Circuit Court for Baltimore City
Case No. 24-C-17-000840

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 493

September Term, 2018

JOANN STUPI

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE

Meredith,*
Friedman,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: March 12, 2021

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

While returning to her car after attending a Baltimore Ravens home game at M&T Bank Stadium, Joann Stupi, appellant, fell and suffered injuries to her leg. As she and her husband were walking among a crowd of fans along the edge of Ostend Street, Ms. Stupi stepped onto a broken storm drain grate that was missing one of its metal bars, and that caused her foot and leg to fall through the gap in the storm drain grate. After another fan helped her dislodge her leg from the storm drain grate, she was transported to a hospital and underwent surgery. Ms. Stupi sued the Mayor and City Council of Baltimore ("the City"), appellee, in the Circuit Court for Baltimore City, alleging that the City had been negligent in failing to properly maintain that part of its street.

At the conclusion of Ms. Stupi's case in chief, the City moved for judgment, asserting that there was no evidence from which the jury could find that the City had either actual or constructive notice of the defective storm drain grate. The Circuit Court for Baltimore City granted the motion and entered judgment in favor of the City.

Ms. Stupi appealed, and presents the following issues (which we have reordered):

1. Did the court err in precluding an eyewitness from testifying that the storm grate had been broken for a considerable period of time based on its appearance and his common experience?

2. Did the court err in ruling that the flaking rust and deterioration on the broken grate could not as a matter of law create an inference that the City should have discovered it before the Ravens game when the City says it inspects the area before Ravens games?

3. Did the trial court err in granting judgment as a matter of law on the grounds that Ms. Stupi needed to present direct evidence that the City was notified of the hazard or is evidence that the hazard was a trap that existed for a considerable period of time legally sufficient to impute constructive notice to the City?

4. Did the court err in concluding that the location of the broken storm grate in a "high traffic area" during Baltimore Ravens home games that the City inspects once a month did not give rise to an inference that the City should have discovered the broken grate before Ms. Stupi's injury?

Because we conclude that the trial court did not commit reversible error in its evidentiary rulings, and the evidence admitted during the appellant's case in chief—even when considered in a light most favorable to Ms. Stupi—was insufficient for a jury to conclude, without speculating, that the defect was present prior to the day of Ms. Stupi's fall, the trial court did not err in granting the City's motion for judgment. We shall affirm the judgment of the Circuit Court for Baltimore City.

FACTS AND PROCEDURAL HISTORY

On September 7, 2014, the Baltimore Ravens opened their season with a home game against the Cincinnati Bengals. Harry Pawley was among the fans who attended the game. Although he had been a police officer with the Baltimore City Police Department for 25 years, he was attending the game as a spectator and was not on duty that day. As he was walking toward the stadium on his way to the game, Officer Pawley walked along the edge of Ostend Street and he fell into a storm drain grate which was missing a bar. At the trial of Ms. Stupi's case, Officer Pawley described his fall as follows:

> A. [BY OFFICER PAWLEY] While I was walking I fell into a storm grate.
>
> Q. [BY COUNSEL FOR MS. STUPI] Can you describe what kind of grate you're referring to?
>
> A. I guess just a standard storm drain, multiple bars, maybe like five bars or so.

> Q. And when you say you fell, did you come to an understanding as to why you fell?
>
> A. Yes, after I – I mean, I was laying basically on the road because it went up all the way up to my groin area. So my leg was completely down in the hole and I was like laying on the street. And I just climbed up out of the hole and kept on walking.
>
> Q. . . . What caused you to go down into the hole?
>
> A. A missing bar from the grate.

Officer Pawley testified that he "got [him]self up out of the hole and just continued to walk" to the game. He did not report the damaged storm drain grate to anyone. But, after the game, when he was walking along Ostend Street to return to his car, as were "herds of people," he saw two people lying down by the same broken storm drain grate through which he had fallen. Considering the evidence in a light most favorable to the non-moving party, it is inferable that the woman Officer Pawley observed lying near the storm drain was Ms. Stupi, and the man who was lying near her was Jeffrey Riddle, who also fell in that storm drain grate after the Ravens game.

At Ms. Stupi's trial, Mr. Riddle described his fall as follows:

> [BY MR. RIDDLE] I was talking to a couple of my friends about the game and I stepped off the curb. And as I stepped off[,] I stepped right into a hole in the sewer grate and fell down to my calf. And a couple of my friend[s] pulled me – they had to take my shoe off to get me out of the sewer grate.
>
> Q. [BY COUNSEL FOR MS. STUPI] What happened after you got out of the sewer grate?
>
> A. They sat me down on a curb and a couple [of] police officers came over to talk to me.

* * *

> Q. And as you were speaking with those police officers did you observe anything that caught your attention as you were –
>
> A. I heard a scream and I turned around and a young lady was – they were pulling a young lady out of the same sewer grate. . . . She was bleeding heavily and she went in the ambulance with me [to the hospital].
>
> * * *
>
> Q. Were you able to see the grate before you fell in it?
>
> A. No.

