dangerous condition because, according to the City, a gap of an inch or less on a 44-foot roadway was "trivial" as a matter of law. The City argues that AASHTO, the only applicable standard, allowed a maximum gap between the frame and replacement grate of one inch or less, and at no time was the gap at Grate 207 "capable of being larger

than one-inch."[8] Mr. Hager responds that the circuit court properly denied the City's motion for judgment or JNOV on grounds of triviality because there was evidence that the gap was not trivial and the jury was properly instructed on "trivial conditions."

Municipalities must have actual or constructive notice that a dangerous condition exists, before it causes injury, to be held liable for negligence. *Williams v. Mayor & City Council of Baltimore City*, 245 Md. App. 428, 443 (2020) (citation omitted). Actual notice exists when an employee either personally observed or was told about a dangerous condition. *Colbert v. Mayor & City Council of Baltimore*, 235 Md. App. 581, 588 (2018) (citation omitted). Constructive notice exists when a dangerous condition has existed for so long that the municipality would have learned about it if it had exercised reasonable care. *Id*. (citation omitted).

"It is the duty of the municipal authorities to exercise an active vigilance over the streets, to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice." *Keen v. City of Havre de Grace*, 93 Md. 34, 39 (1901). However, the doctrine of triviality states that "slight, minor or inconsequential" conditions or obstructions in or on public rights of way are not actionable. *Martin,* 258 Md. at 183 (citations omitted). Therefore, "[a] municipality is not

[8] We feel compelled to point out that the City is wrong in each of its factual assertions. Contrary to the City's argument, the parties stipulated that SHA, not AASHTO, was the City standard. While the latter allowed for a gap of one inch or less, the former allowed for a gap of no more than ½ an inch. Moreover, and contrary to the City's assertion, there was evidence that the gap here was larger than one inch based on measurements taken by Mr. Hager a few days after the accident (between an inch and an inch and a half) and by Mr. Hager's expert witness eight months after the accident (about one and 1/8 inch). The City never presented any evidence as to the size of the gap.

chargeable with constructive notice if the defect is so minor as to make its discovery unlikely." *Id*. at 182.

In *Martin*, Beatrice Martin fell and broke her foot as she prepared to cross a street in the City of Rockville when she stepped off the curb and her foot caught in a depression where the curb apron was broken. *Id.* at 178. The break in the concrete was approximately 4 and ½ inches wide, 7 inches long, and no more than 1 and ½ inches deep. *Id*. She sued the City of Rockville, alleging that her injury resulted from the City's negligence in permitting the unsafe condition to exist and in failing to repair it. *Id*. She presented photographs and measurements of the alleged defect and a witness testified that the erosion of the curb would arise after a year or two of winter weather. *Id*. at 178, 180. The City did not present any evidence. *Id*. at 179. A jury returned a verdict for Ms. Martin and the City moved for JNOV, which the circuit court granted.

Ms. Martin appealed, arguing that the circuit court erred in granting the City's motion for JNOV because the circuit court failed to resolve all conflicts in her favor. *Id*. at 179. The Maryland Supreme Court affirmed the circuit court's ruling, quoting from *Leonard v. Lee*, 191 Md. 426 (1948):

> The duty owed by a municipal corporation to those lawfully using the sidewalks under its control is not that of an insurer of their safe passage. Where there are dangerous obstructions or depressions of which the municipal authorities have actual notice or which have existed long enough to give constructive notice, a municipality is liable if a person is injured because of such condition. While a municipality must generally respond in damages for injuries caused by its negligence, acts, or omissions especially in connection with the public streets and sidewalks under its care and control, there must be a limit to such liability, and it cannot be held responsible for injuries caused by every depression, difference in grade, or unevenness in sidewalks. No city, town, or village could maintain a perfectly level or even

> surface in all of its sidewalks without burdening the property owners with unreasonable and unnecessary taxation. No resident or visitor of a city, town, or village has the right to expect such conditions. Pavements will in time become irregular and uneven from roots of trees, heavy rains and snows, or other causes.

