Circuit Court for Montgomery County
Case No. 429485-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0097

September Term, 2018

CHANDRA WALKER HOLLOWAY

Appellant/Cross-Appellee

v.

SILVERWOOD HOMEOWNERS' ASSOCIATION, et al.

Appellees/Cross-Appellants

Reed,
Friedman,
Sharer, Frederick J.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 13, 2020

This premise liability case arises from a negligence suit that was filed by Chandra Walker Holloway ("Appellant") against Silverwood Homeowners' Association, Inc. and American Community Management, Inc. ("Appellees"). Appellant alleged in her complaint that Appellees breached its duty of care to Appellant, which caused her injury on February 26, 2014. On November 2, 2017, Appellees filed a Motion for Summary Judgment and an opposition to that motion was filed by Appellant on December 22, 2017. On February 26, 2018, The Honorable Harry C. Storm granted Appellees' Motion for Summary Judgment. On March 16, 2018, Appellant filed this timely appeal. In doing so, Appellant brings the following question for our review, which we have rephrased for clarity:[1]

I. Did the circuit court err when it granted Appellees' Motion for Summary Judgment?

For the foregoing reasons, we answer in the negative and affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the fee simple owner of a home located at 10 Silver Spruce Court, Burtonsville, Maryland in a subdivision known as the "Silverwood." According to a recorded Declaration of Covenants, Conditions and Restrictions ("Declaration") subjected

[1] Appellant presents the following question:

1. Did the lower court err by ignoring existing factual evidence to rule on a question of material fact which should have been left to the trier of fact?

to properties within Silverwood, the properties are subjected to various "easements, restrictions, covenants, and conditions." Moreover, the Declaration defined and identified "common area" property that is owned by and under the control of Silverwood Homeowners' Association, Inc., as a "non-stock, non-profit corporation." Every property owner within the subdivision becomes an Association member based on his/her ownership and each property owner is granted a "right and easement of enjoyment in and to the common area…" The bylaws for the Silverwood Homeowners' Association, Inc. imposes a duty of care upon the Silverwood Homeowners' Association, Inc. to maintain the common area.

On the evening of February 26, 2014, Appellant was injured when she fell on black ice[2] in the common area parking lot in the Silverwood subdivision. On January 20, 2017, Appellant filed suit against Appellees. In Appellant's complaint she alleged that she sustained permanent traumatic brain injury when she fell in the common area parking lot. In addition, Appellant alleged that her husband, Richard Holloway, came outside after Appellant's fall to observe where Appellant had fallen. Richard Holloway stated in his Affidavit that he "observed black ice on the ground in front of [their] home…located between [their] house and [Appellant's] car approximately 2 feet wide in dimension" and that "[t]here was no salt on the streets or sidewalk." Appellant's liability expert, Anthony Shinsky, concluded that the black ice that Appellant fell on had been "allowed to form on

[2] Merriam Webster's dictionary defines black ice as "a nearly transparent film of ice on a dark surface (as a paved road or a body of water) that is difficult to see." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020)

the parking lot and was the result of snow melt from an earlier snow event pooling and re-freezing" on the parking lot floor.

On November 2, 2017, Appellees filed a Motion for Summary Judgment and an opposition to that motion was filed by Appellant on December 22, 2017. On February 26, 2018, the Judge granted Appellees' Motion for Summary Judgment. On March 16, 2018, Appellant filed this timely appeal.

STANDARD OF REVIEW

Appellate review of an order granting summary judgment is a two-step process. The first step is to decide whether there were disputes of material fact before the circuit court. *Koste v. Town of Oxford*, 431 Md. 14, 24-25 (2013). We perform this review *de novo*. *Id*.

Summary judgment is proper where the trial court determines that there are no genuine disputes as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Md. Rule 2-501. The trial court should not resolve any issue regarding the credibility of witnesses as those matters are left to the trier of fact.

In reviewing the grant of a motion for summary judgment, appellate courts focus on whether the trial court's grant of the motion was legally correct. The parameter for appellate review is determining "whether a fair minded jury could find for the plaintiff in light of the pleadings and the evidence presented, and there must be more than a scintilla of evidence in order to proceed to trial…" *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152-53 (2008) (citation omitted). Additionally, if the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party. *Id*.

An appellate court ordinarily may uphold the grant of summary judgment only on the grounds relied on by the trial court. *See Ashton v. Brown*, 339 Md. 70, 80 (1995) (citations omitted).

