Circuit Court for Montgomery County
Case No. 475660V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 535

September Term, 2021

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EDWARD COLE

v.

AUTO DENT CARE INC., *et al*.

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Wells,
Zic,
Ripken,

JJ.

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Opinion by Ripken, J.

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Filed: April 4, 2022

Edward Cole ("Cole") appeals from an order of the Circuit Court for Montgomery County entering summary judgment in favor of Auto Dent Care, Inc., Auto Options, and Auto Options, LLC (collectively "Auto Dent"). Cole sued Auto Dent for negligence, asserting that he was injured when he stepped on a broken grate in Auto Dent's parking lot. Auto Dent filed a third-party complaint against Montgomery County ("the County") seeking indemnification and claiming that the grate was on county land. For the reasons explained below, we shall affirm the circuit court's judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Cole alleges in his complaint that he was injured in November 2017 when he stepped on a broken grate in Auto Dent's parking lot. He claims that the broken grate was a dangerous condition and that Auto Dent was negligent in failing to remediate or warn about the danger posed by the grate. During his deposition, Cole described the precipitating events as follows. Cole and an acquaintance were walking on the sidewalk on Randolph Road in Rockville. A car "close to the sidewalk area" in front of Auto Dent had "a sticker in the window for $26.00." The sticker attracted Cole's attention. Cole circled around the car taking photos. While taking photos of the front of the car, Cole stepped backwards. His foot went into a hole left by a "metal grate that was broken off." Cole fell backwards, and his foot and leg twisted into the grate. It appeared to Cole that the grate was "part of the parking lot where the cars sit" and not part of the sidewalk. After freeing his foot, Cole went inside the building on the lot and explained what had happened to a person he presumed to be the manager. The person replied that Cole "shouldn't have been on the property." Cole departed. A short time later, he began experiencing pain in his leg and foot.

Cole also stated that he took photographs of the Auto Dent lot and broken grate on the day of the accident. Cole explained in his deposition that one photo shows the lower half of a pedestrian walking on the concrete sidewalk. Notably, the area Cole identified as the sidewalk is contiguous with the concrete area in which the grate lies. Furthermore, a red Toyota appears to be parked to the right of the grate and to the left of the pedestrian. Another photo shows the grate within an area Cole described as "the driveway going towards the building."

In November 2019, Cole filed suit for negligence against Auto Dent. Auto Dent retained an expert land surveyor, who concluded that the grate was on county-owned land. The expert drafted a site map, also referred to as a site plan, depicting the trench drain inlet over which the broken grate lay. On the site map, the inlet is within the area designated as Randolph Road. Auto Dent filed an expert designation on April 15, 2020, stating that the land surveyor would "testify and render opinions regarding his survey and site plan of the property located at 5410 Randolph Road, Rockville, MD." As Cole notes, the designation did not expressly state that the expert would testify that the grate was on county property. Of note, Auto Dent provided the site map to Cole during discovery. In June 2020, Auto Dent filed a third-party complaint against the County, claiming that the County owned the grate and bore responsibility for its maintenance. In August 2020, Cole sent the County interrogatories and requests for production of documents. In December 2020, the County notified Cole that its responses were delayed due to difficulties from the COVID-19 pandemic but informed Cole that "it is the County's position that it is [the County's] grate and it is on County property."

On February 26, 2021, Auto Dent moved for summary judgment. On March 12, 2021, Cole filed an opposition to summary judgment. He also moved to reopen discovery seeking to pursue further inquiry into the opinions of Auto Dent's land surveyor, and he moved to compel the County to respond to his interrogatories. He argued that Auto Dent's expert designation failed to disclose the land surveyor's opinion. On March 25, 2021, the County opposed Cole's motions to reopen discovery and to compel. The same day, the County responded to Cole's request for discovery. The County's response included the following answer to one of Cole's interrogatories:

> The grate located in the parking lot of the Used Car Lot at 5408-4510 Randolph Road, Rockville, MD 20852, as defined in Plaintiff's Complaint, is located within the public right of way and is County owned. As such, the County is generally responsible for its maintenance, repairs, and safety.

Auto Dent filed a supplemental reply in support of its motion for summary judgment that included the County's response. Cole filed a supplemental reply opposing summary judgment noting that he served the County a second set of interrogatories and requests for document production. On May 17, 2021, the County responded to the second set of discovery requests.

