Circuit Court for Baltimore City
Case No. 24-C-20-003538

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1108

September Term, 2021

TIFFANY COVINGTON

v.

ESV REALTY, LLC, et al.

Wells, C.J.,
Graeff,
Tang,

JJ.

Opinion by Tang, J.

Filed: June 23, 2022

Tiffany Covington ("Covington"), appellant, stepped on a curb and fell into a six-to-seven-inch depression in a landscaped island located in a shopping center parking lot, owned and managed by ESV Realty, LLC ("ESV Realty"), appellee. Covington filed a lawsuit against ESV Realty[1] for negligence alleging, in pertinent part, that the depression was dangerous and ESV Realty had a duty to inspect and maintain the landscaped island for uniformity in height and grade. After the close of discovery, ESV Realty filed a motion for summary judgment, which the circuit court granted. The court entered judgment in favor of ESV Realty, ruling that Covington failed to present sufficient evidence demonstrating that ESV Realty owed a duty to Covington and reasoning that it owed no duty to inspect for (or "discover," as phrased by the court) a condition of which ESV Realty had no prior knowledge.

On appeal, Covington presents the following question, which we have rephrased slightly:

> Did the circuit court err in granting summary judgment on the basis that there was insufficient evidence to establish that ESV Realty owed a duty to inspect for an alleged dangerous condition of which it had no prior knowledge?[2]

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

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[1] Two other defendants were named in the complaint, but they were voluntarily dismissed without prejudice from the lawsuit prior to the summary judgment hearing.

[2] The question as presented in Covington's brief is:

> Did the circuit court err in granting summary judgment on the basis that ESV Realty, LLC had no legal duty to inspect for the dangerous condition on its property and no knowledge of the hazard?

FACTUAL AND PROCEDURAL BACKGROUND[3]

I.

The Accident

The accident occurred on October 7, 2017, at a shopping center owned by ESV Realty, located on Belair Road in Baltimore, Maryland. At the time, a Dollar Tree store, a PNC Bank, and a Bi-Rite Supermarket occupied the shopping center. That day, Covington and her daughter drove to the Dollar Tree. Covington was the front seat passenger of a sports utility vehicle ("SUV") driven by her daughter. Upon arrival at the shopping center, the daughter backed the SUV into a parking spot adjacent to a landscaped island where a PNC Bank sign was situated in the island.

The daughter parked the SUV in a manner that positioned the right passenger side of the SUV, and Covington, parallel with and against a curb that framed the island. Covington opened the front passenger side door and noticed there was no room to step onto the asphalt surface between the SUV and the curb. She observed grass in the island that was "kind of high, not fully manicured," and she expected the turf within the island to be relatively flush with the abutting curb.

Covington placed her right foot on, and perpendicular to, the curb. The "ball" and the "center" of her right foot "straddl[ed]" the curb, and her right toes pointed towards the landscaped portion of the island. Covington grabbed the door handle with her left hand

[3] The facts are derived from deposition transcripts, discovery responses and documents incorporated as exhibits in the motion for summary judgment and opposition thereto.

and raised her left foot from the SUV. As she alighted from the SUV, Covington shifted her weight onto her right leg. During that shift, Covington's right toes "went in a downward motion" into the turf, which was not flush with the curb. The motion caused Covington's body to twist to the right and fall out of the SUV. Covington alleged she suffered injuries to her right ankle because of the fall.

II.

The Drop-Off in the Landscaped Island

In discovery, Covington produced two photographs taken by her husband two to four days after the accident, which depict the general area of the landscaped island where Covington fell. The photographs also depict a measuring tape placed in the interior of the curb, which purportedly established the existence of a six-to-seven-inch deviation[4] ("drop-off") between the curb and the turf where Covington fell.[5]

At its deposition, ESV Realty testified, through its corporate designee, that in 2012, it purchased the property where the shopping center currently sits for the purpose of

[4] In her opposition to ESV Realty's motion for summary judgment and during the hearing on the motion, Covington's counsel described the deviation as a four-to-five-inch drop-off. In viewing the evidence in the light most favorable to Covington, as the non-moving party, we accept Covington's testimony describing the deviation as a six-to-seven-inch drop-off.

