Circuit Court for Anne Arundel County
Case No. C-02-CV-19-003172

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 707

September Term, 2021

DENISE LYNN BOZARTH

v.

RAMS HEAD TAVERN, ET AL

Wells, C.J.,
Shaw,
Zic

JJ.

Opinion by Shaw, J.

Filed: February 7, 2023

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

This is an appeal and cross-appeal from the Circuit Court for Anne Arundel County. Appellant, Denise Lynn Bozarth, appeals the grant of motions for directed verdicts in favor of Appellees, the City of Annapolis and 35 West, LLC. Ms. Bozarth presents two questions for our review:

1. Did the trial court err in granting The City of Annapolis' motion for directed verdict, finding the City's Charter, which requires three days prior written notice of the defect, is enforceable, is consistent with public policy and enforceable despite its clear conflict with state law, and the enabling provisions of state law?

2. Did the trial court err in granting 35 West, LLC's motion for directed verdict finding that 35 West, as the abutting landowner, has no duty to correct or warn of a hazardous condition on its sidewalk or on a hatch that provides access to its property?

The City cross-appeals the denial of its motion for summary judgment and presents three questions:

1. Whether the Court erred when it found that *Anne Arundel Cnty. v. Fratantuono*, 239 Md. App. 126 (2017) extended municipal liability to private property and waived the City's immunity in the absence of an employee as a party to a tort action to whom liability attaches in accordance with the Local Government Tort Claim[s] Act, Md. Code Ann., Cts. & Jud. Proc. § 5-303(e), where the City did not own, operate or control co-Defendant 35 West LLC's basement access hatch which caused Plaintiff's injury?

2. Whether the City painting a warning on the corner of co-Defendant 35 West LLC's uneven basement access hatch with orange spray paint to warn pedestrians of a defect prevents the application of the Special Use Exception and absolves co-Defendant 35 West, LLC of liability for its lack of maintenance of [the] basement access hatch which caused Plaintiff's injury?

3. Whether Plaintiff's record evidence at Summary Judgment established a special relationship between her and the City, or presented sufficient evidence from which a jury could find that the City of Annapolis owned, possessed or controlled co-Defendant 35 West LLC's uneven basement

access hatch that injured Plaintiff, therefore making the City liable for Plaintiff's injuries under Maryland law?

For the foregoing reasons, we reverse in part, affirm in part, and find the City's cross-appeal moot.

BACKGROUND

On December 10, 2017, while walking in the City of Annapolis ("City"), Denise Lynn Bozarth tripped on a basement access hatch cover surrounded by brick pavers located on the sidewalk in front of 35 West Street. Appellee, 35 West, LLC, owns the commercial enterprise 35-37 West Street. It is leased to a coffee shop, a dry-cleaning business, and a restaurant, with residential tenants on the third floor. At the time of her accident, there were no hazard cones located nearby. Ms. Bozarth sustained multiple injuries, including a detached retina and partial blindness in her right eye.

Ms. Bozarth's counsel notified the City, in writing, of her claim on June 29, 2018. On October 7, 2019, Ms. Bozarth filed a Complaint for negligence in the Circuit Court for Anne Arundel County against Rams Head Tavern, WM Enterprises, Inc., The Rams Head Group (collectively "WM Enterprises, Inc."), and the City. Ms. Bozarth filed an Amended Complaint adding 35 West, LLC as a defendant on April 23, 2020. Ms. Bozarth filed a Second Amended Complaint adding Baltimore Gas and Electric Co. as a defendant on June 11, 2020. She alleged negligence against all defendants, asserting that they breached their duties by failing to adequately inspect or cover the sidewalk; failing to adequately repair the same; failing to warn of any defects in the same; and failing to protect the general public from the dangerous condition of the same. She alleged that as a direct and proximate result

of the defendants' negligence, she suffered injuries.

On July 6, 2020, WM Enterprises, Inc. moved for summary judgment and the circuit court granted the motion on October 26, 2020. Baltimore Gas and Electric Co. moved for summary judgment on March 4, 2021, and on March 12, 2021, the City filed its motion for summary judgment. The court held a hearing on the motions for summary judgment on May 10, 2021. Following argument, the court granted Baltimore Gas and Electric Co.'s motion for summary judgment and denied the City's motion.

The court stated:

> And I don't find . . . that the City is absolved from or has absolute governmental immunity. I do think that there's a proprietary function when it comes to rights of way and sidewalks and this is different from a case where a police officer acts in a rogue fashion and the fact finder has to determine whether there was some form of actual malice or gross negligence or whether a driver acted with that degree of liability.
>
> I do find that in a proprietary function where the actions or omissions of a governmental entity can't be localized to one person that that's different from an individual's degree of action and liability. And so I don't believe that the statute absolutely bars a municipality from liability. And to the extent that Mr. Braithwaite wishes to pursue that argument, he's certainly entitled to do so, but that would come in the form of a fact-finding function and the jury instruction conference that, ultimately, that the City has to have with the trial judge to determine whether that can be put to the jury in a meaningful way as a question of fact.

The court further expounded:

> Yeah, the Court finds that the notice for the . . . in this case I do find that the actions of [Mr. Silwick] can be imputed to the City itself. That's not to say that his actions portend any liability, but for the notice provision I find that someone who

> indicated that he routinely placed such obvious preventive measures in place via the cones or the painting itself does constitute actual notice to the City.