A few minutes after Mr. Riddle's fall, Ms. Stupi approached the same intersection of Ostend Street and Scott Street where he had fallen through the storm drain grate. Because of the high volume of fans leaving the stadium at the same time, people were walking very close together, and Ms. Stupi did not see the storm drain grate before her foot and leg went through the gap created by the missing bar. She described the fall as follows:

> [BY MS. STUPI] . . . I was walking with my husband and at a certain point[,] I went to take my next step and my foot seemed like it was stuck. So I said to my husband, "My foot is stuck." And I didn't realize that my foot had dropped down into a storm drain that was there up to my knee. . . . So I went to try to pull my foot up and it was stuck. I guess the weight of my body dropping down through the storm drain, but I couldn't get it up. . . . At that point I remember someone coming up behind me and saying "Don't try to move your leg. You have a nasty cut on your leg."
>
> * * *
>
> And that's the last thing I remember . . . .
>
> Q. [BY COUNSEL FOR MS. STUPI] Were you able to observe the grate into which you fell?

A. Not at the time I fell into it. When I woke up from passing out[,] I was sitting beside it.

* * *

Q. [BY COUNSEL FOR THE CITY] . . . What did you notice about the grate after you fell?

A. After I fell I noticed that it was broken.

Q. And when you – you stated that the next day you returned to the grate to go and look at it. Did you notice anything in the bottom of the grate?

A. I noticed that day, I noticed it while I was sitting there waiting for the EMT's that the broken piece was down inside the drain.

Q. And was the broken piece covered in trash or was it on top of the trash?

A. I don't recall that.

At the hospital, Ms. Stupi was diagnosed with "traumatic arthrotomy of the knee[,] . . . a partial laceration of the patella ligament and . . . a cartilage injury to the medial femoral condyle." She underwent surgery, and was discharged the following day. For several weeks she wore a brace and was on crutches, and she attended physical therapy for four to six weeks.

On February 21, 2017, Ms. Stupi filed a complaint in the Circuit Court for Baltimore City alleging negligence on the part of the Mayor and City Council of Baltimore for the following errors or omissions:

a. creat[ing] an unsafe, dangerous, defective, and/or hazardous condition in a public street;

b. fail[ing] to make the street safe for members of general public [] by creating a hazardous condition;

c. fail[ing] to make proper inspections which would have discovered the broken, hazardous drainage grate;

d. fail[ing] to discover a hazardous condition;

e. fail[ing] to warn members of the general public of the presence of the broken drainage grate, a hazardous condition;

f. fail[ing] to fix or replace the hazardous condition; and

g. [being] otherwise negligent and careless.

On first day of trial, the court granted the City's pretrial motion *in limine* to exclude lay witness testimony about the length of time the grate had been defective. The court explained its ruling as follows:

> The ability of a piece of metal to be susceptible to the weather, the elements, and whether or not it decreases the sustainability of that piece of metal is subject to expert testimony. You can't make an assumption about something merely because you have decided that it seems reasonable to you when I have said to you specifically that in order to be able to have testimony of that nature you need an expert witness. Steel holds up under different -- it depends on the thickness of the steel, the weight of the steel, whether it has been previously exposed to heat or other things. There's a lot of factors. I've sat here and watched trials about buildings that have steel and metal and the different forms and the type of steel and metal and inferior steel and metal and how they determine when you have a piece of inferior steel or metal.
>
> I mean, I've seen experts flown in about oil cans and the thickness of oil cans and how much pressure they can withstand before they break. I mean, that's the -- that smacks of expert testimony. Usually engineers. Usually people with expert testimony with degrees and letters following their name. You cannot ask a lay person to tell me how much weight a piece of rusted metal is going to sustain before it breaks, how long before it breaks, what's the likelihood that it will break. You can't do that through lay testimony. You need an expert.
>
> * * *

[COUNSEL FOR MS. STUPI]: Just to be clear, Your Honor. I've instructed [George Stupi] not to put any time limit on that. But for clarification, he is allowed to testify to what he observed.

THE COURT: That's exactly right.

[COUNSEL FOR MS. STUPI]: Okay.

THE COURT: And he can't give [give an opinion] it looks like it had been there for a long time.

During the trial, Ms. Stupi called John Boyd, superintendent for Storm Water Maintenance in Baltimore City, to testify as a lay witness. Mr. Boyd's testimony included the following:

Q. [BY COUNSEL FOR MS. STUPI] You're aware that these storm grates break.

A. [BY MR. BOYD] I'm aware that they break.

Q. And they break frequently. . . . Is that correct?

A. They break -- well, they break when something is over the capacity of the weight, it breaks them. And the[n] sometimes when people beat on them to try to get in them, they break.

* * *

A. Yes, they break. All over the city they break.

Q. Okay.

A. They only break when something, like I said, if something runs over them or people beat on them to get them up, they could break them out.

* * *

Q. Grates break more often in heavy traffic areas, correct?

A. It all depends. . . . It all depends on the structure of the drain.

Q. Where do you concentrate your complaint crews and your hand crews to

go out and inspect grates?

A. I send them out every day to inspect grates all over the city, but they can't be everywhere at one time.

Q. Do you send them to high traffic areas?

A. Yes, I do.

* * *

Q. You're familiar with the area of Ostend Street and Scott Street, correct?

A. I wasn't familiar with it, what happened.

Q. You don't know the area of Ostend and Scott Street?

A. I know Ostend Street, but I wasn't familiar with the grate at the time.

* * *

Q. And you're aware that that area gets heavy traffic, correct?

A. Sure.

Q. You're aware that it gets heavy foot traffic [on] game days, correct?

A. Correct.

* * *

Q. Do you have any prior knowledge of prior to September 2014 a crew was sent to Ostend Street and Scott Street to inspect the drainage grates?