[5] At her deposition, Covington testified that the photographs fairly and accurately depict the drop-off on the date of the accident, but she was not able to state if her right foot descended in the precise area where the measuring tape was placed. At the summary judgment hearing, ESV Realty did not dispute that these photographs fairly and accurately portray the condition of the landscaped island as it existed when Covington fell, and it did not attach any significance to Covington's inability to identify the precise location where her foot descended into the turf.

developing and leasing space to various businesses. In connection with the construction, which began in 2013 or 2014, ESV Realty obtained from the City of Baltimore approval to install landscaped islands on the property. Upon completion of the construction, the City of Baltimore inspected and approved the landscaped islands.

Covington produced in discovery Google Map images of the landscaped island dated August 2015, September 2015, November 2016, June 2017, October 2017, and July 2019. The Google Map images indicated, and ESV Realty did not dispute, that the turf within the island was never flush with the abutting curb.[6] ESV Realty testified that the deviation between the curb and the turf varied because of the ground's exposure to natural elements like soil settlement, rain and snow. Covington generally understood that landscaping can be uneven and contain divots, but not to the extent depicted in the photographs taken by her husband. She did not know how long the drop-off had existed prior to the accident, and she had "no personal knowledge as to how [the drop-off]…was created[.]"

Having visited the Dollar Tree on approximately six to eight prior occasions and frequented other stores in the shopping center on a regular basis, Covington observed pedestrians travel across the landscaped areas near the Dollar Tree ("I can't say repetitiously, but I've seen it, yes."). ESV Realty, on the other hand, had no prior knowledge that the landscaped areas were used for pedestrian traffic. It did not investigate whether pedestrians had used the landscaped areas to enter and exit the shopping center.

[6] ESV Realty did not dispute the authenticity or admissibility of the Google Map images.

The landscaped areas were not intended for pedestrian traffic, and pedestrians entering or exiting the shopping center were expected to use the asphalt surfaces in the parking lot.

III.

Inspection and Maintenance of the Landscaped Island

The lease agreement between ESV Realty and the Dollar Tree, which was in effect at the time of the accident, required ESV Realty to maintain the common areas to include "landscaping" and "all means of pedestrian...ingress and egress to and from the Shopping Center[,]" "so as to maintain a clean, safe and secure Shopping Center, consistent with the standards of operation and maintenance of a first-class Shopping Center[.]" Neither party, however, produced in discovery any document, regulatory code, or testimony to articulate the "standards of operation and maintenance of a first-class Shopping Center," except ESV Realty, whose corporate designee testified that its approach was to "make sure that [the shopping center] is clean and safe at all times."

Although ESV Realty did not have a formal policy for conducting safety inspections of the landscaped areas in particular, it inspected the common areas of the property for dangerous conditions in various ways. First, ESV Realty contracted a landscaping company to provide landscaping services for the shopping center and, specifically, for the Dollar Tree. The landscaper's duties included mowing, weed whacking around the landscaped islands, clipping shrubbery, and picking up trash to the extent necessary. On October 6, 2017, the day before the accident, the landscaper serviced the Dollar Tree by completing the following tasks, which were documented on a "Property Service Report":

"Bed Edging," "Curb line cleanup," "Edging Curbs & Walkways," "General Turf/Bed Cleanup," "Mowing," and "Weeding."[7]

Second, ESV Realty's partners, who worked at the Bi-Rite Supermarket adjacent to the Dollar Tree, drove past the shopping center seven days a week and occasionally visited the Dollar Tree and the PNC Bank. Although the partners did not establish scheduled visits to survey the shopping center, they "were constantly visualizing" it to "keep the property safe and clean."

Finally, ESV Realty instructed a maintenance worker from the Bi-Rite Supermarket to make sure "all areas are clear and free and safe." The worker "picked up the trash pretty much every day" around the shopping center. ESV Realty never observed any unsafe conditions and did not receive any complaints of such conditions prior to the accident.

IV.