On June 1, 2021, the circuit court held a hearing on Auto Dent's motion for summary judgment. The circuit court found that the material facts were not in dispute and that Auto Dent was entitled to judgment as a matter of law. The court ruled as follows: "the court finds that there are no material issues in dispute, that Montgomery County has acknowledged that it owned the grate, it was responsible for maintaining and repairing the grate. It's on a County right of way." The court denied Cole's motion to reopen discovery.

The court entered a written order memorializing its judgment on June 4, 2021. Cole timely appealed.

## ISSUES PRESENTED FOR REVIEW

Cole presents three issues for our review which we have reordered and rephrased:[1]

I. Whether the circuit court erred in determining that the material facts were not in dispute.

II. Whether the circuit court erred in determining that Auto Dent was entitled to summary judgment as a matter of law.

III. Whether the circuit court erred in denying Cole's motion to reopen discovery.

## DISCUSSION

"In deciding a motion for summary judgment pursuant to Maryland Rule 2-501, the trial court must decide whether there is any genuine dispute as to material facts and, if not, whether either party is entitled to judgment as a matter of law." *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 488 (1995). A summary judgment movant must "identify

[1] Cole presented the following questions:

I. Whether the Court erred in granting Summary Judgment on the grounds that Defendant Montgomery County, Maryland owned the land that the grate which allegedly caused Plaintiff's injuries was on when Auto Dent Defendants displayed vehicles for sale to the general public on or directly near the grate.

II. Whether the Court erred by making factual findings in relation to both the exact location of Plaintiff's accident and the accuracy of a site map relied upon by Defendants.

III. Whether the Court erred in denying Plaintiff's Motion to Reopen Discovery and granting Summary Judgment despite the fact that there was outstanding discovery, including, but not limited to, material issues such as which Defendant repaired the grate after Plaintiff's injury and that material information was produced after the close of discovery by the Defendants.

portions of the record that demonstrate absence of a genuine issue of material fact." *Nerenberg v. RICA of S. Md.*, 131 Md. App. 646, 660 (2000). Once the movant has done so, the burden then shifts to the nonmoving party. *Id.* "To defeat a motion for summary judgment, the party opposing the motion must present admissible evidence to show the existence of a dispute of material fact." *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 386 (1997). Its written opposition must "identify with particularity each material fact as to which it is contended there is a genuine dispute and to specify the evidence that demonstrates the dispute." *Zilichikis v. Montgomery County*, 223 Md. App. 158, 194 (2015) (quoting Md. Rule 2-501(b)). "The party's production of a disputed fact will not bear on the determination of a motion for summary judgment, however, unless that fact . . . will alter the outcome of the case . . . ." *Tennant*, 115 Md. App. at 387. "[A]ll disputes of fact, as well as inferences reasonably drawn from the evidence, must be resolved in favor of the non-moving party." *Id.* "Summary judgment is appropriate if the nonmoving party has failed to make a sufficient showing of an essential element of its case with respect to which it has the burden of proof." *Zilichikis*, 223 Md. App. at 186 (alteration in original) (quoting *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 386 (2010)).

This Court reviews a grant of summary judgment *de novo*. *Koste v. Town of Oxford*, 431 Md. 14, 25 (2013). First, we determine whether a genuine dispute of material fact exists. *Id*. at 24–25. Second, in the absence of such a dispute, we determine "whether the Circuit Court correctly entered summary judgment as a matter of law." *Id*. (quoting *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560,

571 (2008)). Appellate review of the entry of summary judgment, "ordinarily is limited to the grounds relied upon by the circuit court." *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 263 (2003).

We review the circuit court's decision to permit further discovery before ruling on a motion for summary judgment for an abuse of discretion. *Honeycutt v. Honeycutt*, 150 Md. App. 604, 621–22 (2003); *Piney Orchard Cmty. Ass'n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 220 (2015).

## I. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT THE MATERIAL FACTS ARE NOT IN DISPUTE.

In his briefing, Cole identifies four purported disputes of material fact: the location of his fall, the accuracy of the site map, the identity of the person who repaired the broken grate; and whether Auto Dent parked cars for sale near the grate. He also stated at oral argument that the grate was not part of a public sidewalk. The circuit court determined that Cole did not demonstrate a factual dispute as to Auto Dent's responsibility for the condition of the grate. As explained further in Section II, liability for a dangerous condition follows from the defendant's ownership or occupation of the premises or, where the dangerous condition is within a public walkway, from the defendant's creation of a special hazard in the walkway. We proceed by reviewing the evidence attached to Auto Dent's motion for summary judgment and Cole's opposition and conclude that, on these material issues, the facts are not in dispute.