DISCUSSION

A. Parties' Contentions

Appellant argues that the circuit court erred when it granted Appellees' Motion for Summary Judgment because the court ignored factual evidence, which should have been left to a trier of fact to decide. Specfically, Appellant maintains that the circuit court ignored that there was a factual dispute as to whether Appellees had actual or constructive notice of the icy conditions that caused Appellant's fall. Appellant contends that Anthony Shinsky, Appellant's liability expert, provided a report stating that "there had been significant precipitation for the week leading up to Appellant's fall, including during the actual day of the fall." Appellant asserts that Shinsky's report stated that "there was precipitation of rain, freezing rain, or snow every day from February 21, 2014, to February 26, 2014."[3] Appellant argues that despite this, Appellees did not call "their snow clearing

[3] Appellant's brief states that:

> On February 25, 2014, snow began falling at about 4:45 am, with a temperature of 30 degrees and continued falling until about 11 am on February 26, 2014. This snow even left 0.6 inches of snow accumulation on undisturbed ground on February 25, 2014 and a total accumulation of 0.6 inches on undisturbed ground on February 26, 2014. When the snow stopped falling the temperature was 28 degrees, reaching a high of 35 degrees around two pm [sic] and then falling to 27 degrees at around seven pm [sic] that evening, around the time of Ms. Holloway's fall. The temperature continued to drop after seven pm [sic].

contractor, Mainscapes."

Next, Appellant asserts that the circuit court erred by ignoring factual evidence provided by Appellant and her husband, Richard Holloway. Appellant argues that although she did not see the black ice prior to her fall, her husband observed the black ice located on the ground where Appellant fell. Additionally, Appellant maintains that the circuit court failed to consider that Appellees failed to treat the parking lot with salt "or to have the parking lot clear in light of the known weather conditions." Next, Appellant argues that the circuit court failed to consider existing case law. Specifically, Appellant asserts that Appellees had a duty to ensure that common areas like the parking lot were cleared of snow and treated for prevention of ice accumulation. Appellant argues that Appellees had control over the common area and that Appellees had constructive notice about the conditions of the parking lot because of the weather conditions.

Appellant also argues that she was an invitee "in the parking lot owned by [Appellees]." Specifically, Appellant maintains that Appellees' argument that she was a bare licensee was rejected by the circuit court during oral argument for Appellees' Motion for Summary Judgment.[4] In addition, Appellant argues that Appellees argument that they were not liable to Appellant based on the Business Judgment Rule does not insulate [Appellees] from liability in tort." Appellant contends that the Business Judgment rule is a

[4] Under premise liability law, a bare licensee is a person on the property with permission, but for his or her own purposes; the possessor owes no duty except to refrain from willfully or wantonly injuring the licensee and from creating '"new and undisclosed sources of danger without warning the licensee.'" *Wagner v. Doehring*, 315 Md. 97, 102, 553 A.2d 684, 687 (1989)

legal standard in fiduciary duty cases and does not apply in negligence cases. Finally, Appellant asserts that "Maryland law does not require easement holders to maintain property over which they have an easement."

Appellees respond with a cross-appeal stating that they did not violate any duty of care to Appellant. Appellees assert that a real property owner cannot be liable to an individual in the absence of notice and an opportunity to remedy a hazardous condition. Appellees argue that there is "well-established Maryland law that the extent of any duty, if one does exist, is governed by [Appellant's] status on the property, be it invitee, licensee or trespasser." Appellees maintain that Appellant, as a licensee takes the property as it exists and that Appellant has an "easement of enjoyment" that's recorded and her entry on parking lot was for her own purpose or convenience. Appellees contend that the recorded Declaration granted Appellant an easement and "establishes that the easement is for the lot owner's 'enjoyment' and that it runs with the land 'for the purpose of protecting the value' of her real property and that property owned by her similarly situated neighbors." Appellees further argue relying on New York common law that based upon Appellant's "established easement over the common areas of the Silverwood subdivision, that the primary duty of care, if any, to maintain the common area in a safe condition rests upon [Appellant]."

Appellees argue that the Business Judgment Rule precludes any challenge to the Appellees' snow policy. Specifically, Appellees assert that Appellant cannot challenge its business decision when Appellees contracted for snow removal with Mainscapes, Inc. and set the automatic response trigger at two inches. Appellees further argue that based upon

Appellant's established easement over the common areas of the Silverwood subdivision, that the primary duty of care, if any, to maintain the common area in a safe condition rest upon Appellant.