A. No, I don't.

* * *

Q. You don't have any time sheets that show that [your crews have] gone to the area of Ostend Street and Scott Street at any time in 2014?

A. I don't have knowledge of it.

* * *

Q. I'm showing Mr. Boyd what's been pre-marked as Exhibit 8A [a photo

of the grate through which Ms. Stupi fell]. Mr. Boyd, what, if anything, would you do as the superintendent of Baltimore City if you came up to a grate that looked like this? . . . What, if anything, would you do?

A. We would change the grate.

Q. Replace it?

A. Replace it.

* * *

Q. What, if anything does the Storm Maintenance Division do on Ostend Street and Scott Street with regard to the drainage system . . . throughout the year?

A. We check the grates all over the city and storm drains.

Q. And when you say "all over the city," does that include Ostend Street and Scott Street?

A. Yes, east and west. The east area, the west area southeast [indiscernible].

Q. Where would [indiscernible]

A. We send the same crews out every day to clean drains, to repair drains, to inspect drains.

Q. And that area where you send crews, would that include Ostend Street and Scott Street, the intersection?

A. At the time that we inspected it, it must wasn't [sic] a problem at the time.

Q. I'm sorry?

A. When it was inspected – if it was inspected, it must wasn't a problem at the time because if it was a problem at the time with any grate on Ostend Street or Scott Street it would have got dispatched back and we would have repaired it.

* * *

Q. Are you aware there are drainage grates at Ostend Street and Scott Street?

A. I'm aware.

Q. How often do you inspect those grates in a given year?

[objection overruled]

A. We might check them like maybe once a month.

Q. Do you have any records of when the last time prior to or if any time prior to September 7, 2014 you inspected or your crews inspected the grates at Ostend Street and Scott Street?

A. No, I don't.

* * *

Q. What is that [grate] made out of?

A. Cast iron.

* * *

Q. Was the grate where Ms. Stupi fell, if you know, on Ostend and Scott Street a[n] SS grate?

A. Yes.

Q. What would you do – what would your crew be instructed to do if there was a broken bar on a[n] SS grate?

A. They would replace the grate.

* * *

Q. What, if anything, do your crews either complaint crews or hand crews do before the start of a Baltimore Ravens season to prepare for the season?

[COUNSEL FOR THE CITY]: Objection.

THE COURT: Overruled. What if anything, do your crews do or do you

have any role in preparation for the Ravens game? Overruled.

A. Most of the time if it's a Ravens game, if it's a game, during the game, we can't get down there to inspect anything. But before a game we will inspect the grates, the drains.

Q. [BY COUNSEL FOR MS. STUPI] Will you inspect the grates prior to the start of the season?

A. Sure.

Q. . . . Do you have any record that the grates at Ostend Street and Scott Street were ever inspected prior to the start of the 2014 Ravens season?

[COUNSEL FOR THE CITY]: Objection

THE COURT: Overruled.

A. Not to my knowledge.

* * *

A. We check the grates down at the stadium because it's a high volume area.

THE COURT: And what are you looking for?

A. Any grates that's damaged or any -- I mean, grates that's missing or damaged.

Q. [BY COUNSEL FOR MS. STUPI] Why are you looking for damaged or missing grates?

[COUNSEL FOR THE CITY]: Objection.

THE COURT: Overruled.

A. It's a high traffic area.

Q. [BY COUNSEL FOR MS. STUPI] And why is it important for you to inspect areas that are high traffic?

[COUNSEL FOR THE CITY]: Objection.

THE COURT: Overruled.

A. To alleviate hazards.

[COUNSEL FOR MS. STUPI] I'm sorry. I didn't hear you.

A. To alleviate hazards of somebody getting hurt.

* * *

Q. [BY COUNSEL FOR THE CITY]: . . . To your knowledge, did the City receive any phone calls or complaints about the grate at W. Ostend and Scott Streets prior to September 7, 2014?

A. No, they didn't.

Q. And how do you know that?

A. Because we didn't get the call on it until -- we didn't get no call on that location.

* * *

Q. And so you actually reviewed the [City's Service Request] system for complaints about this grate prior to September 7, 2014?

A. Yes.

Q. And you didn't find any complaints or notifications that this grate was damaged?

A. Nothing.

Q. I just want to go back and clarify something that you testified to on direct. You testified that sometimes grates are damaged because people beat on them. What did you mean by that?

* * *

A. People beat on them because they steal them regularly.

Q. Why do they do that, if you know?

A. Scrap.

Q. Do you know what they beat on them with?

A. . . . I don't know. But they beat on them. And most of the time they broke it or stole it.

Q. Okay.

A. That's the problem we've got now.

Q. And you had testified that the longevity of grates can vary based on, you know, the weight of cars going over them, or that sort of thing. And that, you know, the grates can last a short time or a long time.

Do you know what is the outside long time that they can last?

A. Grates can last up to ten years.

Q. Or they can be damaged within a day?

A. Yes, they can.

* * *

Q. [BY COUNSEL FOR MS. STUPI] Did you find anything in the [City's Service Request] system that suggested that any crew had ever inspected the area of Ostend Street and Scott Street?