Cole did not produce evidence to contest Auto Dent's site map or the County's response. The site map and the County's response establish that the grate was within a

public right of way and owned by the County. Cole argues that the site map is inconsistent with his deposition testimony and one of his photographs of the grate, which depicted a red Toyota parked between the grate and the area Cole identified as the sidewalk. At most, Cole's evidence goes to the state of the premises on the day of the accident—it suggests there was a car parked within the area on the site map designated as the Randolph Road right of way. Nor does Cole's deposition testimony that the broken grate was part of Auto Dent's lot create a dispute as to the boundary depicted in the site map: Cole testified that his observation about the sidewalk was based on the location of the parked cars. Cole did not have any basis to discern the property boundary between the public right of way and the private lot. His suggestion that the site map is inaccurate is speculative.[2] *See Tennant*, 115 Md. App. at 387 (noting that "general allegations of disputed facts" are insufficient to create a material dispute).

[2] Cole also argues that the affidavit of Auto Dent's expert land surveyor attached to its motion for summary judgment may not be relied on because it was not notarized. Auto Dent responds that the affidavit did not need to be notarized as it was nevertheless made under oath. Cole's argument is unsupported by authority. Maryland Rule 1-304 on "form of affidavit" states:

> The statement of the affiant may be made before an officer authorized to administer the oath or affirmation, who shall certify in writing to having administered the oath or taken the affirmation, or may be made by signing the statement in one of the following forms:
>
> ***
>
> "I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of this document are true."

The affidavit states that it is made under oath and that the expert created the site plan and prepared the affidavit.

Moreover, the County's answer to Cole's interrogatory claiming ownership of the grate established ownership independent of the challenged site map. Cole did not offer any evidence of a subsequent or prior repair by Auto Dent. Crucially, however, even if Auto Dent had repaired the grate, the repair would not be probative of Auto Dent's ownership in light of the evidence that the grate is part of a public right of way. *See Bethesda Armature Co. v. Sullivan*, 47 Md. App. 498, 504 n.6 (1981) (attempt to repair sidewalk was not relevant to ownership where sidewalk was within right of way dedicated to County); *c.f. Citizens Sav. Bank of Baltimore v. Covington*, 174 Md. 633, 635–36 (1938) (explaining that an individual may be liable for dangers relating to excavation of a public street or sidewalk whether the fee is in the public or himself). Cole contends that he would have pursued and clarified this issue with additional discovery, as addressed in Section III, if the circuit court had not abused its discretion in declining to reopen discovery.

Auto Dent does not contest the accuracy of Cole's testimony or photos. Cole argues that this evidence supports an inference that Auto Dent parked cars near the grate. Indeed, Auto Dent did not offer any evidence that could conflict with Cole's testimony about the day of the incident. An inference may be drawn that the cars parked near the grate are Auto Dent's, given that the parked cars had an "Auto Options" logo over their front license plate area. Based on Cole's evidence, this reasonable inference is limited to the day of Cole's injury.

Last, contrary to Cole's assertion at oral argument, the evidence establishes that the broken grate was connected to the public sidewalk on Randolph Road and forms part of the public walkway. The site map shows a "concrete walk" separated from the street by a

grass buffer. The grass buffer tapers off into a concrete driveway, which connects the Auto Dent lot to the street and intersects the site map's concrete walk shown on the site map. The broken grate is in the area of the driveway in front of Auto Dent's lot. In Cole's photos, the concrete area containing the broken grate is undifferentiated from the rest of the concrete area adjacent to Randolph Road except by the size and color of the component concrete slabs. There is no evidence in the record indicating that the area was closed to pedestrians or otherwise distinguished from the public sidewalk. So too, the County's response indicated that the grate is within the public right of way.

With these undisputed facts in mind, we next consider whether the circuit court erred in entering judgment based on the undisputed facts.

## II. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT AUTO DENT WAS ENTITLED TO SUMMARY JUDGMENT ON COLE'S NEGLIGENCE CLAIM.