Appellees also argue that Appellant's testimony does not establish the duration of the alleged hazard. Specifically, Appellees maintain that Appellant testified that she fell on the night of February 26, 2014, as she was returning to her car, that she took the same path that same morning and later in the day, and that as she was leaving her home and headed to her car Appellant did not observe any snow or ice. Appellees further argue that Appellant's testimony establishes that there was no snow or ice on the parking lot any time prior to Appellant's accident. Moreover, Appellees assert that Richard Holloway's affidavit does not establish the duration of the hazard. Appellees maintain that Richard Holloway's "affirmations do not establish the precise location of the black ice and nowhere does he specifically reference the presence of snow, ice or any moisture on the parking lot." Appellees also contend that Richard Holloway's affidavit is not legally sufficient to oppose its motion for summary judgment.

Lastly, Appellees argue that Anthony Shinksy's report does not establish the property's condition. Specifically, Appellees contend that Shinsky's report is not legally sufficient because it was not submitted under oath. Appellees further argue that Shinksy's inspection of the parking lot in question was "conducted on November 22, 2017 nearly four years after the February 26, 2014 incident." As such, Appellees maintain that Shinksy's report has no probative value.

We hold that the circuit court did not err when it granted Appellees' Motion for

Summary Judgment. There is no evidence in the record that shows that Appellees had actual or constructive knowledge of the hazardous condition in the parking lot in which Appellant's accident occurred.

B. Analysis

i. Appellant's Status on the Property

Appellant maintains that she was an invitee "in the parking lot owned by [Appellees]." Specifically, Appellant asserts that Appellees' argument that she was a bare licensee was rejected by the circuit court during oral argument for Appellees' Motion for Summary Judgment. Appellees respond that Appellant was a bare licensee and a licensee takes the property as it exists. Relying on New York Case law, Appellees further argue that based upon Appellant's "established easement over the common areas of the Silverwood subdivision, that the primary duty of care, if any, to maintain the common area in a safe condition rest upon [Appellant]."

Maryland courts have long held that in premises liability cases a possessor of land owes a certain standard of care to an individual depending on that individual's status on the landowner's property. The Court of Appeals has stated:

> With regard to premises liability, this Court has "long recognized that a possessor of property owes a certain duty to a person who comes in contact with the property. The extent of this duty depends upon the person's status while on the property." *BG & E v. Lane*, 338 Md. 34, 44, 656 A.2d 307, 311 (1995). Historically, in Maryland, four classifications have been recognized: invitee, licensee by invitation, bare licensee, and trespasser. *Id.* An invitee is a person "on the property for a purpose related to the possessor's business." *Id.* The possessor owes an invitee a duty of ordinary care to keep the possessor's property safe. *Id.* A licensee by invitation is a social guest to whom the "possessor owes a duty to exercise reasonable care to warn the guest of dangerous conditions that are known to the possessor but not easily

> discoverable." *Id.* A bare licensee is a person on the property with permission, but for his or her own purposes; the possessor owes no duty except to refrain from willfully or wantonly injuring the licensee and from creating '"new and undisclosed sources of danger without warning the licensee.'" *Wagner v. Doehring,* 315 Md. 97, 102, 553 A.2d 684, 687 (1989) (quoting *Sherman v. Suburban Trust Co.*, 282 Md. 238, 242, 384 A.2d 76, 79 (1978)). "Finally, a trespasser is one who intentionally and without consent or privilege enters another's property." *Id.* As for a trespasser, even one of tender years, no duty is owed except that the possessor may not willfully or wantonly injure or entrap the trespasser. *Murphy v. Baltimore Gas & Elec.*, 290 Md. 186, 190, 428 A.2d 459, 462-63 (1981).

Baltimore Gas and Elec. Co. v. Flippo, 348 Md. 680, 688-89 (1998).

The Judge addressed in his order granting Appellees' Motion for Summary Judgment whether Appellant was a licensee or an invitee on the common area/parking lot. He stated the following:

> In this case the parties disagree on how [Appellant's] status within [Appellees'] common area should be characterized. [Appellees] claims that [Appellant] was a "bare license[e]" or a "licensee by invitation." *See Bramble v. Thompson,* 264 Md. 518, 521-22 (1972)… [Appellant]… argues that the court should focus on control, and apply the duty applicable in the landlord/tenant context i.e. the duty to "exercise the ordinary care and diligence to maintain the retained portions in a reasonably safe condition." *See Shields v. Wagman*, 350 Md. 666, 674 (1998). In other words the duty owed to an invitee.
>
> In the context of this case the Court agrees with [Appellant] that she should be treated as an invitee. There is no question that [Appellees] own[] and control[] the common areas, including the parking lot in question. Moreover, and among other things, [Appellees] assumed the duty of maintenance of the common areas and acknowledged in the recorded Declaration that it could be held liable for its negligence. Accordingly, an "invitee" analysis will be applied.

