Circuit Court for Baltimore County
Case No. C-03-CV-20-004530

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND**

No. 430

September Term, 2022

SUSAN WEIKERS

v.

ELEVEN SLADE APARTMENT CORPORATION, ET AL.

Berger,
Beachley,
Ripken,

JJ.

Opinion by Beachley, J.

Filed: April 12, 2023

*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.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Susan Weikers, filed a complaint in the Circuit Court for Baltimore County against appellees Eleven Slade Apartment Corporation ("Eleven Slade") and Guido Piccinini & Sons Nursery ("GPSN") related to injuries she sustained after falling on a concrete walkway on Eleven Slade's property. Appellees filed separate motions for summary judgment. Eleven Slade's motion alleged that, as the owner of the property, it had insufficient notice of a dangerous condition. GPSN, a landscaping company that did work for Eleven Slade, asserted that it owed no duty to Ms. Weikers at the time of her accident. The circuit court granted summary judgment in favor of both appellees, leading to this timely appeal. Ms. Weikers presents two questions for our review,[1] which we have consolidated and rephrased as:

> Did the circuit court err in granting summary judgment in favor of Eleven Slade and GPSN?

For the reasons that follow, we reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On March 30, 2018, Ms. Weikers was injured when she fell on a concrete walkway outside an apartment building owned by Eleven Slade. In accordance with her usual

[1] Ms. Weikers raised the following questions for our review:

> Did the circuit court commit reversible error by resolving factual conflicts at summary judgment, improperly weighing the evidence, and contravening Frankel v. Deane, 480 Md. 682, 281 A.3d 692 (2022)?
>
> Did the circuit court err by granting summary judgment in favor of appellees 11 Slade and GPSN?

[2] Because this appeal is from the grant of a motion for summary judgment, we recite the facts in a light most favorable to Ms. Weikers as the non-moving party.

practice, Ms. Weikers used the apartment building's valet service, and parked her vehicle as directed by the valet. As she was walking from her car to enter the building, Ms. Weikers stepped with her right foot onto a curb that separated the paved driveway and a flowerbed. After she placed her left foot on the concrete walkway, Ms. Weikers was unable to move her right foot forward to take the next step because it was caught on a metal object "hanging over the curb." As she attempted to free her right foot from the metal object, she lost her balance and fell onto the concrete walkway, sustaining numerous injuries requiring hospitalization.

The day after the incident, Ms. Weikers's friend and neighbor, Dr. Michael Levin, took photographs of the flowerbed on the opposite side of the walkway from where Ms. Weikers fell.[3] Dr. Levin's photographs appear to show wire banding protruding over the curb in the flowerbed on the opposite side of the concrete walkway.

Leonard Freyer, Eleven Slade's general manager, acknowledged that Eleven Slade had a responsibility to maintain common areas, including pedestrian walkways, in a safe condition for its residents. He also confirmed that Eleven Slade had a duty to maintain the two flowerbeds adjacent to the concrete walkway where Ms. Weikers fell. According to him, the wire banding and deer netting were not "removed, moved, or adjusted" between their installation and Ms. Weikers's fall. A few days after the incident, Mr. Freyer took

[3] At deposition, Dr. Levin suggested that one of his photographs might be of the same flowerbed where Ms. Weikers fell, stating, "I would think it's going to be the other end. I don't know why I would take two of one and none of the other." Because that photograph is of very poor quality, we do not rely on it in our analysis.

photographs of the area where Ms. Weikers fell. Although his photographs are of poor quality, they do not appear to show wire banding over the curb.

Barbara Tucker, Eleven Slade's corporate designee, testified that the valets are expected to inspect the valet area on a regular basis and promptly report unsafe conditions.[4] However, Joseph Johnson, an Eleven Slade valet, denied that his valet duties included inspection of the flowerbed and curb where Ms. Weikers fell. In any event, Eleven Slade concedes that it had a duty to perform "safety inspections of the valet area all day to prevent unsafe conditions and accidents."

The only evidence of the condition of the wire banding prior to the accident is found in the deposition testimony of Vincent Piccinini, the owner and president of GPSN. Mr. Piccinini was present for the installation of the wire banding and deer netting on October 12, 2017. He stated that the wire bands are two inches thick and that the bases of the bands are placed in the soil in a manner to permit the deer netting to be affixed to the bands. He did not observe the condition of the wire banding after October of 2017, but he testified that when the wire banding is installed, "it is stuck in the ground deep enough that it can't move." He stated that it is his practice to install the wire banding into the ground six to eight inches away from the edge of the flowerbed. However, when presented with the photographs of the flowerbeds taken by Dr. Levin and Mr. Freyer, Mr. Piccinini admitted that the ends of some of the wire bands appeared to be less than six inches from the edge

[4] In her deposition, Ms. Tucker accepted Eleven Slade's counsel's characterization that valets are required to inspect "all day long" and to identify any harmful or dangerous conditions in the valet area.

of the flowerbeds. Mr. Piccinini agreed that he took pedestrian safety into consideration when placing the banding and netting "[b]y making sure that the material is not in the walkway or over curbs." But he maintained that GPSN had no duty to inspect the flowerbeds after the wire banding and netting were installed.