The City invalidly filed a cross-appeal of the denial.

Trial commenced against the City and 35 West, LLC in June 2021. Ms. Bozarth testified that on the evening of the accident, she was walking down West Street towards Rams Head when she tripped and fell, and her face hit the pavement. She specified that she tripped over a corner of a metal plate that was in the sidewalk and she stayed on the ground for approximately ten minutes before she was able to get up. She testified that she noticed a change in her peripheral vision, but she thought it would go away and she did not "think it was anything major." She did not seek immediate medical care. The issues, however, with her peripheral vision persisted, and she sought medical treatment on December 14, 2017. It was determined that Ms. Bozarth had a detached retina, and she underwent surgery shortly thereafter. She, subsequently, had four surgeries and continues to have vision problems.

Jim Silwick, a City employee, testified that he had previously tripped over the same hatch. Afterwards, he reported the condition of the hatch to his supervisor, Phil Cook. He also painted the corner of the hatch a fluorescent orange and put cones there. He testified the cones would disappear because people would "take them and steal them and throw them in the street." Samuel Brice, the City's former Bureau Chief of Engineering and Construction, testified that he interviewed Mr. Silwick, who told him that he had been painting the hatch and putting out cones. Mr. Brice stated that such actions were not within Mr. Silwick's job duties. He testified that Mr. Silwick "saw what he identified as an issue,

and he addressed it in a manner which would be – which he deemed to be appropriate." Neither Mr. Brice nor anyone that he knew attempted to stop Mr. Silwick from continuing his actions.

In April 2020, Mr. Brice inspected the hatch and basement and determined that 35 West, LLC owned the hatch. The City made a written demand upon 35 West, LLC to repair the hatch, which they did in May 2021. Mr. Brice testified that the hatch, located on the City's right-of-way, was a private improvement. According to him, in 1943, the City formally took ownership of the right-of-way via two straw-man deeds. The deeds specifically reference the City, becoming the owner of, inter alia, all of "West Street" with the "improvements thereupon." The trap door vault predated the formal title transfer, and the metal hatch cover likely originated in the 1970s. He testified that in 2004, the City renovated all of its sidewalks and hired a contractor to re-brick the sidewalk of West Street. The City's contractor integrated the new brick pavers in the existing hatch cover, and a landscaping plan determined the locations of tree plantings and streetlight areas.

Pamela Cole Finlay acquired 35 West, LLC in 2007. She testified that she did not know the hatch was broken until around 2020, she did pay for its repair, and never formally appealed the City's order to repair it. She also testified she did not know what the condition of the hatch was when she purchased the property because it was not in the deed or the final walk through. As of December 2017, the entire building located at 35-37 West Street was leased to others. In January 2007, one tenant took over the building's restaurant, and in later years another tenant opened a coffee shop and another tenant a dry-cleaning business. 35 West, LLC has no office within the building.

At the close of Ms. Bozarth's case, the City moved for a directed verdict, arguing, among other things, that if Ms. Bozarth was injured by City property, there was no prior actual notice of the defect as required by the City Charter. 35 West, LLC moved for a directed verdict, arguing that the City owns the sidewalk and all improvements thereon and 35 West, LLC did not use the hatch and did not make special use of the basement hatch.

The court granted the City's motion, finding that Ms. Bozarth had not satisfied the City Charter's notice provision requiring prior notice before the incident. The court stated:

> And when I'm looking and considering whether or not the City of Annapolis had a duty to Ms. Bozarth, and whether or not there was . . . sufficient evidence generated to be submitted to the jury, I have decided that there has not been sufficient evidence generated as it relates to duty; specifically, because when I'm looking at whether or not the City had notice.
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> So I know that there's been a lot of discussion about the Local Government Tort Claims Act and also the City Charter. And as I hinted at before, it's – there are two different things . . . . First, we're talking about the condition precedent when we're – it's a pre-injury notice.
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> And the purpose of that is because it goes directly to the City's duty. If – "Not sooner than three days prior to the date of the occurrence resulting in the personal injury or property damage" that they should have received written notice. . . . But the Charter says that they have to have three days prior to the date of the occurrence. And that way they have actual notice of a defect, and then that's when their duty is triggered.
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> Here, there hasn't been any evidence that there was the required notice given to the City to give them the opportunity – well, to have the duty activated. And I mentioned before, on Friday, about the fact that I did a lot of reading, and including the different municipal hornbooks, just to make sure it was clear in my mind as far as why there's this requirement for the three days prior versus the post-injury notice.

> . . . that's the reason why, is that there are a lot of City – there are a lot of sidewalks in the City of Annapolis. And, you know, the City can't have notice of every defect in the sidewalk until they actually do. And here, the Charter requires the three days prior to the date of the occurrence, in writing. And that has not occurred.
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> So, for those reasons, I am going to grant the City's motion for a judgment.

The court granted 35 West, LLC's motion, finding that the City owned the sidewalks and improvements and that the abutting property owner has no duty to correct a hazardous condition on the sidewalk.