A. To my knowledge, no.

* * *

Q. [BY COUNSEL FOR THE CITY] The summary report [in the Service Request system] that they referred to[;] that only contains the work orders that were generated, correct, and not inspections?

A. Yes.

The only other witness called to testify about the condition of the storm drain grate was Ms. Stupi's husband, George Stupi. He was present when she fell, and he returned to the site to take the photos that were admitted in evidence. After photos marked as

Exhibits 8A, 8B, 8C, 8D, and 8E were introduced, counsel for Ms. Stupi endeavored to have Mr. Stupi describe the condition of the grate. Counsel asked: "At the area where the grate had broken, what did it look like?" After an objection, the court rephrased the question and Mr. Stupi testified as follows:

> THE COURT: . . . What did [the broken area of the grate] look like to you? In other words, use adjectives to describe what you saw.
>
> [GEORGE STUPI]: It was dark brown, rusty, worn, flaky, just deteriorated.
>
> Q. [BY COUNSEL FOR MS. STUPI] You said "rusty." Was it a thin, thick?
>
> A. [BY GEORGE STUPI] It was just dark. I mean, it was pretty uniform with everything else. This area matched this area (indicating). I mean, there was rust along here (indicating). It was kind of flaking off. It's kind of shiny up here, but rusty and kind of flaky and dull on the sides and over here as well (indicating). It was just -- it was all rusty.
>
> Q. And what was the general condition of the grate?
>
> A. I'm sorry?
>
> Q. What was the general condition of the grate?
>
> A. The general condition of the grate was --
>
> [COUNSEL FOR THE CITY]: Objection
>
> THE COURT: Sustained.
>
> THE COURT: Counsel, you're aware of the Court's ruling.
>
> [COUNSEL FOR MS. STUPI]: Yes, Your Honor.
>
> THE COURT: And I don't want you to generate anything that the Court has directed you not to do.
>
> [COUNSEL FOR MS. STUPI]: Understood.
>
> THE COURT: So why don't we ask a different question.

[COUNSEL FOR MS. STUPI]: Okay. Understood.

Q. Just the area that had broken off was it rusty on both sides?

A. It was rust. There's a curve right here (indicating). This is a point (indicating). And then there's a curve right here (indicating). That was rusty, the face of it. And there's another part of it where it broke off. That is also rusted.

That's another part of the beam that broke or whatever you call that, bar. That is also rusty. And it matches the color of this (indicating).

Q. Okay. You mentioned it was also flaky. Was it flaky on both sides?

A. Yes, it was kind of flaky. Mostly on the sides it was flaky and rusty. But this was more of a brown, dark brown that matched this (indicating). So it wasn't -- this part here (indicating) was not flaky. This was the flaky part here (indicating).

The court took a break and, outside of the presence of the jury, the following exchange took place:

[COUNSEL FOR MS. STUPI]: I don't mean to interrupt you, but perhaps this is a good time just to do like literally a one question proffer regarding some evidence that you've excluded with Mr. Stupi so we don't have to do it when we get back.

THE COURT: I'm not sure I understand. If you're going to proffer something you come to the bench outside of the earshot of the witness.

[COUNSEL FOR MS. STUPI]: I understand. But I was just going to ask him the question and you instruct --

THE COURT: To see what answer he's going to give?

[COUNSEL FOR MS. STUPI]: Yes.

THE COURT: Well, ask --

[COUNSEL FOR MS. STUPI]: Just opposed to --

THE COURT: Ask the question and make sure it's not leading.

[COUNSEL FOR MS. STUPI]: What would you expect if the grate had just broken off, what would you expect to observe?

THE COURT: That's sustained. You are not to answer it.

And, Mr. Stupi, you're not going to have to answer that question because I just told him he can't ask you that question.

[GEORGE STUPI]: Okay.

THE COURT: Okay. So one of the issues that has come up and I know you've been directed is you're not an expert in metal or engineering, are you?

[GEORGE STUPI]: No.

THE COURT: And so I have made a ruling that your opinion about how long that rust might have been there is not admissible which is why your lawyer told you not to say anything about that. Your opinion about that is not admissible, but your observations are. And you did a great job of describing things.

* * *

[COUNSEL FOR MS. STUPI]: . . . I just want to make sure that I'm preserved for appeal what his answer to those questions.

THE COURT: Correct. I understand that the record should reflect that you believe that the witness should be able to say how long he believes that that rust was there, that the cases you cited from other jurisdictions go to a lay person's ability to talk about the length of time that the rust existed at the location.

And so therefore, the Court has previously heard your argument and preserved it. . . .

* * *

So therefore, he can tell us what he saw but he may not give a further opinion as to the length of time that that rust may have been there. . . . Or even the cause of the break.

When the jury returned, Mr. Stupi's examination continued, and included the following testimony:

> Q. [BY COUNSEL FOR THE CITY] And when you went back to view the grate of even on the same day you saw that the bar that had broken out was directly under the grate, correct?
>
> A. [BY GEORGE STUPI] I believe I saw the bar laying down inside the grate.
>
> Q. And it was on top of some trash?
>
> A. It was mingled in with it. There was stuff on top of it.
>
> * * *
>
> Q. . . . [D]rawing your attention back to your testimony where you had talked about how the grate was rusty. Those were on the sides of the bar, correct, for the most part?
>
> A. There was rust all over, but the top part was worn shiny, but the sides and where the break was was rusty on the sides where the break is. I can't show you – where the bar came out.