Id. at 181-82 (ellipses, quotation marks, and citation omitted). The Court cited cases where the Court had upheld the application of and the refusal to apply the doctrine of triviality, differentiating those cases that held triviality did not apply.[9] *Id.* at 183-84. The Court concluded that the circuit court had properly granted JNOV to the City, stating that "a municipality's liability must be limited so that it cannot be held responsible for every depression or irregularity. To hold it answerable for every difference in grade or uneven surface would impose an almost unsupportable burden on both the municipality and its taxpayers." *Id*. at 185.

We think *Martin* is distinguishable. Unlike the facts of *Martin, supra*, after notice of Mr. Hartsky's accident, the City clearly thought that WR replacement sewer grates without adjustment bolts were unsafe. The City's assistant director of PWD asked in an

[9] *Martin* cited the following case holding triviality did apply: *Leonard v. Lee*, 191 Md. 426 (1948) (affirming the entry of a directed verdict in favor of municipality because the plaintiff's injury on a public sidewalk was caused by a slight irregularity in the cement.). *Martin* cited the following cases holding triviality did not apply: *President & Com'rs of Town of Princess Anne v. Kelly*, 200 Md. 268 (1952) (upholding a trial court's denial of defendant's motion for JNOV where the municipality had actual notice of the defect); *Com'rs of Delmar v. Venables*, 125 Md. 471 (1915) (upholding the legal sufficiency of the case to go to jury where a municipality had actual notice of stump that rose six or seven inches about the road level); *City of Annapolis v. Stallings*, 125 Md. 343 (1915) (upholding judgment for plaintiff where plaintiff fell into a "considerable hole" that had been allowed to exist for several months); *Keen v. City of Havre de Grace*, 93 Md. 34 (1901) (upholding judgment for plaintiff where plaintiff fell into an eight-inch hole that was commonly known among the townspeople).

email, "What can we do to make this safer?" and the City purchased adjustment bolts and placed them in maintenance trucks to rectify the problem. We also note that the court instructed the jury by giving the City's suggested non-pattern jury instruction on triviality.

We find persuasive the reasoning of the circuit court in its accompanying memoranda to its order denying the City's motion for JNOV:

> The Court finds that the issues of whether the gap in Grate 207 was trivial, or whether the City was placed on actual or constructive notice, are not questions of law for which the Court may grant JNOV in this case. Instead, these are fact questions for the jury to consider in determining whether the City was negligent (i.e., did the City know or should the City have known of the defective or unsafe conditions in WR Replacement grates by the exercise of reasonable care). *See* MPJI-Cv 23:7 Governmental Liability for Defects in Sidewalks and Highways, Liability-Generally. Indeed, as described *supra*, the Court prepared non-pattern instructions with the parties' participation in order to present these questions to the jury in a more comprehensive manner given the City's arguments that it lacked proper notice.

We also find persuasive the reasoning of *Keen v. City of Havre de Grace*, 93 Md. 34 (1901) where the Court discussed the relative burdens on the parties regarding the doctrine of triviality in a JNOV context. In *Keen*, the Maryland Supreme Court wrote:

> "After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence." [*Todd v. City of Troy*, 61 N.Y. 506, 509 (1875)] (If the effect be of such a character as not to be readily observable, express notice to the municipality must be shown. . . . But if it be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable. . . .
>
> If, therefore, the evidence in this case shows that there was a defect in the sidewalk, of which the city had knowledge, or by the exercise of reasonable diligence ought to have known, and the plaintiff, while exercising

proper care, stepped into the hole, and was thereby injured, the municipality would be liable for such damages as ensued; further, that, if there is any evidence from which the jury can reasonably so find, the prayer we are now considering should not have been granted. The prayer is to the effect that there is no evidence in the case to establish negligence on the part of the defendant. Now, negligence is usually a question of fact for the jury. *Lewis v. Railroad Co*., 38 Md. 588 [(1873)]. And it is only where the "facts are undisputed, or where only one reasonable inference can be drawn from them, that the question is one of law for the court." *Baltimore & O.R. Co. v. State*, 75 Md. 537 [(1892).] Moreover, a case could not be withdrawn from the jury if there be some reasonable evidence of the existence of facts requisite to fix liability upon the defendant. *Baltimore & O.R. Co. v. State*, 71 Md. 599 [(1889).]