> . . . . Again, thinking about what issues are appropriate for me at this stage of the trial versus the issues for the jury, and my focus, again, was on whether or not there was a duty . . . for 35 West LLC.
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> When – in my mind, the deeds are significant, in that it was clear from the evidence that was presented that when – that the actual sidewalks and the improvements are owned by the City. And the law in the case is that the abutting landowner has no duty to correct the hazardous condition on a public sidewalk.
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> . . . . I think that there was insufficient evidence to submit it to the jury. So I'm going to grant 35 West's motion as well.

Ms. Bozarth timely appealed the grant of the motions for directed verdict.

STANDARD OF REVIEW

We review a trial court's grant of a motion for judgment in a civil case *de novo*. *Ayala v. Lee*, 215 Md. App. 457, 467 (2013). The trial court's decision regarding a motion for judgment is reviewed without any deference. *D.C. v. Singleton*, 425 Md. 398, 406 (2012). Our review is the "same analysis that a trial court should make when considering the motion." *Estate of Blair v. Austin*, 469 Md. 1, 17 (2020). We look "at the evidence in

a light most favorable to the non-moving party." *Webb v. Giant of Maryland, LLC*, 477 Md. 121, 266 A.3d 339, 348 (2021). We "evaluate[] whether the evidence was sufficient as a matter of law to generate a jury question as to the cause of action at issue." *Id.* If we conclude "the evidence permits only an inference in favor of the moving party regarding the issue presented, then that party is entitled to judgment as a matter of law." *Id.*

DISCUSSION

I. The circuit court erred in granting the City's motion for directed verdict.

Ms. Bozarth argues the provision of the City Charter that requires three days prior notice of a defect, conflicts with the Local Government Tort Claims Act ("LGTCA"), which prevails by preemption. Ms. Bozarth contends the LGTCA, not the City Charter, supplies the applicable notice provision for her negligence claim. She contends that she satisfied the LGTCA notice requirement by giving notice to the City in June 2018. According to Ms. Bozarth, the circuit court's reliance on the City's Charter is misplaced, the Charter provision is unenforceable, legally invalid, and was abrogated by the LGTCA.

The City contends its governmental immunity was not waived by the enactment of the LGTCA, and the LGTCA did not implicitly repeal the City Charter provision. The City asserts that satisfying the City Charter notice provision, in addition to the LGTCA notice provision are conditions precedent to maintaining a lawsuit against Annapolis. The City argues that to the extent Ms. Bozarth was injured by City property, there was no written notice of the defective hatch three days prior to the incident as required by the City's Charter and thus, Annapolis is not liable for her injuries.

A. The LGTCA preempts the City of Annapolis Charter.

The LGTCA notice requirement, at issue in the present case, states that "an action for unliquidated damages may not be brought against a local government or its employees unless the **notice of the claim** required by this section is given within 1 year after the injury." Md. Code, Cts. & Jud. Proc. § 5-304(b)(1) (emphasis added). "The notice shall be in writing and shall state the time, place, and cause of the injury." Md. Code, Cts. & Jud. Proc. § 5-304(b)(2).

The City's notice requirement at issue here, Article IX, § 9(b)(1) of the Annapolis City Charter, provides:

> Not sooner than three (3) days prior to the date of the occurrence resulting in the personal injury or property damage, the mayor or the director of public works shall have received **written notice of the specific condition, defect, act or omission,** or accumulation alleged to have caused or contributed to the occurrence, injury or damage . . . (emphasis added).

Article IX, § 9(c) of the Annapolis City Charter addresses liability limitations:

> In no such event shall the City of Annapolis . . . be liable in damages for such personal injuries or property damage beyond the limits imposed by federal, state, and local law including but not limited to the limits imposed by Maryland Courts and Judicial Proceedings Article, Title 5, Subtitles 3 and 4, or their successors.

Article III, § 1(b) of the Annapolis City Charter provides:

> In addition to all powers granted to the City of Annapolis by this Charter or any other provision of law, the city may exercise any power or perform any function which is not now or hereafter denied to it by the Constitution of Maryland, this Charter, or any applicable law passed by the General Assembly of Maryland. The enumeration of powers and functions in this Charter or elsewhere shall not be deemed to limit the power and authority granted to the city by this section.

"Under [Supreme Court of Maryland[1]] decisions, state law may preempt the local law in one of three ways: 1) preemption by conflict, 2) express preemption, or 3) implied preemption." *Talbot Cnty v. Skipper*, 329 Md. 481, 487 (1993). A local ordinance is preempted by conflict when it prohibits an activity which is intended to be permitted by state law or permits an activity which is intended to be prohibited by state law. *Boulden v. Mayor*, 311 Md. 411, 415-17 (1988). Generally, state law preempts by implication local law where the local law "deal[s] with an area in which the [State] Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Cnty Council v. Montgomery Ass'n*, 274 Md. 52, 59 (1975).

In *Prince George's Cnty v. McBride*, 263 Md. 235, 242-43 (1971), the Supreme Court of Maryland stated:

> This Court has always held repeal by implication in disfavor and has labored to reconcile existing legislation; in this case whatever labor is required is certainly minimal. We conclude by simply quoting the lucid language of Judge Alvey speaking for the Court in *Garitee v. Mayor, etc., of Baltimore*, 53 Md. 422, 435 (1880):
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> > If the subsequent Act can be made, by any reasonable construction or intendment, to stand with the previous legislation, that construction will always be adopted. This is a canon of construction as well as established as any principle of law.