After Ms. Stupi concluded her case in chief, the City moved for judgment pursuant to Maryland Rule 2-519. During arguments on the motion, counsel for Ms. Stupi agreed with the court that "there was no actual notice" to the City regarding the broken storm drain grate, but nevertheless, counsel insisted that the evidence was sufficient for the jury to conclude that the damage had been present long enough for the City to be charged with constructive notice of the defect, and the City should have discovered the defect if it had exercised due care for the maintenance of the City's streets in that high traffic area. The court then engaged in the following colloquy with counsel for Ms. Stupi:

THE COURT: You see, **this is the problem . . . . There was no testimony in this record about the length of time that that rust had been there**. I precluded it. So you can't now argue facts that are not in evidence. You took exception to my ruling. **You felt that Mr. Stupi should have been permitted to testify about the length of time that the rust existed.** However, I did not agree with you. So that's not part of your case. You can't argue now that it was. And since you're finished with your case you can't not [sic] now argue well, Judge, if you had let me ask Mr. Stupi then we would have had evidence. Well, unfortunately, that's not what your case includes. Your case includes observations by Mr. Stupi of the content of what he saw and identified as rust, the condition of the grate.

And **are you asserting to the Court that because Mr. Stupi saw the rust that that was notice to the City?**

[COUNSEL FOR MS. STUPI]: **In part, yes.**

* * *

[COUNSEL FOR MS. STUPI]: . . . But even in the absence of [Mr. Stupi's] testimony as to how long [the rust had been there] that might lead him to conclude that condition existed, **my argument is that the presence of the rust alone at the location of the break[,] that area in particular[,] allows the inference that the rust had been there for an appreciable period of time**. And that comes from the case law that we submitted to the Court. And that is in the absence of testimony about the amount of time. **It is simply the existence of rust which a lay person can infer is not formed immediately, does not form overnight.** A lay person can make an inference and that's what the cases say.

THE COURT: But that's not in your case, is it?

[COUNSEL FOR MS. STUPI]: It is.

THE COURT: No, the jury never heard that.

[COUNSEL FOR MS. STUPI]: The jury heard --

THE COURT: The jury never heard that. You're at the end of the Plaintiff's case in the light most favorable of not what you wanted to be put in evidence, but what was admitted into evidence.

[COUNSEL FOR MS. STUPI]: Exactly, Your Honor.

THE COURT: And **you don't have any evidence of how long the rust was there**.

[COUNSEL FOR MS. STUPI]: **That's correct.**

THE COURT: So you can't argue in the negative. You can't argue in the light most favorable to the Plaintiff a fact that's not part of your case.

[COUNSEL FOR MS. STUPI]: I'm not suggesting to the Court that that fact is in the case. My point is that **the fact that is in the case is Mr. Stupi's testimony that he saw rust. He observed flaking rust at the location where the bar was exposed.** And that was --

THE COURT: And that is notice to the City[?]

[COUNSEL FOR MS. STUPI]: **That allows an inference that the condition existed long enough to put the City on notice.**

* * *

In addition to the rust[,] there was testimony from Mr. Stupi about observing the bar in the bottom of the grate. And when he was asked whether it was sitting on top of the debris and trash that was inside the grate he specifically said no. It was . . . mixed in with the trash and debris.

. . . **The existence of trash and debris that is covering the bar that is mixed in over the top of the bar allows the jury to infer that that took a period of time to accumulate and cover up at least parts of the bar. And that allows an inference that . . . it existed long enough for the City to be on notice** particularly in a case where the City knows this drain to be in a high traffic area that exposes pedestrians to a danger.

(Emphasis added.)

The court granted the City's motion for judgment from the bench, and followed up with a written memorandum in which the court explained its rationale as follows:

This Court finds no actual or constructive notice to the Defendant of any defective or unsafe condition before the Plaintiff was injured. Although Plaintiff argues that rust on the storm grate alone allows for the inference that the rust had been there a "long time" and thereby puts the Defendant,

> Baltimore City, on notice that the grate was defective and needed to be replaced, this Court does not agree. The argument set forth by the Plaintiff is mere speculation and conjecture insufficient without evidence such as the testimony of an expert. . . . There is simply no evidence, sufficient as a matter of law, that the Defendant knew or should have known of the unsafe condition. *Smith v. City of Baltimore*, 156 Md. App. [377] (2004).
>
> * * *
>
> . . . It is clear in Maryland that the mere existence of a defect on the sidewalks and highways does not subject a municipality to liability for negligence. *Smith v. City of Baltimore,* 156 Md. App. 377 (2004). . . . There is no evidence of the length of time the defect had been present nor the manner in which the Defendant might have discovered the defect. This Court precluded the Plaintiff to present a lay person to testify about the manner in which metal deteriorates but required that an expert be presented. No expert was properly identified or noted by the Plaintiff pretrial and therefore there was no expert testimony provided of the testing of metal rusted portions of the broken storm drain, the length of time the grate had been rusted or exposed to rust or even the amount of weight the grate might endure before breaking. This Court finds that this type of testimony is beyond the knowledge of the average person and requires expert testimony.

This appeal followed.