This Court had previously explained that:

> The highest duty is that owed to an invitee; it is the duty to use reasonable and ordinary care to keep [the] premises safe for the invitee and to protect [the invitee] from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for [the invitee's] own safety will not discover.

Deboy v. City of Crisfield, 167 Md. App. 548, 555 (2006) (internal citation and marks omitted). With regard to common areas, the Court of Appeals has stated in that:

> A landlord has an affirmative duty to provide his or her tenants with a reasonably safe means of passage to and from their homes. ***Langley Park Apartments, Sec. H., Inc.*, 234 Md. at 407, 199 A.2d at 623** ("[W]here a landlord leases separate portions of his property to different tenants and reserves under his control the passageways and stairways, and other parts of the property for the common use of all the tenants he must then exercise ordinary care and diligence to maintain the retained portions in a reasonably safe condition.").

Thomas v. Panco Management of Maryland, LLC, 423 Md. 387, 597 (2011).

In the instant case, we agree that Appellant was an invitee when she fell in the parking lot on February 26, 2014. Moreover, the recorded Declaration stated that the common area property (i.e. parking lot) was owned and under the control of Silverwood Homeowners' Association, Inc. Accordingly, we hold that Appellees, as the owner of the property, owed Appellant a duty of reasonable and ordinary care in the parking lot of the subdivision.

ii. Did Appellees Have Notice of the Hazardous Condition in the Common Area?

Appellant maintains that the circuit court ignored that there was a factual dispute as to whether Appellees had actual or constructive notice of the icy conditions that caused Appellant's fall. Appellant contends that Anthony Shinsky, Appellant's liability expert, provided a report stating that "there had been significant precipitation for the week leading up to Appellant's fall, including during the actual day of her fall." Appellant asserts that Shinsky's report stated that "there was precipitation of rain, freezing rain, or snow every day from February 21, 2014, to February 26, 2014." Additionally, Appellant maintains that

although she did not see the black ice prior to her fall, her husband observed the black ice located on the ground on which she fell.

As it relates to whether Appellees had actual and constructive notice the circuit court stated the following:

> There is simply no evidence in the record to suggest that [Appellees] had knowledge, actual or constructive, of the hazardous conditions… The burden was on [Appellant] to show that [Appellees] ha[d] actual or constructive knowledge of the alleged hazard's existence. *Lexington Market Authority v. Zappala,* 233 Md. 444, 445-46 (1964). This she failed to show, and as a result, [Appellees] are entitled to summary judgment in their favor.

Appellant stated during her deposition that she was returning to her car on the night of February 26, 2014. Appellant also admitted that she walked the same path that same morning with her children and as she was leaving she did not observe any snow or ice in the common area. In addition, Appellant stated that she walked the same path from her car to her home a couple of hours before the accident and did not notice any snow or ice in the common area. Appellant stated the following during her deposition:

> [Appellees' Counsel]: Did you see any problems in the morning when you went out?
> [Appellant]: No.
>
> [Appellees' Counsel]: No snow or ice on the ground?
>
> [Appellant]: No.
>
> [Appellees' Counsel]: No accumulation at all?
>
> [Appellant]: No
>
> …
>
> [Appellees' Counsel]: When you got home, was it still day light?
>
> [Appellant]: I don't remember.
>
> [Appellees' Counsel]: Is it safe to say you walked that exact same path –

[Appellant]: I did.

[Appellees' Counsel]: From your car to your house?

[Appellant]: Yes.

[Appellees' Counsel]: And then this evening, you were walking from your house to your car?

[Appellant]: Yes.

[Appellees' Counsel]: Same path?

[Appellant]: Same path.

[Appellees' Counsel]: Did you encounter any difficulties after parking your car and going into the house?

[Appellant]: No.

[Appellees' Counsel]: When you came home that day, February 26, 2014, walked across the parking lot, you didn't notice anything unusual?

[Appellant's Counsel]: Objection.

[Appellant]: No.

…

[Appellees' Counsel]: On the evening of the accident, however, if you walked out your front door, was the sidewalk and landing clear?

[Appellant]: Yes.

[Appellees' Counsel]: No snow on them whatsoever?

[Appellant]: No.

[Appellee's Counsel]: Same for the sidewalk down to the parking lot?

[Appellant]: Same for the sidewalk down to the parking lot.