On December 22, 2020, Ms. Weikers filed a complaint against Eleven Slade and GPSN. On December 11, 2021, Ms. Weikers filed a Second Amended Complaint, which is the operative complaint for our analysis. In that complaint she alleged that the metal object overhanging the curb was a wire band used for deer netting that was installed in the flowerbed by GPSN.

Eleven Slade and GPSN filed separate motions for summary judgment. Eleven Slade conceded for the purposes of the summary judgment motion that it failed to conduct reasonable inspections of the area, and that a wire band was overhanging the curb at the time of Ms. Weikers's fall, creating a dangerous condition. The sole focus of Eleven Slade's argument was that there was no evidence that it had notice of the dangerous condition prior to the incident, and that a reasonable inspection would not have disclosed any dangerous condition. GPSN argued in its motion for summary judgment that Ms. Weikers failed to present evidence showing that it owed her a duty at the time of the occurrence, contending that "there is no evidence that the metal banding or deer netting was improperly installed, so GPSN's duty ended after it finished planting flowers on October 12, 2017."

After a hearing, the circuit court granted summary judgment in favor of appellees. The court noted that the only evidence about the condition of the wire banding prior to Ms.

Weikers's fall "was that described by Mr. Piccinini, nearly five months earlier," who testified that "at the time of installation, the netting and banding were installed six inches from the edge of the curb, inside the flower bed." The court thus concluded that, as to Eleven Slade, the evidence was "insufficient to permit a jury to reasonably find for [Ms. Weikers] on the issue of notice." As to the negligence claim against GPSN, the court found that the allegations that GPSN failed to

> properly install, inspect and advise concerning the netting and banding it had installed . . . fail in the first instance for the same reason as did the allegations [against Eleven Slade], to wit, there is no proof of the existence of a dangerous condition prior to Ms. Weikers' fall. In addition, the Plaintiff has identified no source of any duty beyond the installation of the work.

From that adverse judgment, Ms. Weikers noted this timely appeal.

STANDARD OF REVIEW

In an appeal from a grant of summary judgment, this Court reviews the circuit court's decision *de novo*. *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 176 (2015). A circuit court should grant summary judgment "if the motion and response show that there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Rule 2-501(f). A review of the circuit court's decision to grant summary judgment thus begins by determining "whether a dispute of material fact exists in the record on appeal." *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 313 (2019). "[O]nly where such dispute is absent will we proceed to review determinations of law." *Id.* (alteration in original) (quoting *Remsburg v. Montgomery*, 376 Md. 568, 579–80 (2003)). All facts and reasonable inferences must be construed in the light most favorable to the non-moving party. *Id.*

DISCUSSION

I. Ms. Weikers Presented Sufficient Evidence That GPSN Breached Its Duty of Care

To succeed on a negligence claim, a plaintiff must prove:

> (1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.

Macias, 243 Md. App. at 316 (emphasis removed) (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 314 (2007)). Summary judgment is appropriate where the plaintiff fails to make a sufficient showing of one of these essential elements. *Davis v. Regency Lane, LLC*, 249 Md. App. 187, 206 (2021). In its motion for summary judgment, GPSN argued that Ms. Weikers failed to establish that it had a duty to protect her from injury on the day she fell on Eleven Slade's property.

Where the risk created by failure to exercise due care "is one of personal injury, . . . the principal determinant of duty becomes foreseeability." *Landaverde v. Navarro*, 238 Md. App. 224, 249 (2018) (quoting *Jacques v. First Nat'l Bank of Md.*, 37 Md. 527, 535 (1986)). This Court has stated that "[i]t is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure . . . when the work is negligently done." *Cash & Carry Am., Inc. v. Roof Sols., Inc.*, 223 Md. App. 451, 469 (2015) (emphasis removed) (quoting *Council of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 27–28 (1986)). Here, the flowerbeds are in the middle of an area where residents park their cars to use the building's valet service. It is foreseeable that this area would have a high level of pedestrian traffic, and that if the

wire banding protruded out of the flowerbed area it could cause a pedestrian to trip and fall. Indeed, GPSN essentially concedes that it had a duty to install the wire banding in a manner that is safe for pedestrians. However, GPSN argues that there is no evidence that the banding was installed improperly.