In view of this statement of the law, it follows that if there had gone to the jury evidence from which the jury could reasonably find that there was a dangerous hole in the sidewalk, of which the defendant had, or ought to have had, knowledge, and that such hole was the proximate cause of the accident, the prayer should not have been granted. Without discussing the evidence on these points, it is sufficient to state that [] witnesses testify to the existence and character of the hole. Mrs. Suter said she had seen it there for three weeks before the accident; George Carroll, that it had been there, "maybe, a couple of weeks or so"; and John Suter, "two or three weeks." There is further proof that the hole was in the bed of the sidewalk, and not hidden or obscured by anything from the full view of any one who passed along that part of the walk. There was also evidence that the plaintiff passing there on a dark night, without knowledge of the defect, stepped into the hole, and "was thrown backward" and fell into the gutter, and thereby was injured. If the jury believed this testimony, they would unquestionably be justified in finding that the municipality was negligent in not repairing the defect if it, or its proper officers or agents, knew of its existence; and, if they did not have knowledge of its existence, then they did not exercise that active vigilance which was incumbent on them, to see that the sidewalk was kept in a reasonably safe condition for public travel.

As this is the only question presented by the record, it follows that the judgment must be reversed, and the cause remanded.

Keen, 93 Md. at 39-41 (some citations omitted).

Under the circumstances presented, we are persuaded that the issue of triviality was sufficiently generated to go before the jury and the circuit court did not err as a matter of law in denying the City's motion for judgment and JNOV on this issue.

III.

The City argues that the circuit court erred in allowing the jury to hear evidence of Mr. Hartsky's bicycle accident that had occurred five years earlier as evidence of actual or constructive notice.[10] The City argues that evidence of the prior accident was irrelevant and highly prejudicial and should have been excluded as a matter of law "because it impose[d] strict liability upon the City." Citing *Smith v. Hercules Co.*, 204 Md. 379, 385 (1954) and *Salisbury Coca-Cola Bottling Co. v. Lowe*, 176 Md. 230 (1939), the City argues that only a prior accident involving Grate 207 was admissible and that evidence of any other accident was irrelevant and highly prejudicial. Mr. Hager responds that evidence of the 2012 accident had probative value as to the City's notice of a dangerous defect in its replacement grates and its relevance did not outweigh the danger of unfair prejudice. Mr. Hager further argues that "evidence of actual notice was legally sufficient to generate a question of fact for the jury" and therefore, the circuit court correctly denied the City's motion for JNOV on that ground.

[10] The City argues that the circuit court committed "plain error" in allowing the jury to hear evidence of Mr. Hartsky's 2012 bicycle accident. "Plain error" is a legal term that applies in the context of an unpreserved issue. *See* Md. Rule 8-131. Neither party argues that this issue is not preserved. We assume that the City is using the word "plain" in the sense that the error was obvious.

Law on admission of prior, similar evidence

It is axiomatic that only relevant evidence is admissible at trial. *See* Md. Rule 5-402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The Supreme Court of Maryland has recognized that the finding of relevance "is generally a low bar[.]" *State v. Simms*, 420 Md. 705, 727 (2011) (citations omitted). "[R]elevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case but whether "it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quotation marks and citation omitted)).

"The determination of evidentiary relevance is a legal question that is reviewed *de novo*." *State v. Robertson*, 463 Md. 342, 353 (2019) (citation omitted). "Although trial judges have wide discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Id.* (quotation marks and citations omitted).