Cole argues that the circuit court erred in granting Auto Dent's motion for summary judgment because Auto Dent's activities on the lot gave rise to a duty to warn business invitees of known hazards, even if Auto Dent does not own the grate. Auto Dent responds that Cole failed to produce any evidence that it operated its business or exerted control over the public right of way containing the grate. First, we first explain that business owners are not liable for the upkeep of abutting public walkways except in limited circumstances where the business owner creates a "special hazard" that causes a person's injury. Next, we explain that Cole's evidence is insufficient to show that it created a special hazard or otherwise owed a duty of care for the condition of the abutting public walkway.

### A. Premises Liability

Owners and possessors of land owe a duty of care to entrants that is dependent upon the entrant's status. *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 317 (2019). Invitees are owed an affirmative duty of care; licensees and trespassers are owed a duty to abstain from willful misconduct or entrapment. *Debroy v. City of Crisfield*, 167 Md. App. 548, 555 (2006). The Court of Appeals has endorsed the approach for liability to invitees set out in Restatement (Second) of Torts § 343. *Deering Woods Condo Ass'n*, 377 Md. at 262. Under the Restatement, a possessor of land includes "a person who is in occupation of the land with intent to control it." Restatement 2d of Torts § 328E.

The duty of care owed to business invitees by possessors and owners of land is "the duty of ordinary care and caution . . . to see that that portion of its premises . . . was in such a condition as to not imperil [an invitee], so long as she, herself, exercised ordinary care." *Evans v. Hot Shoppes, Inc.*, 223 Md. 235, 239 (1960). A possessor of land breaches this duty of care and is liable for an invitee's injury only if the possessor knows or should know of a condition that poses an unreasonable risk of harm, knows or should expect that an invitee would not discover the danger, and fails to warn or prevent such danger. *Deering Woods Condo Ass'n*, 377 Md. at 263. "[T]he owner or occupier of land ordinarily has no duty to warn an invitee of an open, obvious, and present danger," but has a duty to warn of latent dangers. *Tennant*, 115 Md. App. at 389.

The duty a storekeeper owes to a business invitee "extends not only to the store itself, but as well to such area abutting it as is under the storekeeper's control and likely to be used by his customers." *Bethesda Armature Co.*, 47 Md. App. at 500. A second, "equally

well settled" proposition, is that where the abutting area "is part of a public walkway, the duty of care and maintenance (and the concomitant liability arising from the negligent performance of that duty) generally rests with the local body politic and not with the abutting property owner." *Id.* at 500–01. However, where the abutting property owner "by virtue of some extraordinary use that he makes of the walkway, creates a special hazard on it, he and not the body politic is answerable for any damage caused by the special hazard." *Id.* at 501.[3] "Cases applying [this exception] have typically involved situations where the owner or occupier constructs or installs something on the public sidewalk intended specifically to benefit it." *Duncan-Bogley v. United States*, 356 F.Supp.3d 529, 536 (D. Md. 2018); *see Bethesda Armature Co.*, 47 Md. App. at 503 (noting the doctrine has been applied to "cellar doors, protruding pipes, valves, meter boxes, 'manhole' or hatch covers" and "alterations that in some way encourage the accumulation of ice and snow.").

### B. Cole Did Not Produce Evidence That Auto Dent Created a Special Hazard on the Public Walkway.

The undisputed evidence showed that the broken grate covered a trench drain connected to the walkway along Randolph Road. Accordingly, the broken grate must be analyzed as a dangerous condition on a public sidewalk. Under this framework, Auto Dent did not have a duty of care relating to the walkway unless, by some extraordinary use of the walkway, it created the special hazard that caused Cole's injuries. *See Bethesda*

[3] Section 350 of the Restatement (Second) of Torts explains that "A possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to dedication."

*Armature Co.*, 47 Md. App. at 503. Cole has not offered sufficient evidence to show that Auto Dent created such a hazard. Under these circumstances, in the absence of any duty owed to Cole, Auto Dent cannot be held liable for Cole's injuries.[4]

Cole's injuries were caused by the defective grate within the public way. The general duty to maintain the grate and sidewalk rested with the County. *Bethesda Armature Co.*, 47 Md. App. at 501. The broken grate is not a special hazard attributable to Auto Dent. There is no evidence that Auto Dent dug the trench drain or placed the grate over it. Nor is there evidence that the drain was created for the sole benefit of Auto Dent. *See* 2d. Restatement on Torts § 350, comment (e) (land owner abutting public highway may be required to exercise reasonable care to maintain grating constructed for land owner's sole benefit). At most, there is evidence permitting a reasonable inference that one of the Auto Dent cars was located on the edge of the lot within the area of the walkway at some time on the day of the incident.