The Complaint

On August 18, 2020, Covington filed a complaint against ESV Realty in the Circuit Court for Baltimore City, alleging negligence. Covington alleged in pertinent part, that (1)

[7] With respect to the Report, Covington claims that ESV Realty "did not present any testimonial evidence via deposition or affidavit that explained *inter alia*," the precise date, location, and nature of landscaping services provided. At ESV Realty's deposition, however, counsel for ESV Realty referred to "the records from the [landscaper] that [ESV Realty] produced in this case" as a precursor to confirming with its corporate designee that the landscaper provided services on October 6, 2017. With respect to the location, the Report includes the address for the Dollar Tree, which corresponds with the address listed in the Landscape Management Agreement. With respect to the nature of the services, the agreement details the scope of work to include, *inter alia*, mowing, "[e]dging of all…curbs…Debris from edging operations shall be removed and areas swept or blown clean[,]" which services are consistent with those in the Report.

the drop-off constituted a dangerous and/or defective condition that created an unreasonable risk of harm; (2) ESV Realty knew, or in the exercise of reasonable care should have known, that the drop-off was unknown and unlikely to be discovered by Covington, an invitee; and (3) ESV Realty had a duty to use reasonable care to see that the landscaped island was safe. ESV Realty filed an answer that generally denied its liability and asserted the affirmative defenses of contributory negligence and assumption of the risk, among others.

V.

ESV Realty's Motion for Summary Judgment

On July 12, 2021, after the close of discovery, ESV Realty filed a motion for summary judgment. Covington filed an opposition, and the parties appeared in the circuit court for a hearing on September 15, 2021. ESV Realty argued it was entitled to judgment as a matter of law on three main grounds.

A. The Drop-Off Was Not a Dangerous Condition

ESV Realty argued that Covington was unable to demonstrate the drop-off was a dangerous condition because (1) the landscaped island was constructed and remained in compliance with Maryland codes, regulations, and other building standards; (2) no law, regulation, or other legal precedent required the turf within the landscaped portion of the island to be flush with the abutting curb; and (3) Covington failed to produce any evidence in discovery by way of expert testimony demonstrating that the landscaped island deviated from applicable standards. Covington, on the other hand, argued that the photographs of

the drop-off taken by her husband and her testimony that the tall, unmanicured grass obstructed her view of the drop-off generated a genuine dispute of material fact that should be resolved by a jury.

B. ESV Realty Owed No Duty to Covington

ESV Realty argued it owed no duty to Covington because the drop-off was open and obvious to her. According to ESV Realty, Covington observed the curb and the grass upon exiting the SUV, she acknowledged that she had to balance on the curb and proceed to walk on the grass, and she understood that landscaped areas could be uneven. To the contrary, Covington argued that a dispute of material fact existed as to whether the drop-off was open and obvious because it was obscured by tall, unmanicured grass.

Pertinent to the Discussion section below, Covington claimed that ESV Realty had a duty to monitor and inspect the shopping center for the drop-off. Conceding that ESV Realty had no actual knowledge of the drop-off, Covington argued ESV Realty had constructive knowledge of it prior to the accident. Covington focused on three main points to support her contention that disputes of material facts existed as to ESV Realty's constructive knowledge, and that such factual disputes should be resolved by the jury.

First, Covington maintained that ESV Realty had an "affirmative" and/or "heightened duty of care" imposed by its lease agreement with the Dollar Tree, which, according to Covington, provided that ESV Realty was "going to be maintaining and inspecting a common area and reasonable uses of ingress and egress to look for these types of dangerous and defective conditions [referring to the drop-off]" commensurate with a

"first class" shopping center. Despite this purported commitment, Covington claimed that ESV Realty had "no policy, protocol or procedure for inspecting, maintaining or repairing any dangerous or defective conditions that posed a tripping or falling hazard within the Common Area." According to Covington, ESV Realty "never made sure the property was safe" and "free from tripping hazards," and had ESV Realty inspected the property, it would have discovered the drop-off.

Second, Covington testified that, prior to the accident, she observed pedestrians regularly using the landscaped island as ingress to and egress from the shopping center, a fact, she argued, ESV Realty should have anticipated or discovered upon inspection.

Third, relying on the Google Map images, Covington argued the deviation between the turf within the island and the abutting curb existed for several months prior to the accident and eventually developed into the drop-off that existed on the day of the accident. Covington claimed that ESV Realty should have known about the drop-off based on the foregoing facts and, therefore, had a duty to "continue to monitor and inspect" its property for several months prior to the accident.

C. Covington Assumed the Risk of Her Injuries and Was Contributorily Negligent

Alternatively, ESV Realty argued that even if it breached its duty, Covington's claim was barred by assumption of risk and contributory negligence because Covington undisputedly observed the curb and grass prior to exiting the SUV and voluntarily chose to step on the curb with an understanding that the turf within the island could be uneven.

Covington maintained that a dispute of material fact existed as to whether she could see or appreciate the height differential between the curb and the turf within the island.