If "a person is injured because a municipality failed to maintain its streets, and the municipality had actual or constructive notice of the dangerous condition that caused the injury, the municipality may be held liable in negligence." *Smith v. City of Baltimore*, 156 Md. App. 377, 383 (2004). Evidence of prior similar accidents is generally admissible for

the following purposes: "(1) To show the existence of a defective or dangerous condition or appliance and the dangerous character of the place of injury or of the machine or the appliance, and (2) to show the defendant's notice or knowledge thereof." *Mayor and City Council of Cumberland v. Turney*, 177 Md. 297, 318 (1939) (quotation marks and citation omitted).

We have recently discussed the admission of prior similar accidents in *Southern Management Corp v. Mariner*, 144 Md. App. 188, 195 (2002). In *Mariner*, we held that in a tort suit involving a fire that plaintiff claimed started in her dryer, evidence of two fires within the prior four months involving different dryers in plaintiff's apartment were properly admitted to show her landlord's notice of the clogged exhaust hose and its dangerous nature as causing the dryers to overheat and ignite. We rejected the defendant's argument that the two previous fires should have been excluded because they involved different dryers not involved in this case. *Id*. at 194. We stated that "[i]n order to present evidence as to past accidents, tendencies or defects, there must be a similarity of time, place and circumstance and, in the discretion of the trial court, the evidence must not cause an unfair surprise or confusion by raising collateral issues." *Id*. (ellipses, quotation marks, and citation omitted). We held "that different drying units were attached to the clogged hose is of no consequence because [plaintiff] was never asserting that the drying unit was in any way defective, but rather that *any* drying unit attached to the [] exhaust hose was a hazard." *Id*. at 195 (emphasis in original).

We find *Locke v. Sonnenleiter*, 208 Md. 443, 451 (1955) instructive on this issue. In that case, plaintiff filed suit after a table on which flat steel bars were laid toppled over

and injured the plaintiff. A worker testified that other identical tables had toppled over before. *Id*. at 447. The Court reiterated the general rule: "that evidence of this kind is relevant if it relates to an occurrence which happened under substantially the same conditions, at substantially the same place as the accident in suit, and at a time not too remote therefrom." *Id*. at 448.

The Court noted that "Maryland [tort] cases have not been entirely consistent in passing on the question" of admission of prior similar accidents. *Id*. As to this point, the Court then cited the following cases, among others:

> In *Wise v. Ackerman*, 76 Md. 375 (1892), an employee was injured, while riding on an open freight elevator, by boards that were too close to the elevator. The Maryland Supreme Court held that it was improper to admit evidence of a prior similar accident in a similar elevator in the same building. The Court, however, qualified its holding, 76 Md. at 426, stating:
>
> > "This is not analogous to the case of an attempt to affect a defendant with knowledge of a negligent habit of an employee ... nor to that of a case of a latent defect in machinery, or want of repair in a road or bridge, and the simple fact of a former accident is allowed to be proved as means of affecting the defendant with or bringing home to him knowledge of such supposed negligent habit or defect or want of repair."
>
> Nonetheless, the Court held that the earlier accident "did not happen on the same elevator upon which the plaintiff received his injury, nor did the accident happen under the same conditions. The fact, therefore, was wholly collateral." *Id*.
>
> In *Smith v. Hercules Co.*, 204 Md. 379, 385 (1954), the Maryland Supreme Court held that the trial court properly excluded testimony from another employee that he had fallen in the same hold of the ship on the same day as the accident because of a defective u-shaped metal clamp used to install cargo battens in the hold. The Court stated that "[e]vidence of other accidents, particularly where the circumstances are not identical, have little probative value and are calculated to prejudice the jury." *Hercules*, 204 Md. at 385.

> In *Cordish v. Bloom*, 138 Md. 81, 93 (1921), a plaintiff alleged that his injury was caused as he walked by a defective condition in a cellar door on the pavement in Baltimore City. The Court held that in keeping with *Wise*, evidence of other accidents that had occurred in the same manner were admissible to show that the defendant had notice. The Court explained that: "Evidence of similar accidents from the same cause is competent, not for the purpose of showing independent acts of negligence, but as tending to show that the common cause of the accidents is a dangerous, unsafe thing[.]" (quotation marks and citation omitted).