STANDARD OF REVIEW

The standard of review of a ruling granting a motion for judgment was described as follows in *Sugarman v. Liles*, 234 Md. App. 442, 464 (2017), *aff'd*, 460 Md. 396 (2018):

> Maryland Rule 2–519 provides that "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." The standard for reviewing a circuit court's ruling on a motion for judgment is well settled:
>
> > [W]e ask whether on the evidence adduced, viewed in the light most favorable to the non-moving party, any reasonable trier of fact could find the elements of the tort by a

> preponderance of the evidence. . . . If there is even a slight amount of evidence that would support a finding by the trier of fact in favor of the plaintiff, the motion for judgment should be denied.
>
> *Asphalt & Concrete Services, Inc. v. Perry*, 221 Md. App. 235, 271–72, 108 A.3d 558 (2015) (quoting *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491–92, 979 A.2d 194 (2009)), *aff'd on other grounds*, 447 Md. 31, 133 A.3d 1143 (2016).

With respect to the standard of appellate review of a trial court's ruling regarding the admissibility or exclusion of opinion testimony, Judge Charles E. Moylan, Jr., explained in *Mack v. State*, 244 Md. App. 549, 572-73 (2020), that the evidentiary ruling "is one quintessentially entrusted to the broad discretion of the trial judge[,] and an appellate court will not substitute its judgment for that of the trial judge absent a clear abuse of that discretion. In upholding a trial court judge's exercise of discretion, the appellate court is scrupulously and broadly deferential."

DISCUSSION

1. Lay witness opinion that the grate had been broken for a long period of time

Ms. Stupi argues: "The court erred in excluding the testimony of Mr. Stupi that, based on his lay-person's observation of the grate and his common experience, it appeared to have been broken for a considerable period of time." She further explains in her brief: "Mr. Stupi was prepared to testify that the grate's appearance indicated that it [had] been broken for a considerable time. The trial court, however, did not allow Mr. Stupi to offer this testimony." She concedes, however, that "Mr. Stupi was not prepared to give testimony estimating a specific length of time over which the rust and corrosion

developed," but she says in the following sentence that Mr. Stupi "was going to testify that based on his observation, the grate gave the appearance that it had been broken for a long period of time."

As the excerpts of Mr. Stupi's testimony (quoted above) reflect, the trial court did not preclude Mr. Stupi from describing what he observed, and the photographs he offered were all admitted in evidence. When the trial court asked him if he was "an expert in metal or engineering," he answered: "No." Under the circumstances, we fail to see an abuse of discretion in the court's ruling that he could not offer a lay witness opinion "about how long that rust might have been there." Although it may be common knowledge that rust is caused by moisture, we agree with the trial court that it would require specialized training to be able to estimate how long it had taken for specific rust to have appeared and accumulated on a given piece of metal. That sort of estimate is a matter beyond the realm of common experience.

As Judge Moylan explained in great detail in *Mack v. State*, 244 Md. App. at 560-68, the Court of Appeals held in *Ragland v. State*, 385 Md. 706 (2005), that Maryland Rule 5-701 would be interpreted as if it contained the same limitation upon lay opinion testimony as Federal Rule of Evidence 701 has contained since being amended in 2000, namely, that a witness "not testifying as an expert" is not qualified to give an opinion "based on scientific, technical, or other specified knowledge within the scope of Rule 702." 385 Md. at 722 (quoting Fed.R.Evid. 701). As a consequence, the Court of Appeals held in *Ragland*: "[W]e will follow the approach as reflected in the 2000 amendment to

Fed. R. Evid. 701 and hold that Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." 385 Md. at 725.

In Ms. Stupi's case, the trial court concluded that it was not a matter within the common knowledge of the average juror to be able to look at rust on a piece of iron and know how long that rust had been present. There was no foundation testimony or evidence offered to indicate that the trial court's conclusion on that point was erroneous as a matter of fact.

Ms. Stupi cited three out-of-state cases that she said had concluded that it is common knowledge that rust and corrosion takes place over time: *Baker v. Granite City*, 311 Ill. App. 586, 593, 37 N.E.2d 372 (1941); *Wrobleski v. Linn-Jones FS Services, Inc*., 195 N.W.2d 709, 713-14 (Iowa 1972); and *Northern v. Gen. Motors Corp.*, 2 Utah 2d 9, 10, 268 P.2d 981, 981-82 (1954). It goes without saying that all three of those cases predated the 2000 amendment to Federal Rule of Evidence 701, and the 1994 adoption of Maryland Rules 5-701 and 5-702. Further, recognizing the proposition that rust and corrosion generally takes place over time is materially different from permitting a lay witness to examine a particular piece of metal and express an opinion that the rust observed on that piece had been there "a long time," which is the opinion Ms. Stupi sought to elicit from her husband. Based upon *Ragland* and *Mack*, we conclude that the trial court did not commit an abuse of discretion in precluding Mr. Stupi from expressing

his opinion that the rust he observed on the storm drain grate appeared to have been there a long time.

2. Constructive notice of a defect

Ms. Stupi asserts that George Stupi's descriptive testimony, when considered in combination with the photographs of the grate, provided sufficient evidence to allow a jury to use its "common knowledge" to infer that the grate had been broken for a sufficiently long period of time to give constructive notice to the City. We agree with the circuit court that Ms. Stupi failed to present sufficient evidence that would allow the jury to draw this inference.