McBride, 263 Md. at 242-43; *see also Anne Arundel County v. Board*, 248 Md. 512, 523 (1968).

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

The Supreme Court of Maryland has emphasized that "[t]here is no particular formula for determining whether the General Assembly intended to preempt an entire area." *Skipper*, 329 Md. at 488. "The primary indicia of a legislative purpose to preempt an entire field of law is comprehensiveness with which the General Assembly has legislated in the field." *Howard County v. Pepco*, 319 Md. 511, 523 (1990). If there is no legislative intent to occupy an area of law, there is no preemption. *Id*.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. *Williams v. Peninsula Reg'l Med. Ctr*., 440 Md. 573, 580 (2014) (citation omitted). "[S]tatutory interpretation begins, and usually ends, with the statutory text itself, for the legislative intent of a statute primarily reveals itself through the statute's very words." *Price v. State*, 378 Md. 378, 388 (2003) (citing *Marriott Employees v. MVA*, 346 Md. 437, 444-45 (1997); *Derry v. State*, 358 Md. 325, 335 (2000)). "A court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application." *Cnty Council v. Dutcher*, 365 Md. 399, 416-417 (2001). "[I]f the words of a statute clearly and unambiguously delineate the legislative intent, ours is an ephemeral enterprise. We need investigate no further but simply apply the statute as it reads." *Derry*, 358 Md. at 335; *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515 (1987). The "[c]ourt has been most reluctant to recognize exceptions in a statute when there is no basis for the exceptions in the statutory language." *Lee v. Cline*, 384 Md. 245, 256 (2004).

"[P]rior to the enactment of the LGTCA, local governments enjoyed immunity from tort liability only with respect to non-constitutional torts based on activity classified as 'governmental,' and such immunity could be waived by the General Assembly or local enactments." *Rios v. Montgomery Cnty*, 386 Md. 104, 125 (2005). "This limitation on the immunity from tort action with respect to local governments remains applicable today." *Id.* "[T]he LGTCA does not waive any preexisting immunity against suit held by the local government[.]" *Rounds v. Maryland-Nat. Capital P. & P. Comm'n*, 441 Md. 621, 639 (2015) (citing *Hansen v. City of Laurel*, 420 Md. 670, 689 (2011)).

In enacting the LGTCA, the legislature repealed and replaced a notice of claim requirement, then codified at Md. Code § 5-306 of Cts. & Jud. Proc. *Mitchell v. Housing Authority of Baltimore City*, 200 Md. App. 176, 191 (2011). The previous notice requirement had existed in Maryland law since 1941 in various forms and with varying applicability. *Williams v. Maynard*, 359 Md. 379, 389 (2000). The new notice requirement expanded its reach, however, to apply to all 'local governments' as defined under the Act. *Mitchell*, 200 Md. App. at 191. Virtually the same notice requirements are set forth, but instead of applying to actions "brought against a county or municipal corporation," the requirements are applied to actions "brought against a local government or its employees." *Maynard*, 359 Md. at 392. "[W]hile § 5-304 extends the scope of the notice requirement to actions brought against all entities deemed local governments under the LGTCA . . . it fully encompasses the scope of the former notice statute." *Id.*

Addressing the legislative intent of the Act, the Supreme Court of Maryland explained in *Ennis v. Crenca*, 322 Md. 285, 291 (1991):

> The Local Government Tort Claims Act was passed in response to a perceived insurance crisis plaguing counties, municipalities and their employees. The legislative history of the Act reflects the General Assembly's concern for the impact of increased law suits on the incentive of public employees and officials to do their jobs to the best of their abilities.

Further, this Court stated in *Baltimore Police Dep't v. Cherkes*, 140 Md. App. 282, 324 (2001):

> [T]he LGTCA was in large measure the product of concern in the mid-1980's that local governments were facing increasing exposure for tort liability. The statutory scheme enacted in response to that concern was, and remains, multifaceted: it imposes new duties on the "local government" entities but at the same time gives them added protection against liability, and preserves their common law immunities. The overarching purpose of the legislation was to bring stability to what was perceived as an escalating liability picture for local governments by containing their exposure while guaranteeing payment to tort victims of judgments against employees of local government entities in certain situations.

The Annapolis City Charter provision mandating a pre-accident notice requirement was passed by the Annapolis City Council in 1984, prior to the passage of the LGTCA. In 1987, the General Assembly enacted Chapter 594 of the Acts of 1987, which repealed prior statutory provisions and replaced them with the LGTCA. 1987 Md. Laws, Chap. 594, § 1. "On several occasions, the Maryland appellate courts ... have held that the [LGTCA] neither authorizes a direct action against a local government nor waives the common law governmental immunity of an entity designated as a local government." *Baltimore Police Dep't v. Cherkes*, 140 Md. App. at 318. "Rather, the LGTCA's enactment affects the financial liability of a defendant local government." *Rounds*, 441 Md. at 641. "[T]he Legislature altered the terms under which a plaintiff could bring already-available causes of action, so as to give local governments fair notice of tort suits, for which they would be

responsible financially." *Hansen*, 420 Md. at 689. "The only actions which can be brought directly against a local government are those authorized by law which is separate and distinct from the LGTCA." *Maynard*, 359 Md. at 391.

We observe, in examining the plain language of the statutory text of both § 5-304 of the LGTCA and Article IX, § 9 of the Annapolis City Charter, that there is a distinction between the types of notice contained in each statute.