Locke, 208 Md. at 448-50.

After reviewing the above cases, the Court ruled that "the trial court did not err in admitting the evidence that on prior occasions the witness had observed tables, identical to the one in question, to topple over when too much weight in the form of steel bars, which they were designed to accommodate and did accommodate, was placed on one side of them." *Id*. at 451.

We are not persuaded by the City's argument that evidence of Mr. Hartsky's accident was inadmissible. Preliminarily, it appears that the City has not preserved its argument regarding the admissibility of Mr. Hartsky's accident because two of the five facts to which the City stipulated specifically mentioned Mr. Hartsky's accident. *See Berg v. Plitt*, 178 Md. 155, 170 (1940) ("In view of that stipulation the objection to the admission of the copy because it was not certified disappears.").

In any event, we agree with the circuit court's reasoning that evidence of the 2012 accident was "highly relevant to whether the City had notice of the dangerous condition associated with gaps in WR Replacement grates throughout Annapolis." The circuit court stated in its memorandum opinion denying the City's motion for JNOV:

> The Plaintiff did not introduce Mr. Hartsky's testimony to show that the City was negligent, which would have been improper. *Cumberland*, 177 Md. at 318. Instead, Mr. Hartsky's testimony was introduced for its value in showing to the jury that WR Replacement grates, as a machine or appliance, may have had a dangerous character in that over time they may separate from their frames creating gaps which pose a danger to bicyclists, and that the City may have had knowledge thereof because the City responded to and acted upon Mr. Hartsky's report. The City's overreliance on the phrases "place of injury" and "bearing on the nature and tendency of the place" from *Cumberland* and *Sonnenleiter*[, 208 Md. at 451] disregards the fact that these cases address more than physical location, but also allow admission of evidence to the jury tending to show that notice was established regarding the dangerous character of the specific type of thing which caused the injury.
>
> Hypothetically, if Mr. Hartsky's 2012 accident was due to something other than the same type of WR Replacement grate as injured the Plaintiff, the admissibility of Mr. Hartsky's testimony would be more dubious. However, the *Sonnenleiter* court made it clear that when the dangerous "machine or appliance" for which the defendant had notice is substantially identical to that which injured the plaintiff, such evidence may be admitted to establish notice or that the "machine or appliance" had a dangerous character. 208 Md. at [451-52] ("The fact that the table here involved was not specifically identified as one previously observed would not be material. The tables were substantially identical."). Thus, the Court finds that Mr. Hartsky's testimony was both relevant and admissible and denies JNOV as it relates to his testimony.

The circuit court went on to state:

> To the extent that the gap in Grate 207 may have been so trivial that the jury should not have been instructed regarding constructive notice, the City's argument wrongfully assumes that the City did not receive actual notice through Mr. Hartsky's 2012 communications with the DPW, which fits squarely within the definition of actual notice; Mr. Hartsky gave this notice directly to the City.
>
> Because the Court finds that the issue of notice was a jury question, and the jury determined that the City was negligent (which necessarily

> implies the City had notice), the Court must deny the City's Motion as it pertains to JNOV for lack of actual notice.[11]

We find distinguishable the two cases cited by the City as support for their argument: *Smith*, 204 Md. at 385, where the Maryland Supreme Court upheld a trial court's refusal to allow the admission of testimony from a witness who fell on the same day on the same ship as the plaintiff, holding that "[e]vidence of other accidents, particularly where the circumstances are not identical, have little probative value and are calculated to prejudice the jury" and *Lowe*, 176 Md. at 240-41, where the Maryland Supreme Court reversed a trial court's decision to allow admission of evidence in a case where a person was injured drinking Coca Cola that had oil/gasoline in the bottle, where seven years earlier a mouse was trapped in a Coca Cola bottle, because the separate incidences were independent, had no evidentiary connection, and "instead of aiding the jury in the solution of the subject of inquiry, tended to excite its prejudice, and mislead it." Those cases are easily distinguishable for the simple reason that here, unlike *Smith* and *Lowe*, the fixtures identified were identical storm grates that the City had identified as a safety issue and had resulted in a similar accident.