VI.

The Circuit Court's Ruling

During the motions hearing, the circuit court focused its inquiry on ESV Realty's prior knowledge of the drop-off:

THE COURT:	Is there evidence that anyone else, accepting your client's testimony that she's familiar with this shopping center and people walk there all the time, is there evidence that anyone else has ever fallen in that –
[COVINGTON'S COUNSEL]:	I don't have – I mean, I certainly asked for it, Your Honor.
THE COURT:	Yeah, sure.
[COVINGTON'S COUNSEL]:	It's not something that I would be privy to. I mean, it's nothing—
THE COURT:	Or that [ESV Realty was] otherwise on specific notice that it was a fall or trip hazard?
[COVINGTON'S COUNSEL]:	Yeah. I'm sorry, Your Honor. *I have no evidence of that…*

(Emphasis added). At the conclusion of the hearing, the court granted ESV Realty's motion for summary judgment and set forth its reasoning as follows:

> The Court has had an opportunity to consider the pleadings in this case, to consider the arguments presented before the Court this morning and also the applicable law.
>
> In this particular case, the Court is satisfied that there exists no evidence or support in the law for a duty owed by [ESV Realty] in this case. The duty

> under the law is to warn patrons of any known hidden defects, and so if we assume, as [Covington] said, it was a hidden defect, there's absolutely no evidence that this was known to [ESV Realty] as a danger or hazard or defect. And what [Covington] has tried to do is sort of argue that there was a duty to find out or to learn that this was some type of defect or hazard and that is just not founded in the law, the notion that [ESV Realty] in this case would have a duty to – [Covington] conceding that this island it not intended for people to walk on but that she is familiar with the parking lot and she has seen people walking on it and that people regularly walk on it. You know, it spawns two things that are just not present here or present in the law. One is that [ESV Realty] somehow had a duty to go out and watch the parking lot and know if people were walking on it, which is not founded, but it would also require an additional issue which is that if people are walking on it and nobody's falling, there would still have to be some evidence or knowledge on the part of [ESV Realty] that people are walking on it and it's a hazard. There is no evidence that this is a per se hazard, that the curb has to be even with the ground under any normal – any regulations or any other sort of industry standards for landscaping or anything of that sort.
>
> And so I think the problem with [Covington's] case is that she cannot establish the duty to sort of discover, if you will, this otherwise unknown hazard, assuming that it is a hazard, and then use that to support that there was a duty to warn. And so for that reason, the Motion for Summary Judgment is granted.

Assuming without deciding that the drop-off was a dangerous condition, the court concluded that ESV Realty owed no duty to Covington, reasoning that it had no duty to "discover" the drop-off of which it had no prior knowledge.[8]

[8] On appeal, the parties disagree about the bases for the court's ruling. According to ESV Realty, the court found as a matter of law that (1) the drop-off did not present a dangerous condition; and (2) the drop-off was open and obvious. With respect to the former, the court did not find as a matter of law that the drop-off is not a dangerous condition. Rather, the absence of a regulation requiring the turf within the island to be flush with the curb was one of other factors it considered in concluding that ESV Realty lacked constructive knowledge of the drop-off. With respect to the latter, nothing in the record suggests that the court found that the drop-off was an open and obvious condition.

On September 16, 2021, the court entered an order stating, in relevant part: "Upon consideration of the pleadings, arguments and applicable law, it is… ORDERED that, for the reasons stated on the record, [ESV Realty's] Motion for Summary Judgment is GRANTED." Covington timely noted her appeal to this Court.

STANDARD OF REVIEW

We review *de novo* the granting of summary judgment, that is, whether the court's conclusions were legally correct. *Koste v. Town of Oxford*, 431 Md. 14, 25 (2013). A court properly grants a motion for summary judgment when there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501. To defeat a motion for summary judgment, the opposing party must "show that there is a genuine dispute as to a material fact by proffering facts which would be admissible in evidence." *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737 (1993). General allegations are not sufficient to generate a genuine issue of material fact. *Id*. at 738. Instead, the evidence must be "sufficiently detailed and precise to enable the trial court to make its ruling as to the materiality of the proffered fact." *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 387 (1997).