"The plain language of § 5-304 of the LGTCA indicates a legislative intent to make the notice requirement broadly applicable to tort actions brought directly against local governments." *Maynard*, 359 Md. at 391. The notice requirements of Sections 5-304(a) and (b) are intended to apprise a local government "of its possible liability at a time when it could conduct its own investigation, *i.e.*, while the evidence was still fresh and the recollection of the witnesses was undiminished by time, 'sufficient to ascertain the character and extent of the injury and its responsibility in connection with it.'" *Faulk v. Ewing*, 371 Md. 284, 298-99 (2002) (quoting *Williams v. Maynard*, 359 Md. 379, 389-90 (2000), quoting in turn *Jackson v. Bd. of Cnty Comm'rs*, 233 Md. 164, 167 (1963)). "The purpose of the statute clearly would seem to be to have the claimant furnish the municipal body with sufficient information to permit it to make an investigation in due time[.]" *Jackson*, 233 Md. at 167. In other words, § 5-304 requires notice of the injury that gives rise to the tort claim against the local government.

"[T]he Legislature made no substantive amendments to the notice section[,] therefore, the LGTCA notice requirement speaks to the claim itself and the financial liability of the local government." *Maynard*, 359 Md. at 391. As noted by the trial judge:

> [W]hen I'm looking at the statute itself, it's actual or constructive notice of the injury. So it's not as it relates to the defect.
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> So there's – in my mind, there's two different issues: the City's notice as far as whether or not a defect occurred under their Section 9, and then – so that's separate from whether or not an injury occurred under the Local Government Torts Claims Act.

As we see it, the City's "notice requirement" is better understood as an attempt to redefine the scope of the City's duty to those who travel its streets, walk on its sidewalks, or otherwise venture upon City-owned property. The City Charter does this by requiring written notice of the allegedly defective condition before the accident occurs. Only then, according to the City, does it have a duty. In comparison, the LGTCA's § 5-304 requires notice of a claim against a local government or its employees must be given within one year after the injury. Such written notice apprises the local government of a damages claim by a tort victim. The LGTCA notice requirement does not relate to a prior defect in public property, that is, a breach of duty, but rather to the claim of the injury.

While the language of § 5-304 of the LGTCA and Article IX, § 9 of the Annapolis City Charter relate to different types of notice, the two are incompatible and subject to preemption. In Maryland,

> [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.

Smith v. City of Balt., 156 Md. App. 377, 383 (2004) (emphasis added and citations omitted). "Because a municipality has a duty to keep its roads in proper condition, it must

perform repairs upon being notified of a 'bad condition of the street.'" *Keen v. Mayor, Etc., of City of Havre De Grace*, 93 Md. 34, 39 (1901). However, in Annapolis, the City Charter requires "three (3) days prior" to "personal injury or property damage, the mayor or the director of public works shall have received **written notice of the specific condition**[.]" Article IX, § 9(b)(1) (emphasis added). Further, rather than requiring the repair of the condition, the City Charter states, "reasonable diligence shall include but shall not be limited to a **request** . . . to inspect and if necessary to correct the condition, defect, act or omission, or accumulation described in the written notice[.]" Article IX, § 9(b)(2) (emphasis added).

Based on the reading of LGTCA and the City Charter together, outside of the City of Annapolis, there is no requirement that a local government have prior written notice, rather the element of the cause of action is whether there was actual or constructive notice. Yet in Annapolis, written notice is all that matters, and actual or constructive notice is irrelevant. Additionally, outside of Annapolis, if a local government has actual or constructive notice, it must repair the unsafe condition, but in Annapolis, the City only must "request . . . any city officer, employee or agent, to inspect and if necessary to correct the condition[.]" Therefore, here, the City Charter provision modifies the elements of the cause of action for negligent failure to maintain public property.

Acknowledging the differences in notice requirements, the City maintains that it has the authority to modify the elements of a cause of action as a condition precedent. In *Faulk v. Ewing*, 371 Md. at 304, the Supreme Court of Maryland "expressly held that the LGTCA notice requirements are a condition precedent to maintaining an action against a local

government or its employees to the extent otherwise not entitled to immunity under the LGTCA." Such condition precedent "is a longstanding principle of Maryland jurisprudence[.]" *Hansen*, 420 Md. at 682 (citing *Rios v. Montgomery Cnty*, 386 Md. at 127). "A condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied." *Rios*, 386 Md. at 127.

Chester James Antieau's treatise offers a comprehensive analysis of local government law and a complete perspective on municipal corporations, as well as independent local government entities and counties. "Where a right against a local government has been created by the legislature, it may be circumscribed by procedural requirements in any way the legislative body sees fit." ANTIEAU ON LOCAL GOVERNMENT LAW at § 71.08 (2d ed. 2009). "The way in which a plaintiff may bring a claim is connected fundamentally to the type of claims that a plaintiff may bring, such that whatever restrictions the General Assembly imposes should be deemed 'conditions precedent.'" *Hansen*, 420 Md. at 690. In construing a notice provision, the Supreme Court of Maryland explained that:

> It is a fundamental doctrine that the Legislature may grant or deny to individuals a right of action against municipal corporations for injuries resulting from the negligent manner in which streets are maintained. When the Legislature creates a municipal corporation as part of the machinery of government of the State, it is within its province to adjust the relative rights of the corporation and the citizens. The Legislature has thus the power to enact a statute requiring that, before suit for damages shall be instituted against a municipal corporation, a written notice of the claim shall be presented to the municipal authorities within a specified period after injury or damage is sustained.