[11] See 1 McCormick on Evid. § 200 (8th ed., July 2022 update). In this treatise, the authors state: "The admissibility of evidence of other accidents and injuries is raised frequently in negligence [] cases." (footnote omitted). The authors state: "At one time, a few courts . . . applied a rigid rule of exclusion[,]" but "modern cases commit the matter to the trial judge for a weighing of the advantages and disadvantages of admitting or excluding the evidence" and "many opinions stress the trial judge's discretion." (footnotes omitted). The authors further note that "a nonpropensity purpose and a showing of sufficient similarity in the conditions giving rise to the various accidents are required[,]" stating, however, that often "identical circumstances cannot be realized" and "the burden of showing substantial similarity falls on the proponent of the evidence." (footnotes omitted).

IV. Foreseeability

Citing *Bd. of Cnty. Comm'rs of Cecil Cnty. v. Dorman*, 187 Md. App. 443, the City argues that because they had never received a complaint about Grate 207 in the 25 or so years it was in place, and because the grate was compliant with AASHTO, the City did not breach a duty to Mr. Hager as a matter of law because it was not foreseeable that Grate 207 would cause injury to Mr. Hager. Mr. Hager responds that we should uphold the circuit court's denial of the City's motion for judgment (or JNOV) because there was sufficient evidence of foreseeability to generate a question of fact for the jury.

In determining whether the first element of a negligence cause of action exists, a duty, a court must weigh the various policy considerations and reach "a conclusion that the plaintiff's interests are, or are not, entitled to legal protection against the conduct of the defendant." *Dorman*, 187 Md. App. at 454 (quotation marks and citation omitted). When determining whether a duty exists, we consider the following factors, among others:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Steamfitters Loc. Union No. 602 v. Erie Ins. Exch., 469 Md. 704, 728 (2020) (quotation marks and citations omitted). A "foreseeability of harm test," which weighs the heaviest among the above factors, "is based upon the recognition that duty must be limited to avoid liability for unreasonably remote consequences." *Dorman*, 187 Md. App. at 454 (quotation marks and citations omitted).

In *Dorman*, Karl Dorman was injured when a car traveling in the opposite direction turned abruptly in front of him causing the car to strike the left side of his motorcycle, which re-directed his motorcycle into a utility pole that was 27-29 inches from the paved road. *Dorman*, 187 Md. App. at 445-46. Dorman, whose leg was amputated following the accident, filed suit against Cecil County alleging negligence. *Id*. at 449. Evidence elicited at trial showed the county road was neither designed nor built by the county, and the pole was erected by a utility company. *Id*. at 451. There was no evidence presented that the County or the utility company that maintained the pole were ever notified that any motorist had ever struck the pole prior to the subject accident. *Id*. at 452. A jury returned a verdict for Dorman and the County appealed, arguing, among other things, that the trial court erred in denying its motion for judgment based on its contention that it did not owe Dorman a duty to remove the utility pole. *Id.* at 450.

We reversed on appeal, reasoning that the collision did not occur while Dorman was traveling on the road but only when he was forced off the road by the negligence of another motorist. *Id*. at 459. As to foreseeability, we stated:

> The existence, *vel non,* of a duty is a legal issue to be determined by the court after weighing the various policy considerations and reaching a conclusion that the plaintiff's interests are, or are not, entitled to legal protection against the conduct of the defendant. In establishing whether a duty exists, courts first apply a foreseeability of harm test, which is based upon the recognition that duty must be limited to avoid liability for unreasonably remote consequences. Foreseeability, however, is not the only test to be utilized in determining the existence of a duty. There is also the mix of public policy considerations that must be weighed before imposing a duty upon the defendant.