"An appellate court, when reviewing the grant of a motion for 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). In the instant matter, the court granted summary judgment on the basis that ESV Realty owed no duty to Covington, reasoning that it had no duty to "discover" the drop-off of which it had no prior knowledge. The

court focused its reasoning on Covington's failure to demonstrate a dispute of material fact as to whether ESV Realty had knowledge of the drop-off, assuming without deciding that it constituted a dangerous condition. Accordingly, we are constrained to limit our review to this basis.

DISCUSSION

I.

The Parties' Contentions

On appeal, Covington asserts that the circuit court erred in granting summary judgment. First, she argues that the court was legally incorrect when it concluded that ESV Realty had no duty to inspect its property. Second, Covington argues that disputes of material facts exist as to whether ESV Realty had constructive knowledge of the drop-off and such disputes should be resolved by a jury. On the other hand, ESV Realty argues that the court properly concluded that ESV Realty owed no duty to Covington because the undisputed facts established that it had no constructive knowledge of the drop-off.[9]

II.

The Analytic Framework

In a negligence case, the plaintiff must present facts sufficient to support a finding, among other elements, that the defendant was under a duty to protect the plaintiff. *Six Flags America, LP v. Gonzalez-Perdomo*, 248 Md. App. 569, 581 (2020), *cert. denied sub*

[9] ESV Realty also reiterates its other arguments raised below, which the court did not rely upon in its ruling. Accordingly, we decline to address those arguments. *See Deering Woods*, 377 Md. at 263.

nom. Gonzalez-Perdomo v. Six Flags Am., 474 Md. 206 (2021). In the context of premises liability law, "the duty of care that is owed by the owner of property to one who enters on the property depends on the entrant's legal status." *Rehn v. Westfield Am.*, 153 Md. App. 586, 592 (2003) (quoting *Rivas v. Oxon Hill Joint Venture*, 130 Md. App. 101, 109 (2000)). In the instant case, Covington's status as an invitee of the shopping center is not challenged.

The general rule regarding liability of owners of land to invitees is set forth in § 343 of the Restatement (Second) of Torts (1965), which the Court of Appeals has quoted with approval. *Deering Woods*, 377 Md. at 262-63. Section 343 provides that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement § 343. A property owner is obligated "to warn invitees of known hidden dangers, inspect, and take reasonable precautions against foreseeable dangers." *Tennant*, 115 Md. App. at 388. "A key element in this is that the property owner have actual or constructive knowledge (know or should know) of the defective and dangerous condition. Absent such knowledge–or, more appropriately, evidence of such knowledge–there is no liability, and thus no right of recovery." *Burkowske v. Church Hosp. Corp.*, 50 Md. App. 515, 522 (1982), *disapproved of on other grounds by B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co.*, 324 Md. 147, 154 (1991).

A party has constructive knowledge when evidence shows "that [the] defective condition existed long enough to permit one under a duty to inspect to discover the defect and remedy it prior to the injury." *Maans v. Giant Of Md., L.L.C.*, 161 Md. App. 620, 633 (2005) (citing *Deering Woods*, 377 Md. at 267-68). The burden is on the invitee to show the property owner had constructive knowledge of the defective or dangerous condition. *See Tennant*, 115 Md. App. at 388.

Whether there has been sufficient time for a property owner to discover, cure, or clean up a dangerous condition depends on the circumstances surrounding the fall. *Rehn,* 153 Md. App. at 593. Whether a condition has existed long enough to impose constructive knowledge is not a simple calculation with set parameters for length of time; rather, it is a consideration of factors including, "the nature of the danger, the number of persons likely to be affected by it, the diligence required to discover or prevent it, opportunities and means of knowledge, the foresight which a person of ordinary care and prudence would be expected to exercise under the circumstances, and the foreseeable consequences of the conditions." *Moore v. Am. Stores Co.*, 169 Md. 541, 541 (1936). "Among the factors which determine the extent of safety preparation that an invitee is entitled to expect, 'the nature of the land and the purposes for which it is used are of great importance.'" *Deering Woods*, 377 Md. at 264 (quoting Restatement § 343, cmt. *e*.). For example, "one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect

that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory." Restatement § 343, cmt. *e*.

A. The Correlation Between the Duty to Inspect and Constructive Knowledge

"Whether a condition on the possessor's land is one which the possessor should know involves an unreasonable risk of harm to invitees is closely related to, if not indistinguishable from, the extent of the possessor's duty to inspect, at least in cases in which the claimant relies on constructive notice." *Deering Woods*, 377 Md. at 264-65. The correlation between the duty to inspect and the existence of a property owner's constructive knowledge has been recognized in various cases.