In his deposition, Mr. Piccinini testified that "when we installed the wire banding, it is stuck in the ground deep enough that it can't move." A reasonable jury may construe this statement to be literally true—the wire banding remains in a static position within the flowerbed after it is installed, and it remains in that state until it is pulled out of the ground when it is removed. Mr. Freyer confirmed that the wire banding was not "removed, moved or adjusted" after it was installed. Nevertheless, Ms. Weikers testified that she saw a wire band hanging over the curb, which caught her foot and caused her to fall. Ms. Weikers's expert, Walter Green, testified that, "If [the wire banding] was not displaced, then that would mean that it was installed in a hazardous position." Additionally, Dr. Levin's photographs show multiple wire bands protruding over the curb on a nearby flowerbed—bands that were installed on the same day as those where Ms. Weikers fell.[5] Mr. Green, referring to Dr. Levin's photographs, testified: "[T]here were other [wire bands] hanging over and on the curb. *So it was a condition that existed*. . . . [I]f that similar condition existed at other places along the landscape bed," then there is a "reasonable certainty" that

[5] It is true that Dr. Levin testified that he did not see "anything that extended beyond the flowerbed itself." But he also stated that he was not looking for problems with the area, explaining that "My attempt was only to get a picture, but not to see -- if I had seen a particular spot, I think I would have focused on it. But rather I just wanted to take a picture of the entire oblong, which is what I did."

an overhanging wire band caused Ms. Weikers's fall. (Emphasis added). Given these facts, a reasonable juror could make one of two inferences favorable to Ms. Weikers. A jury could infer that because the wire banding "can't move" after installation, the placement and position of the wire banding was the same on October 12, 2017 (date of installation) and March 30, 2018 (date of occurrence). In other words, a jury could conclude that the wire banding was protruding over the curb when GPSN installed it. Alternatively, and perhaps more likely, a jury could infer that the wire bands in the flowerbeds did not remain within the flowerbeds as designed, but instead shifted slowly over the winter due to improper installation.

Although Mr. Piccinini also testified that GPSN would not install wire bands in such a way that they extend over a curb, and that it is GPSN's normal practice to place the ends of the wire bands six to eight inches inside the flowerbed, a jury is free to disregard that portion of his testimony and instead find that GPSN did not follow its usual practices for this particular installation. *See Qun Lin v. Cruz*, 247 Md. App. 606, 629 (2020) (A jury "may believe part of a particular witness's testimony but disbelieve other parts." (quoting *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136 (2000))). Indeed, although Mr. Piccinini testified that the installation shown in the photographs "was done properly," he acknowledged that the ends of the bands were placed less than six inches inside the flowerbed.

In short, GPSN had a duty to install the wire banding without creating a dangerous condition for pedestrians. A jury could find that GPSN breached its duty of care by

installing the wire banding in a manner that allowed the wire bands to encroach upon and over the curb, creating a dangerous condition for foreseeable pedestrians.

II. Ms. Weikers Presented Sufficient Evidence That Eleven Slade Had Notice of the Dangerous Condition

A premises liability claim is based in negligence, and requires a plaintiff to establish the four elements of negligence discussed above. For premises liability claims, the nature of the duty owed to a person injured on the property is determined by that person's legal status at the time of the injury. *Macias*, 243 Md. App. at 316. Because she was a resident of the apartment building, all parties agree that Ms. Weikers was an invitee, and thus Eleven Slade's duty to her was to "use reasonable and ordinary care to keep the premises safe for [Ms. Weikers] and to protect [her] from injury caused by an unreasonable risk which [she], by exercising ordinary care for [her] own safety[,] will not discover." *Id.* at 317 (quoting *Deboy v. City of Crisfield*, 167 Md. App. 548, 555 (2006)). "A property owner will be liable to an invitee in negligence if (1) the owner 'controlled the dangerous or defective condition;' (2) the owner knew or should have known of the dangerous or defective condition; and (3) 'the harm suffered was a foreseeable result of that condition.'" *Id.* (quoting *Hansberger v. Smith*, 229 Md. App. 1, 21 (2016)).

> Generally, to sustain a cause of action in a premises liability case, the plaintiff "must prove not only that a dangerous condition existed but also that the [defendants] 'had actual or constructive knowledge of the dangerous condition and that the knowledge was gained in sufficient time to give [them] the opportunity to remove it or to warn the [plaintiff].'" When a customer alleges that a business proprietor breached a duty of care, "'[t]he burden is upon the customer to show that the proprietor . . . had actual or constructive knowledge' that the dangerous condition existed." "In terms of constructive knowledge, moreover it is necessary for the plaintiff to show how long the dangerous condition has existed."