Id. at 454-55 (quotation marks and citations omitted). Although we recognized that "[u]nder some circumstances, the local government's duty to keep its highways safe and to remedy any dangers extends to dangers on private property adjacent to the traveled way[,]" we held that Dorman's striking of the utility pole "was not legally foreseeable." *Id*. at 466. We reasoned:

> Nottingham Road was flat and straight and there were no dangers posed by "dips" or curves in the roadway. . . . The placement of the pole had remained constant . . . for decades. And, as far as can be determined, the utility pole that Sergeant Dorman struck had never been previously struck by anyone using the roadway during a period of over 40 years. Therefore, . . . the County had no duty to anticipate that a motorist like appellee would be endangered by the pole in question.

Id. at 466-67.

We next addressed "whether, as a matter of public policy, a duty should be imposed on State or local governments to make sure that utilities set their poles back far enough from the paved roadway so that if a vehicle travels off the roadway it will not strike the poles." *Id*. at 467-68. We considered "the convenience of[] administration, the extent of the burden on the utility and its capacity to bear that burden, the benefit or detriment to the community, the desire to prevent future injuries, and any moral blame associated with the placement of the pole." *Id*. at 468. We quoted *Coates v. Southern Md. Electric Coop. Inc.*, 354 Md. 499, 524 (1999), where the Maryland Supreme Court stated:

> We do not wish, or intend, to establish a law that provides an absolute immunity for utility companies and gives them no incentive to use due care in the placement of their poles. Nor, however, are we willing to create the prospect of a damage award against a utility every time someone runs off the road and strikes a pole. We are not competent to decide, as a matter of common law, how far a pole must be removed from the traveled portion of a road in order to be safe; that is the function of highway and safety engineers.

> To make liability in every accident a jury question would, we expect (1) quickly remove the availability of affordable liability insurance for utilities, and (2) effectively force them to move hundreds, if not thousands, of poles, at enormous cost and inconvenience to them and to their customers and, even then, without absolute assurance of safety.

187 Md. App. at 468-69. We concluded that under the circumstances presented:

> [T]he County owed no legal duty to Sergeant Dorman because: the pole had been in place for a significant length of time without creating any problem to motorists and, therefore, the County had no reason to foresee that a particular pole would incommode or otherwise imperil traffic on Nottingham Road. On the other hand, as in the case with utility companies, a local government may be liable to persons who are injured by poles allowed to exist in close proximity to a paved roadway maintained by the governmental entity if the local government, prior to the accident, knew that the pole's proximity to the roadway posed some special dangers to motorists but took no action to remedy the danger. Any broader imposition of a duty would create too great a financial burden on local government.

Id. at 469-70. Accordingly, we held that the circuit court erred in denying the County's motion for judgment at the conclusion of the evidentiary phase of the case.

We find persuasive the reasoning of the circuit court distinguishing *Dorman* in its memorandum denying the City's motion for JNOV:

> The primary issue in *Dorman* was whether the municipality, Cecil County, could have reasonably foreseen that a third party would drive negligently to cause the plaintiff's injuries such that the County had a duty to move utility poles in close proximity to a paved roadway. *Dorman*, 187 Md. App. at 469-70. However, the utility pole that caused the plaintiff's injury in *Dorman* involved a separate negligent driver, whereas the Plaintiff's injury in this case was caused entirely by an existing gap along the roadway without any negligent third party. Also, *Dorman* did not involve any prior notice that the specific type or location of the utility poles would pose a danger to the public, unlike this case where Mr. Hartsky had communicated with the DPW about the specific danger posed to bicyclists by gaps in WR Replacement grates.

We add that here, unlike in *Dorman*, the City did take action to correct the "gap" problem when it purchased bolts and placed them in maintenance trucks. Moreover, the City had recently repaved, redesigned, and redesignated bike lanes on Chinquapin Round Road just prior to Mr. Hager's accident but did not update the sewer grates. Under these circumstances, we too find that the evidence presented by Mr. Hager generated a question of fact as to foreseeability so as to send the question to the jury.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.