In *Carter v. Shoppers Food Warehouse Md. Corp.*, the plaintiff tripped and fell over what she believed to be a turned-up corner of a carpet in a grocery store. 126 Md. App. 147, 152 (1999). This Court affirmed summary judgment in favor of the grocery store, explaining that "without [plaintiff] having presented evidence of appellee's actual or constructive knowledge of the dangerous condition, it would not be reasonable to require [the grocery store] constantly to inspect the produce section and fix the floor mats each time a corner becomes misplaced or turned up." *Id*. at 164.

In *Deering Woods*, the plaintiff slipped on black ice located on a walking path. 377 Md. at 265. The plaintiff maintained that the property owner "had reason to know that, despite snow removal from the pathway, water might accumulate at the [pathway] and, depending on the winter temperature, freeze" causing black ice to develop. *Id*. at 267. The Court of Appeals affirmed the trial court's grant of summary judgment in the property

owner's favor because the undisputed evidence was that for approximately twenty winters there were "no complaints about ice, or accidents on ice, or ponding, at the [pathway]," and there was no basis in the evidence for concluding that the property owner should have known of black ice on the pathway sufficiently prior to the plaintiff's fall to have removed the ice or to have treated the surface by sanding or salting. *Id*. at 267-68. The Court explained that "[g]iven the nature of the premises in the case before us, [the property owner], after having removed the most recent snowfall the day before the accident, had no duty continuously to inspect and was not on constructive notice of the allegedly dangerous condition." *Id*. at 270.

In *Macias v. Summit Mgmt., Inc.*, a child was injured when he climbed on a condominium flag stone sign, which fell from its framework and on top of the child. 243 Md. App. 294, 305 (2019). The plaintiff sued the condominium management company ("condominium") for negligence. *Id*. The circuit court granted summary judgment in favor of the condominium, explaining that the record was devoid of facts to support "a finding that [the condominium] had knowledge or reason to know of 'an unsafe condition or [that] anybody might get hurt there.'" *Id*. at 312. On appeal, this Court affirmed the grant of summary judgment, highlighting that "[t]here was no evidence that anyone had ever been harmed by the community sign, or that there were any visible defects that might have put [the condominium] on notice that someone could be injured." *Id*. at 338. Recognizing that "[t]he duty to inspect is a function of the landowner's knowledge, actual or constructive, of the unreasonable risk," this Court concluded that the plaintiff "did not adduce any evidence

of direct or constructive knowledge on the part of [the condominium] that would give rise to a duty to inspect the community sign." *Id.* at 338-39 (citing *Deering Woods*, 377 Md. at 264-65).

B. A Question of Law or Fact?

The "existence of a legal duty is a question of law to be decided by the court." *Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999). Covington argues that ESV Realty had constructive knowledge, a fact which should have been determined by a jury. Although the existence of constructive knowledge is ordinarily for the jury, the absence of evidence of constructive knowledge is dispositive as a matter of law. *See, e.g.*, *Macias*, 243 Md. App. at 338-39; *Deering Woods*, 377 Md. at 270; *Carter*, 126 Md. App. at 164. Consequently, we must determine whether there are disputed material facts demonstrating that ESV Realty had constructive knowledge of the drop-off upon which a jury could have reasonably determined that ESV Realty had a duty to inspect. *See, e.g.*, *Six Flags*, 248 Md. App. at 582-83.

III.

Analysis

We briefly address Covington's first argument that the circuit court was legally incorrect in concluding that ESV Realty had no legal duty to inspect the property. Covington cites to, *inter alia*, *Tennant* for the general proposition that a property owner has an "unequivocal and unqualified" duty to inspect, which Covington argues the court rejected in error. Covington, however, construes the court's conclusion in isolation without

placing it in context with its underlying reasoning, which was premised on the absence of ESV Realty's knowledge of the drop-off.[10] In its questioning of Covington's counsel and ruling at the motions hearing, the court recognized the correlation between a property owner's duty to inspect and the owner's knowledge of an alleged dangerous condition. Our analysis, therefore, is centered on Covington's second argument, which we address *seriatim* below.