Such activity did not generate a duty of care for Auto Dent relating to the condition of the grate. There is nothing to suggest that Auto Dent routinely or repeatedly parked cars where Cole photographed them or otherwise habitually encroached into the public way—in other words, the inference does not establish Auto Dent's control or extraordinary use over the right of way. Even if the incursion into the sidewalk constituted an extraordinary

[4] The *Tennant* case, on which Cole relies for the proposition that occupation and possession can create premises liability, is distinguishable on the basis that *Tennant* involved a dangerous condition inside of a grocery store and not a defect in an abutting public walkway. 115 Md. App. at 384–85. As discussed in Section I, where the locus of an injury is a public right of way, an abutting owner's legal duty depends on the precise use of the area and circumstances leading to the dangerous condition. *Bethesda*, 47 Md. App. at 503.

use, an Auto Dent car within the walkway did not create a special hazard causing Cole's injuries. Cole argues that "Auto Dent parked a car immediately adjacent to the grate, advertised it for sale, and actively invited the public to cross over the grate in order to move around the vehicle and inspect it." There is no evidence that the parked car enhanced the danger posed by the broken grate by, for example, obscuring the defect. In any event, a business's invitation to the public to enter its premises alone cannot constitute a special hazard. If it could, any person injured by a defective sidewalk while heading to patronize a nearby business or while inspecting goods through a shop window could invoke the special hazard exception. This would have an unintended consequence of allowing the exception to subsume the rule that "[a]n abutting owner is not liable for injuries resulting from his failure to repair a defect in a sidewalk which he had not caused." *Citizens Savings Bank of Baltimore*, 174 Md. at 636.

In sum, Cole did not produce sufficient evidence to establish that Auto Dent owed a duty of care relating to the condition of the grate. Without a duty to repair or warn of the broken grate, Auto Dent cannot be liable. We conclude that the circuit court did not err in entering summary judgment in Auto Dent's favor.

## III. THE CIRCUIT COURT DID NOT ERR IN DENYING COLE'S REQUEST TO REOPEN DISCOVERY.

Cole argues that summary judgment should not have been granted because, as articulated in his motion to reopen discovery, Auto Dent failed to disclose its expert's opinions and the factual basis for his opinions. Cole also argues that he should have been permitted further discovery into who repaired the grate. Auto Dent responds that the

expert's opinions were properly designated and that Cole was on notice that the County owned the grate. The County agrees that Cole was on notice of its positions, notwithstanding any delays in discovery, and that it responded to all of Cole's requested discovery by the date of the summary judgment hearing. We conclude that the circuit court did not abuse its discretion in denying Cole's motion to reopen discovery and that summary judgment was properly granted.

Trial courts have broad discretion to control discovery between the parties. *Bartholomee v. Casey*, 103 Md. App. 34, 48 (1994). "[T]he court may at any time order that discovery be completed by a specific date or time, which shall be a reasonable time after the action is at issue." *Mahler v. Johns Hopkins Hosp., Inc.*, 170 Md. App. 293, 315 (2006) (quoting Md. Rule 2-401(b)). At the hearing on the motion to reopen and motion for summary judgment, Cole noted to the circuit court that discovery closed in January 2021. Cole did not have any pending motions concerning his interrogatories to the County at the close of discovery or when Auto Dent filed its February 2021 motion for summary judgment. He cannot dispute that he was on notice of Auto Dent's position that the County owned the grate through its June 2020 third-party complaint or of the County's same position through its December 2020 email. Additionally, the land surveyor's opinion that the grate was within the public right away was discernable from the site map. The circuit court determined that the County's ownership over the grate and its location within the right of way were not in dispute, and Cole's additional requested discovery was unlikely to controvert that issue. Cole has not offered a sufficient reason for us to conclude that the

circuit court acted outside the bounds of its discretion in declining to reopen discovery. We find no legal error in the circuit court's rulings.

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