Zilichikhis, 223 Md. App. at 186–87 (alterations in original) (citations omitted). "[T]o show constructive knowledge, [an] invitee must demonstrate that [the] defective condition existed long enough to permit one under a duty to inspect to discover the defect and remedy it prior to the injury." *Macias*, 243 Md. App. at 337 (alterations in original) (emphasis omitted) (quoting *Joseph*, 173 Md. App. at 316–17).

In the circuit court, Eleven Slade conceded, for the purposes of its summary judgment motion, that a dangerous condition existed and that it failed to conduct reasonable inspections of pedestrian areas relevant to Ms. Weikers's negligence claim. Pertinent to that concession, we note that Ms. Weikers testified at her deposition that, as she was falling, she saw a piece of metal overhanging the curb, which caught her foot.

Viewing the evidence (including Eleven Slade's concessions) in a light most favorable to Ms. Weikers vis-à-vis her claim against Eleven Slade, a jury could find the following:

- The existence of a dangerous condition on Eleven Slade's property on March 30, 2018, *i.e.*, a piece of wire banding overhanging the curb where Ms. Weikers fell.

- That the wire banding and deer netting was installed in both flowerbeds by GPSN on the same day in October, 2017.

- That, when properly installed, the wire banding is placed in the soil six to eight inches from the curb and "deep enough that it can't move."

- That Dr. Levin's photographs taken the day after the incident show that there was wire banding overhanging the curb bordering the flowerbed on the opposite side of the walkway from where Ms. Weikers fell.

- That, in light of Mr. Piccinini's testimony that the wire bands are placed in the soil with the intent that they remain static, the jury could infer that it is unlikely that the wire bands in two separate flowerbeds unexpectedly

and simultaneously shifted to encroach upon and over the curb, and instead conclude that either the wire banding was installed protruding over the curb, or the banding migrated out of place slowly over time.

- That a reasonable inspection of the valet area would have revealed the dangerous condition that existed in one flowerbed (as evidenced by Dr. Levin's photographs taken the day after the occurrence) and *inferentially* existed on March 30, 2018, in the flowerbed adjacent to where Ms. Weikers fell.

- And finally, that a reasonable inspection would have revealed the dangerous condition in enough time for Eleven Slade to either adjust or remove the wire bands to eliminate the hazard, or to warn Ms. Weikers of the hazard.

In light of these facts and inferences, the court erred in granting summary judgment in favor of Eleven Slade.

Eleven Slade argues that this case is similar to *Lexington Mkt. Auth. v. Zappala*, 233 Md. 444 (1964), *Rehn v. Westfield Am.*, 153 Md. App. 586 (2003), and *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294 (2019). *Zappala* involved an oil or grease spill in a parking garage, which caused a woman to slip and fall. 233 Md. at 445. The woman had parked her car in the garage two hours before the accident and did not observe any oil or grease on the floor at that time. *Id.* at 446. The Court held that there was not enough evidence to establish constructive notice. *Id.* *Rehn* involved a customer spilling a drink on the floor of a restaurant, which caused another customer to slip and fall within seconds to minutes after the drink was spilled. 153 Md. App. at 590–91. This Court held that the evidence was insufficient to prove that the interval between the spill and the fall was long enough for the restaurant to either clean up the spill or warn customers of its presence. *Id.* at 595. *Macias* involved a large sign affixed to a stone wall that came loose and fell on a boy who

was playing on the wall. 243 Md. App. at 306–07. The boy who was injured testified that, while climbing on the wall, "he did not see any problems with the . . . sign, feel any movement while playing on it, or hear any cracking or crumbling that might indicate a danger." *Id.* at 338. Affirming judgment in favor of the property owner, we held that "[t]here was no evidence that anyone had ever been harmed by the community sign, or that there were any visible defects that might have put [the property owners] on notice that someone could be injured." *Id.*

Unlike the cases involving spills, which may occur randomly at any time, the wire banding installed in the flowerbeds here was designed to remain in place. Thus, there was no expectation that the wire banding would suddenly pop out of the ground and encroach upon the curb, and the jury could therefore conclude that such an event would be unlikely. Additionally, unlike *Macias*, a reasonable juror could conclude that the dangerous condition was not a hidden, latent defect. Based on Dr. Levin's photographs of the opposite flowerbed and Ms. Weikers's testimony about the event, a reasonable juror could conclude that a visual inspection would have provided Eleven Slade notice that the banding was hanging over the curb prior to Ms. Weikers's fall.

CONCLUSION

The evidence presented by Ms. Weikers was sufficient for summary judgment purposes to show that GPSN breached its duty to install the wire banding in a reasonably safe manner for pedestrian ingress and egress to the apartment building, and that Eleven

Slade had constructive notice of the dangerous condition.[6]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEES.

[6] Nothing in this opinion should be construed as intimating our view on the substantive merits of Ms. Weikers's claims against appellees.