The testimony of Mr. Boyd indicated that storm drain grates are made of cast iron, and they can last ten years. But they can also break any day if a vehicle with excessive weight drives over the grate or if a thief gathering marketable scrap metal beats on a bar until it breaks. Mr. Boyd admitted that, if his crew knew of a storm drain grate missing a bar like the one shown in Mr. Stupi's photos, the crew would replace the grate. But Mr. Boyd also testified that he could find no record in the City's Service Request system that indicated anyone had ever alerted the City to the damaged condition of the storm drain grate that caused Ms. Stupi's injury.

Counsel for Ms. Stupi agreed that there was no evidence that the City had actual knowledge of the damaged storm drain grate. But, even now, she urges us to conclude that the evidence was sufficient to create a jury question as to constructive notice. Despite the serious nature of Ms. Stupi's injury, the lack of evidence from which a jury could

rationally conclude, without speculating, that the grate had been missing one of its bars for such a long time that the City should have discovered the damage leads us to conclude that the trial court did not err in granting the City's motion for judgment.

As we observed in *Anne Arundel County v. Fratantuono*, 239 Md. App. 126 (2018), a local government does not enjoy governmental immunity for failing

> "to maintain its streets, as well as the sidewalks, footways and the areas contiguous to them, in a reasonably safe condition," which has been treated as proprietary. *Higgins v. City of Rockville*, 86 Md. App. 670, 679, 587 A.2d 1168 (1991). This is sometimes known as the "public ways" exception to governmental immunity.

239 Md. App. at 133 (footnote omitted).

In the trial court's written opinion in Ms. Stupi's case, the trial court cited *Smith v. City of Baltimore*, 156 Md. App. 377 (2004), for the principle that a municipality's liability for failing to maintain its public streets and walkways in a reasonably safe condition depends upon evidence that the municipality had either actual or constructive notice of the existence of the unsafe condition. In *Smith*, Judge Deborah Eyler explained that the City was properly granted summary judgment in that case because there was no evidence the City had actual notice of a damaged crosswalk signal, and there was no evidence to show how long the condition had been in existence. The pedestrian crossing signal had been rotated approximately 90 degrees from its proper position, and as a consequence, a pedestrian who would normally be guided by that signal could no longer see what it said. A pedestrian who tried to cross the highway when the signal would have

told him to wait was struck by a vehicle and fatally injured. Judge Eyler summarized the governing principles as follows:

> Generally, a municipal corporation owes a duty to persons lawfully using its public streets and sidewalks to make them reasonably safe for passage. This duty is not absolute and the municipality is not an insurer of safe passage. **If, however, 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**.

156 Md. App. at 383 (citations omitted; emphasis added).

Judge Eyler quoted the following "often repeated" passage, 156 Md. App. at 384, from *Keen v. City of Havre de Grace*, 93 Md. 34 (1901):

> It is not questioned that the city of Havre de Grace has the power to grade and repair its streets and sidewalks (Act 1890, ch. 180); and when such is the case, the municipality is bound to maintain them in safe condition, and if it negligently fail so to do and thereby persons, acting without negligence on their part, are injured, it is liable to respond in damages for all injuries caused by its neglect. Before, however, the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the street. As was well said in the case of *Todd v. City of Troy*, 61 N.Y. 509 [(1875)]: "By constructive notice is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see if 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. 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." If the defect 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.

93 Md. at 38-39 (citations omitted).

In *Keen*, there was eyewitness testimony that the hole in the sidewalk that caused Keen's fall had been present for two or three weeks, 93 Md. at 40, and the Court of Appeals held that that was a sufficient period of time to create a jury question as to constructive notice. Judge Eyler explained in *Smith* that, "when read in context," *Keen's* reference to "active" vigilance "does not impose a duty on municipalities to conduct regular inspections of their roadways. Rather, the language explains the circumstances in which municipalities will be found to be on constructive notice of defects in their roadways, and the rationale underlying the concept of constructive notice." 156 Md. App. at 385. We said in *Smith* that a municipality "must perform repairs upon being notified of a 'bad condition of the street.'" *Id*. at 386 (quoting *Keen*, 93 Md. at 39). "[T]herefore, when the evidence shows that a 'bad condition' is such that, by virtue of its nature or the length of time it has existed, the municipality would have learned of it by the exercise of due care, the municipality may be found to have constructive knowledge of its existence." *Id*. Because there was no evidence in *Smith* "showing that the defect [in the crosswalk signal] had existed for a sufficient length of time that it would have been reported to City authorities, and therefore would have been known to the City, had the City been abiding by its practice of responding to citizen reports of adverse roadway conditions," *id*., summary judgment in favor of the City was appropriate.

Ms. Stupi points to language in the Court of Appeals's decision in *Pierce v. City of Baltimore*, 220 Md. 286 (1959), as providing support for her case. In *Pierce*, the Court of

Appeals reversed the circuit court's order granting judgment notwithstanding the verdict. 220 Md. at 288-90. In that case, Charles Pierce exited a Baltimore City bus at a bus stop located at a point along a section of Harford Road that did not have a sidewalk. *Id.* at 288. As Pierce walked toward his destination by walking upon the unpaved strip of land adjacent to Harford Road, "he caught his left foot under a metal plate covering a drain and fell." *Id.* He sued the City for failing to eliminate the hazardous condition that caused his fall. Although the jury returned a verdict in his favor, the circuit court granted a judgment notwithstanding the verdict based upon its conclusion that Pierce had been contributorily negligent as a matter of law. The Court of Appeals reversed the circuit court's ruling and reinstated the jury's verdict.