A. ESV Realty's Purported Lack of Inspection Policy and Procedure

Covington contends that constructive notice can be established by ESV Realty's failure to adopt and employ a policy and procedure to inspect the property. Covington relies on the maintenance provisions of the lease agreement to demonstrate that ESV Realty's failure to adopt and employ a protocol to inspect the property contravened the terms of the agreement and, therefore, was unreasonable. Accordingly, she argues, "whether [ESV Realty's] lack of meaningful inspection policies was reasonable" is a question for the jury.

[10] Covington relies upon, and correctly recites, the principle that "[t]he occupier must … act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property." *Tennant*, 115 Md. App. at 388 (quoting W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts*, § 61, at 425-26 (5th ed. 1984)). The principle, however, is balanced against the oft-repeated tenet that "[a]lthough the business invitor has a duty to protect against unreasonably dangerous conditions, the business invitor is not an insurer of the invitee's safety." *Tennant*, 115 Md. App. at 389. "[T]here is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated, or from those which the occupier neither knew about nor could have discovered with reasonable care." Keeton, *supra*, § 61, at 426.

Covington's reading of the agreement with respect to ESV Realty's purported obligation to inspect the property is problematic. The maintenance provision required ESV Realty to "operate, maintain, repair, and replace the Common Areas so as to maintain a clean, safe and secure Shopping Center, consistent with the standards of operation and maintenance of a first-class Shopping Center." Section F.1. (Operation and Maintenance). The provision, however, did not expressly require ESV Realty to "inspect" or continuously "monitor and inspect" the common areas, as Covington posited at the motions hearing below.[11] Significantly, Covington did not produce any document or witness (lay or expert) to demonstrate that "first class" maintenance standards require inspections in a particular manner, at certain intervals, and/or pursuant to a formalized protocol.

In any event, the absence of an inspection protocol is insufficient to show that ESV Realty had constructive knowledge of the drop-off. *See Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 189-90 (2015) (failure to perform mandatory daily inspections of garage to locate hazards is insufficient to show that defendants had constructive knowledge of greasy substance); *Maans*, 161 Md. App. at 632 (rejecting the proposition that a jury can infer constructive notice from an alleged failure to conduct reasonable inspections); *Smith v. City of Baltimore*, 156 Md. App. 377, 386 (2004) (rejecting the proposition that the City was "deemed" to have constructive knowledge because of an alleged failure to conduct routine inspections).

[11] By contrast, an unrelated provision expressly required ESV Realty to "perform *regular inspections* of the roof." Section K.1. (Repairs by Landlord) (Emphasis added).

B. Pedestrian Use of the Landscaped Island

Citing the *Moore* factors, Covington argues the jury could have inferred constructive knowledge by the number of persons likely to be affected by the drop-off, among other factors. Covington contends that her observation of pedestrians traversing the landscaped areas supports an inference of constructive knowledge sufficient to preclude summary judgment. The *Moore* factors, however, bear on the *sufficiency of the time* to discover the purported dangerous condition. *Moore*, 169 Md. at 541 ("if it is shown that the conditions have existed *for a time sufficient* to permit one under a duty to know of them, to discover them, had he exercised reasonable care, his failure to discover them may in itself be evidence of negligence sufficient to charge him with knowledge of them… What will amount to *sufficient time* depends upon the circumstances of the particular case, and involves consideration of" the *Moore* factors, *supra*) (citations omitted) (emphasis added).

Covington's observation that pedestrians traversed the landscaped areas in the shopping center prior to the accident, alone, is not sufficient to generate a genuine dispute of material fact that the drop-off existed *long enough* to impute constructive knowledge to ESV Realty. There is no evidence that the drop-off was known to other patrons, tenants or employees of the shopping center. *Cf. President & Comm'rs of Town of Princess Anne v. Kelly*, 200 Md. 268, 273 (1952) (holding that evidence that a defect in the sidewalk was well known to neighbors and town authorities was sufficient to support a finding of constructive notice). There is no evidence of prior falls or accidents in the area where Covington fell. *See Macias*, 243 Md. App. at 338 (holding that the plaintiff did not adduce

evidence of constructive knowledge where no one had ever been harmed by the community sign). There is no evidence of requests for, or actual repairs made to the landscaped island prior to the accident. There is no evidence of prior complaints made about the condition of the landscaped curb.