Neuenschwander v. Washington Suburban Sanitary Comm'n, 187 Md. 67, 76-77 (1946). "Since legislatures can withhold the opportunity to sue local governments, they can impose whatever conditions precedent to suit they deem proper. Conditions precedent to suit against local governments are found in nearly all State statutes and local charters." ANTIEAU ON LOCAL GOVERNMENT LAW at § 71.08 (2d ed. 2009).

In *Engle v. Mayor & City Council of Cumberland*, 180 Md. 465 (1942), the Supreme Court of Maryland upheld a Cumberland City Charter provision that required actual notice of a defect causing damage or injury to person or property. In *Engle*, the Mayor and City Council of Cumberland were sued as a result of injuries sustained after the plaintiff stumbled on a water curb box lid obstruction extending above the sidewalk which was installed by the City. *Id.* at 467. The City demurred, and from an order sustaining the demurrer, the plaintiff appealed. *Id*.

Similar to the City Charter in the present case, the Cumberland Charter provision under Section 89, Chapter 96 of the Acts of 1922, Code of Public Local Laws, section 89, Article 1A reads as follows:

> Before the City of Cumberland shall be liable for damages of any kind, the person injured, or someone in his behalf, shall give the Mayor or City Clerk notice in writing of such injury within thirty days after the same has been received, stating specifically in such notice when, where and how the injury occurred, and the extent thereof. The City of Cumberland shall never be liable on account of any damage or injury to person or property arising from or occasioned by any public street, highway or grounds, including accumulations of snow or ice, or any public work of the city, unless the specific defect or the accumulation of snow or ice causing the damage or injury shall have been actually known to the Mayor or City Engineer by personal inspection for a period of at least twenty-four hours prior to the occurrence of the injury or damage, unless the attention of the Mayor or Engineer shall have been called thereto by notice thereof in writing at least

> twenty-four hours prior to the occurrence of the injury or damage and proper diligence has not been used to rectify the defect or cause said accumulations of snow or ice to be removed after actually known or called to the attention of the Mayor and City Engineer as aforesaid.

In ruling in favor of the City of Cumberland, the Court stated, "[t]he main effect of such a charter provision is to be rid of the decisions of Courts sustaining a charge of constructive notice, which makes a case of this character almost impossible to defend, where municipalities and county commissioners are charged with the maintenance of streets, roads, and highways." *Id.* at 467-68 (citing *Annapolis v. Stallings*, 125 Md. 343 (1915); *County Comm'rs of Baltimore Cnty v. Collins*, 128 Md. 335 (1930)). "It is therefore evident that the right to sue is predicated upon such notices being given, as well as upon the injury." *Engle* at 469. "This court has said over and over again that if the enactment be within the power of the Legislature, the courts are not concerned with its wisdom or unwisdom, or the reasonableness or unreasonableness of the Act." *Id.* at 471. "Because we believe the provision of the city charter of Cumberland is a valid expression of the legislative will, the order appealed from should be affirmed." *Id.*

However, the Supreme Court of Maryland has stated that charter counties do not have the authority to create new causes of action:

> In Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by this Court under its authority to modify the common law of this State. *See e.g., Adler v. American Standard Corp.*, 291 Md. 31 (1981) (recognizing tort actions for abusive discharge), Furthermore, the creation of new judicial remedies has traditionally been done on a statewide basis.

McCrory Corp. v. Fowler, 319 Md. 12, 20 (1990) (superseded by statute as stated in *Wash. Suburban Sanitary Comm'n v. Phillips*, 413 Md. 606, 627-29 (2010)).

Here, unlike *Engle*, the notice provision in the Annapolis City Charter is not a valid expression of the legislative will and is not a condition precedent to filing a lawsuit. The charter provision at issue in *Engle* was a local public law enacted by the General Assembly. *Engle*, 180 Md. at 467. At that time, municipalities "had little power to legislate for themselves." *Campbell v. Mayor & Alderman of City of Annapolis*, 289 Md. 300, 305-06 (1981). This changed in 1954, when Maryland adopted Article XI-E to the Maryland Constitution, which granted Maryland municipalities the power to enact "local laws." *Id.* The scope of municipal authority to enact local legislation is now codified as Md. Code, Local Gov't §§ 5-202 through 5-217. There is nothing in such statutes that suggests a municipality has the authority to modify the elements of a cause of action.

The City Charter provision at issue in this case was not enacted by the Maryland General Assembly. Thus, the Annapolis City Charter cannot modify or create a cause of action inconsistent with the LGTCA's notice requirement without the authority of the General Assembly or the modification of the common law by Maryland Courts. The City Charter ultimately prohibits an act permitted by the state legislature, and is therefore preempted by the LGTCA. Accordingly, the circuit court erred in granting the City's motion for directed verdict, finding that the City Charter notice requirement is a valid exercise of its legislative authority and is enforceable.