The Court of Appeals cited the general rule that "a municipality has a duty to maintain streets, sidewalks, and footways, and the areas contiguous to them, in a reasonably safe condition." *Id*. at 290. Citing its opinion in *Mayor & Council of Hagerstown v. Hertzler*, 167 Md. 518, 520-21 (1934), the Court observed in *Pierce* that, "if the defect is slight or trivial, there is no right of recovery against the municipality." 220 Md. at 291. "If, however, the obstruction or defect is not to be expected and is substantial, **and the municipality has actual or constructive notice of it,** generally recovery is allowed, even though the area involved is one not actually or formally dedicated to pedestrian use." *Id*. (emphasis added; footnote omitted). The Court described the evidence of notice in Pierce's case as follows:

> There was testimony that permitted the inference that the City had actual or constructive notice of the defective conditions that caused the injury. **It is**

> **apparent from the photographs in the record that the condition which caused the metal plate to tilt above the concrete sides of the drain was of long standing and must have existed when the City inspected the property some five months before the accident or have come into being shortly thereafter.** The jury could have inferred from the testimony and the photographs that Pierce was walking along the grass plot near the curb in a line with the tree until he got to a point so close to the tree that he must have diverged to the right, and that when he did so he caught his foot under the black metal plate that was protruding above the drain in a position well-calculated to catch an unwary traveler.

Id. at 291-92 (emphasis added).

Ms. Stupi argues that the above-quoted passage establishes that photos alone were sufficient to establish notice in *Pierce*, and her photos (when considered with Mr. Stupi's description of rust on the storm drain grate) provided sufficient evidence for the jury to find that the City had constructive notice that a bar was missing from the storm drain grate. This conclusion does not follow from the statement in *Pierce*. The Court of Appeals provided no details about the information in the photographs that made it "apparent" to the Court that the dangerous condition was "of long standing and must have existed . . . some five months before the accident," but that was clearly the Court's interpretation of the photos in evidence in that case. In stark contrast, we detect no similarly persuasive information in the photographs introduced in Ms. Stupi's case. From our examination of the photographs, it is not at all "apparent" how long before Ms. Stupi's fall the cast iron bar was dislodged from the storm drain grate. Even if we give full credit to Mr. Stupi's description of rust, we could only speculate whether the bar became dislodged long enough before the game day that the City ought to have known about the damage to that storm drain grate.

In *Keen*, 93 Md. at 39, as noted above, the Court of Appeals described the amount of time that must pass in order to impute constructive notice in these terms: "**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." (Emphasis added; internal quotation marks omitted) There is simply no evidence in this case from which the jury could have found, without speculation, that the gap in the storm drain grate that caused Ms. Stupi's injuries had been in existence for such a period of time.

3. Constructive notice of a "trap"

Ms. Stupi's Question 3 (as reordered) asks:

> Did the trial court err in granting judgment as a matter of law on the grounds that Ms. Stupi needed to present direct evidence that the City was notified of the hazard or is evidence that the hazard was a trap that existed for a considerable period of time legally sufficient to impute constructive notice to the City?

This question assumes two premises that are not present in this case: (1) that the trial court's ruling was based upon the ground "that Ms. Stupi needed to present direct evidence that the City was notified of the hazard"; and (2) that there was evidence from which the jury could have rationally found, without speculation, that the hazardous condition "existed for a considerable period of time." As noted above, the trial court ruled that, in the absence of actual notice, constructive notice could suffice, but there was no evidence from which the jury could have made a rational finding as to how long the

storm drain grate had been missing one of its bars. Accordingly, we answer "no" to this question.

4. "High-traffic" location

Ms. Stupi asserts in her brief:

> The location of the broken grate was an area that deserved particular attention from the City. . . . [T]housands of pedestrians going to and from Ravens games would walk on West Ostend Street where they would be exposed to the risk of injury on broken grates. The City should have exercised due care to remove traps that would not be expected by foot passengers.
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> * * *
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> . . . [T]he City's duty does not change – its duty is still to exercise "reasonable" care. But the jury could infer, given the heightened risk presented by a broken storm grate on Ostend Street during a Ravens home game, that the rusted, flaky, deteriorated condition of the broken grate was not reasonable. In other words, the jury could have found that if the City were indeed exercising "reasonable" care in maintaining Ostend Street, the condition of the storm grate should never have reached that point. Again, the question was for the jury to decide.

This theory of liability is not supported by Maryland cases. As explained above, we said in *Smith*, 156 Md. App. at 383, that the duty a municipal corporation owes (to maintain its public streets and sidewalks in a "reasonably safe" condition) "is not absolute and the municipality is not an insurer of safe passage." Although Ms. Stupi cites the statement in *Pierce*, 220 Md. at 291, that said the defective condition of the drain cover in that case "almost amounted to a trap," the Court in *Pierce* also stated that, even if "the obstruction or defect is not to be expected and is substantial," *id*., the municipality will have liability *if* the municipality "has actual or constructive notice of" the defect. *Id.* In other words, the Court in *Pierce* did not relieve a plaintiff of the obligation to prove

that the City had "actual or constructive notice" of the dangerous condition even if the location of the hazard almost amounts to a trap.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.