C. Discovery of the Drop-Off Upon Reasonable Inspection

Covington asserts that ESV Realty would have discovered the drop-off if it had made reasonable inspections prior to the accident. Even if we assume ESV Realty did not conduct reasonable inspections, the assumption does not advance Covington's cause. An invitee's "mere assertion of what an inspection might have revealed [cannot] supplant the need for some evidence of what it would have revealed," and "[i]t simply does not suffice to claim the obvious—that if [the owner] had inspected [the allegedly defective condition], it would (or may) have noticed the condition." *Burkowske,* 50 Md. App. at 523; *Rawls v. Hochschild, Kohn & Co., Inc.*, 207 Md. 113, 122 (1955) ("where no inference could reasonably be drawn that the shopkeeper could have discovered the condition by exercise of reasonable care, the court should decide the case as a matter of law.").

There is no evidence to demonstrate that, given the nature of the landscaped island, ESV Realty would have identified the drop-off as unique even if it engaged in continuous monitoring and inspection of the property, as Covington suggests should have been accomplished. *See, e.g., Leonard v. Lee*, 191 Md. 426, 433 (1948) ("pavements will in time become irregular and uneven from roots of trees, heavy rains and snows, or other causes"); *Martin v. Mayor & Council of Rockville*, 258 Md. 177, 182 (1970) ("constructive

notice is equated to triviality in the holding that the municipality is not chargeable with constructive notice if the defect is so minor as to make its discovery unlikely") (citing *Leonard*, 191 Md. at 433). There is neither lay testimony nor expert opinion that the drop-off was in any way unique in comparison to other landscaped islands in the shopping center or elsewhere. *See Deering Woods*, 377 Md. at 267-68 (holding there was no evidence to establish that the condominium should have known of black ice where neither lay testimony nor expert opinion established that the pathway where accident occurred was in any way unique in comparison to the "literally thousands" of crossings in the area). As the circuit court alluded to in its ruling, there was no regulation or industry standard requiring the turf within the landscaped island to be flush with the abutting curb, the existence of which might have indicated to ESV Realty that the drop-off was distinctive. The only way the jury could conclude that ESV Realty would have discovered the drop-off prior to the accident would be if the jury engaged in forbidden speculation or conjecture. *See Maans*, 161 Md. App. at 636.

D. The Google Map Images

Covington contends that the Google Map images between August 2015 and June 2017 demonstrate a gradual settling or erosion of the turf where she fell, and that the drop-off existed between November 2016 and June 2017, suggesting that ESV Realty had constructive knowledge of the drop-off months before the accident. The Google Map images, however, depict distant, wide-shot views of the landscaped island. Without more, they lack critical context and information. For example, there was no testimony

demonstrating (1) in each image, the precise location of the drop-off; and (2) whether the November 2016 and June 2017 images depict a depression in the turf measuring six to seven inches deep. The Google Map images provide some visual indication that the turf was not completely flush with the abutting curb, but that fact is not disputed by ESV Realty. Covington's assertion that the Google Map images depict the drop-off, measuring six to seven inches, in November 2016 and/or June 2017, is speculative and does not give rise to a genuine dispute of material fact as to how long the drop-off existed prior to the accident.[12] *See Carter v. Aramark Sports & Ent. Servs., Inc.*, 153 Md. App. 210, 225 (2003) (conclusory statements or speculation by the party resisting the motion will not defeat summary judgment).

For the foregoing reasons, Covington did not generate any disputed, material facts demonstrating that ESV Realty had constructive knowledge of the alleged dangerous condition upon which a jury could have reasonably determined that ESV Realty had a duty

[12] Relying on *Lexington Market Authority v. Zappala*, 233 Md. 444, 446 (1964), Covington posits that proof of constructive knowledge is unnecessary if the owner created the dangerous condition. Covington argues that ESV Realty "tacitly concedes the existence of a question of material fact regarding an awareness of any hazard and whether such knowledge can be attributed" to ESV Realty because it constructed the landscaped island and acknowledged that turf within the landscaped island was never flush with the abutting curb. The argument is unavailing. Although ESV Realty constructed the landscaped island, the City of Baltimore inspected and approved it. There is no evidence that years later, ESV Realty created or caused the turf within the landscaped island to develop into a six-to-seven-inch drop-off. *See id.* (judgment entered for the proprietor where there was "no evidence at all that the [oil or grease in the parking garage] was caused by the proprietor or its employees…").

to inspect. Accordingly, we hold that the record supported summary judgment in favor of ESV Realty.

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