We have stated in *Pratt v. Maryland Farms Condo. Phase 1, Inc*., the following:

In Maryland, the liability of possessors of land with regard to invitees is as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees; and
>
> (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Pratt v. Maryland Farms Condo. Phase 1, Inc., 42 Md. App. 632, 637–38 (1979) (quoting Restatement (Second) of Torts § 343 (1965)). It follows that a landowner must exercise ordinary care to keep the premises safe for invitees. However, the landowner must know or have reason to know about the hazardous condition of the property in order to be held liable to invitees. Here, the record shows that Appellant fell on the night of February 26, 2014, as she was walking towards her car in the parking lot. In Appellant's deposition, she stated that morning of the accident she did not observe any snow on the sidewalk or on the parking lot ground. Appellant also testified that she took the same exact path that same day about three-two hours before the accident and that she did not observe any snow or ice on the ground. Appellant testified further that she did not know how long the black ice upon which she fell had been on the ground. In fact, she never said she saw black ice. Moreover, Appellant's husband, Richard Holloway, mentions in his Affidavit that he observed black ice in the area in which Appellant fell. However, his Affidavit does not state how long the black ice was present. It follows that Appellant's deposition and her husband's affidavit does not establish whether Appellees had actual or constructive notice of the hazardous condition in the parking lot.

As it pertains to Shinsky's report, Judge Storm stated the following in his order:

> [Appellant's] unverified architect report dated December 12, 2017 does not, even if considered, create a genuine dispute of material fact regarding the absence of actual or constructive knowledge on the part of [Appellees] of the presence of a hazardous condition that [Appellant] herself acknowledged did not exist two to three hours before her fall. Related to that, there is no evidence that [Appellees] expected that [Appellant] would not discover or realize the danger, or fail to protect herself against it under the circumstance.

We agree. Shinsky's 12 page report does not consider if Appellees had actual or constructive knowledge of the hazardous condition. Moreover, even if Shinksy's report did create a genuine dispute of material fact, Shinsky's report fails to adhere to the standard set forth in Maryland Rule 2-501 (b). Maryland Rule 2-501 (b) prescribes as follows:

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

(emphasis added). Shinsky's report is not supported by an affidavit nor was it taken under oath. It follows that this Court cannot consider if Shinsky's report created a genuine dispute of material fact.

Accordingly, we hold that the circuit court did not err when it granted Appellees' Motion for Summary Judgment. There is no evidence in the record that shows that Appellees had actual or constructive knowledge of the hazardous condition in the parking lot, in which Appellant's accident occurred.

iii. Business Judgment Rule

Finally, we briefly address Appellees' argument that Appellant is precluded from challenging Appellees pursuant to the Business Judgment Rule. Specifically, Appellees assert that Appellant cannot challenge its business decision to "contract[] for snow removal with Mainscapes, Inc. and set the automatic response trigger at two inches."

This Court has explained in *Reiner v. Ehrlich*, 212 Md. App. 142, 155–56 (2013) that:

> The general rule under Maryland law is that decisions made by a homeowners association's board of directors will not be disturbed unless there is a showing of fraud or bad faith. *See Black v. Fox Hills North Cmty. Ass'n,* 90 Md. App. 75, 82, 599 A.2d 1228 (1992). In *Black,* members of a homeowners association challenged the association's approval of a fence installed by other members of the community. *Id.* at 77, 599 A.2d 1228. The plaintiffs claimed that the fence was approved and installed in violation of the association's covenants and restrictions. *Id.* We held that it did not matter whether the fence actually violated the association's declaration of covenants, because the enforcement of those rules was within the exclusive purview of the association. "Whether [the association] was right or wrong; the decision fell within the legitimate range of the association's discretion." *Id.* at 83, 599 A.2d 1228. We further explained: "Absent fraud or bad faith, the decision ... was a business judgment with which a court will not interfere." *Id.* "The 'business judgment' rule, therefore, precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith." *Id.* at 82, 599 A.2d 1228. Further, under the business judgment rule, "there is a presumption that directors of a corporation acted in good faith and in the best interest of the corporation." *Danielewicz v. Arnold,* 137 Md. App. 601, 638, 769 A.2d 274 (2001).

The Business Judgment Rule generally is a legal standard that applies to fiduciary duty cases in which "courts generally will not interfere with the internal management of a corporation of the request of a minority stockholder or a member." *Mountain Manor*

Realty, Inc. v. Buccheri, 55 Md. App. 185, 194 (1983). The Business Judgment Rule is a legal standard that is primarily applied to cases involving shareholders who challenge decisions made by the board of directors in corporations. In the present case, Appellant does not request that this Court interfere with the internal management decisions by Appellees or impose any mandatory requirement on Appellees. Rather, "[Appellant] seeks damages in tort as a result of [Appellees'] negligence in failing to exercise ordinary care to keep the communal parking lot…safe." Thus, The Business Judgment Rule is not applicable in the present matter.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.