II. The circuit court did not err in granting 35 West, LLC's motion for directed verdict.

Ms. Bozarth argues the trial court erred in granting the motion for a directed verdict because both the City and 35 West are responsible for the defective condition of the

sidewalk and hatch. Ms. Bozarth asserts that a property owner has a duty to keep his or her property in a safe condition in order to avoid injuries to travelers. Ms. Bozarth contends that the hatch, in question, was an improvement, not an appurtenance and was located in the public right-of-way. According to her, the City and 35 West are liable for her injuries.

35 West argues that the hatch is an improvement erected within the City's right-of-way, which the City has controlled since the formal 1943 deed transferring title and further maintained during the 2005 West Street renovations. 35 West argues, regardless of statute or ordinance, the owner of private property adjacent to the public right of way has no duty to pedestrians to maintain publicly owned improvements located within the City's right-of-way. Further, 35 West argues the City has a duty to repair sidewalks located upon the City's right-of-way and traditionally used by the public. 35 West contends that an abutting landowner is not liable for injuries resulting from a defect in the public way since there was no "special use" creating a hazard. 35 West argues it cannot be held liable for a hatch it does not own.

A. The City of Annapolis owns the hatch.

The Deed

In the present case, the deed in question was executed on June 10, 1943. It states, in pertinent part:

> [T]he City of Annapolis has maintained the said hereinafter mentioned streets and public highways for a period of more than twenty years and said maintenance and use by the public has been open, continuous, hostile and notorious[.]
>
> [T]he City of Annapolis, a municipal corporation of the State of Maryland, do hereby grant and convey unto Henry J. Tarantino, Trustee, his successors

> and assigns, in special trust and confidence, nevertheless, that he immediately reconvey the hereinafter described streets and public highways to the Said Mayor, Counselor and Alderman of the City of Annapolis, a municipal corporation of the State of Maryland, its successors and assigns, forever in fee simple, all those streets and public highways situate, lying and being in the City of Annapolis, State of Maryland, and described as follows:
>
> 50. All of the **bed of that street known as West Street**, extending westerly from the westerly side of Church Circle to the city line at the National Cemetery.
>
> Together with the improvements thereupon erected, made or being, and all and every, the **rights**, alleys, ways, waters, **privileges, appurtenances and advantages, to the same belonging, or otherwise appertaining**.

The deed, further, provides:

> To have and to hold said streets and public highways to and unto the proper use of him, the said Henry J. Tarantino, Trustee, his successors and assigns, in fee simple, in special trust and confidence, nevertheless, that he immediately reconvey the said streets and public highways to the Mayor, Counselor and Alderman of the City of Annapolis, a municipal corporation of the State of Maryland, its successors and assigns, **in fee simple**.

"A 'right-of-way' is nothing more than a special and limited right of use; and every other right or benefit derivable from the land, not essentially injurious to, or incompatible with the peculiar use called the right-of-way, belongs as absolutely and entirely to the holder of the fee simple as if no such right-of-way existed." *Desch v. Knox*, 253 Md. 307, 311 (1969) (quoting *Pub. Serv. Comm'n v. Maryland Gas Transmission Corp.*, 162 Md. 298, 312 (1932)). "[I]nterpreting a deed whose language is clear and unambiguous on its face, the plain meaning of the words used shall govern without the assistance of extrinsic evidence." *Drolsum v. Home*, 114 Md. App. 704, 709 (1997).

Based on the plain meaning of the words in the deed, the City of Annapolis' use of the right-of-way had been open and obvious for more than twenty years. The 1943 City

deed transfers ownership to Henry J. Tarantino, acting as a "straw man," which then requires him to immediately convey ownership in fee simple back to the City.[2] The transfer includes all of the street bed of West Street, facade to facade. Importantly, the "together" clause in paragraph 50, after conveying fee simple ownership to City, says "together with the improvements thereon erected." Samuel Brice, Annapolis bureau chief of engineering and construction, testified that the metal hatch on the sidewalk in front of 35 West Street is a private improvement within the City's right-of-way, existing at the time of this 1943 deed.

The circuit court judge found "it was clear from the evidence that was presented that when – that the actual sidewalks and the improvements are owned by the City." We agree. The City of Annapolis took fee simple ownership of the hatch, an improvement, by virtue of the plain language of the deed. Consequently, as a result of the 1943 deed, the right of way was subsumed into the City's ownership.

[2] THIS DEED, made this 10th day of June, 1943, by and between Henry J. Tarantino, Trustee, party of the first part, of Annapolis, Maryland, and the Mayor, Counselor and Alderman of the City of Annapolis, a municipal corporation of the State of Maryland, party of the second part.

WHEREAS, The Mayor, Counselor and Alderman of the City of Annapolis, a municipal corporation of the State of Maryland, by deed of even date herewith and recorded prior hereto among the Land Records of Anne Arundel County aforesaid, did grant and convey unto Henry J. Tarantino, Trustee, the streets and public highways hereinafter described, in special trust and confidence, nevertheless, that he **immediately reconvey** the said hereinafter described streets and public highways to the said Mayor, Counselor and Alderman of the City of Annapolis, a municipal corporation of the State of Maryland, its successors and assigns, in fee simple, all those streets and public highways situate, lying and being in the City of Annapolis, State of Maryland and described as follows[.]

Duty Owed

In Maryland, a property owner "is under no duty to pedestrians to maintain the public sidewalk abutting his land." *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 273 (2003) (quoting *New Highland Recreation, Inc. v. Fries*, 246 Md. 597, 601 (1967)). A property owner has the right "to maintain a cellar-door in the sidewalk, but it is a privilege to be enjoyed without danger of injury to pedestrians who are only required to use ordinary care[.]" *Citizens Savs. Bank of Baltimore v. Covington*, 174 Md. 633, 638 (1938). "It is a risk the abutting property owner runs for the enjoyment of such a privilege." *Citizens Savs. Bank*, 174 Md. at 639. However, "where the area in question 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." *Bethesda Armature Co. v. Sullivan*, 47 Md. App. 498, 501 (1981). "[A]ny duty on the part of [the adjacent property owner] to provide routine maintenance terminate[s] when the area [is] accepted within the County's right of way." *Bethesda Armature*, 47 Md. App. at 504.

The immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a "governmental" rather than a "proprietary" function. *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 508 (1979); *O & B, Inc. v. Md.-Nat'l Cap. P. & P.*, 279 Md. 459, 462 (1977). The Supreme Court of Maryland in *Eagers* stated:

> There is no question that, by the great weight of authority, the rule of law is that it is a private **proprietary** obligation of municipal corporations to keep their streets and public ways reasonably safe for travel in the ordinary

> manner, and to prevent and remove a nuisance affecting the use and safety of these public ways.

Mayor and City Council of Baltimore v. Eagers, 167 Md. 128 (1934) (emphasis added). Therefore, "[i]t has long been held that a municipality is not immune from a negligence action arising out of its maintenance of its public streets and highways." *Higgins v. City of Rockville*, 86 Md. App. 670, 678 (1991).

The exception to such local government liability on public property is referred to as the "special use" doctrine, which "holds that if an abutting 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 that special hazard." *Bethesda Armature Co.*, 47 Md. App. at 502. "A person who does any act rendering the use of a street hazardous or less secure than it was left by proper public authorities commits a nuisance and is liable to anyone who is injured while exercising due care[.]" *Citizens Savs. Bank*, 174 Md. at 635 (quoting Cooley on Torts, 4th Ed., sec. 452).

"[B]ut if what [the] person does is consistent with the customary use of the way for private purposes, and he observes a degree of care proportioned to the danger, the person cannot be held responsible for accidental injuries." *Id*. at 636. "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). "[I]t seems to be well settled that the abutting owner is not liable to pedestrians for injuries resulting from his failure to keep in repair a public sidewalk which he had not constructed." *Leonard v. Lee*,

191 Md. 426, 431 (1948) (citing *Canton Co. v. Seal*, 144 Md. 174 (1923); *Citizens Savs. Bank*, 174 Md. 633 (1938)).

It is undisputed that the City, acting within the authority of its own property, fully assumed control over the subject area during the reconstruction work at the start of this century, all without undertaking or demanding any repair to the hatch cover before the accident in question. In 2005, the City of Annapolis continued to exercise its control over the sidewalk and hatch in question when the City did a total renovation of the West Street roadway and sidewalks. The City paid the entire cost without charging 35 West. The City developed a landscaping plan and the renovation work was performed by a contractor hired by the City. The City contractor decided the means and methods as to how to tie in the existing metal trap to the rest of the sidewalk. Because the sidewalk is located upon the City's property and because that sidewalk, comprised of brick pavers and the hatch cover, has been traditionally used by the general public, the actual responsibility for repair rests upon the City of Annapolis, not 35 West.

Further, the special use exception to an abutting property owner's liability does not relieve the City of liability. There is no evidence of "some extraordinary use" undertaken by 35 West which caused the hatch cover to become a potential tripping hazard to pedestrians. Any "special use" by the abutting property owner was terminated long ago by the City's deeded ownership of the hatch cover and by its ongoing control of the hatch through reconstruction. The City failed to establish that the hatch was used by 35 West prior to the accident or that 35 West caused the hatch to be in need of repair. 35 West did not alter the trap cover or take any action which increased the hazardous condition beyond

that encountered and left by Mr. Silwick and the Annapolis Department of Public Works in October 2017. Absent special use, 35 West had no duty to correct the hazardous condition on a public sidewalk.

The accident here occurred on an improvement in the City's right-of-way, which the City took fee simple ownership of via the 1943 deed. For these reasons, the trial court did not err in granting 35 West, LLC's motion for directed verdict.

III. The City's cross-appeal is invalid and moot.

As noted, *supra*, the City cross-appeals the denial of its motion for summary judgment. Typically, once a lower court has denied a party's motion for summary judgment, and the matter proceeds to a full trial on the merits, the correctness of the pretrial denial of summary judgment, other than for an abuse of discretion, is not reviewed. *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 29 (1980). As noted by other courts, a party believing that a trial court erred in denying their motion for summary judgment has adequate remedies besides seeking review of the denial after a full trial. *Chesapeake Paper Prod. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1234 (4th Cir. 1995). The party may move for judgment as a matter of law and seek review of those motions if they are denied. *Id.* at 1236.

Here, the City of Annapolis moved for a directed verdict and it was granted. We hold, therefore, that our determinations regarding Appellant's appeal make the cross-appeal moot, and we decline to address the issues raised by it.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED IN PART AND AFFIRMED IN PART; COSTS TO BE PAID BY APPELLEE.