Circuit Court for Baltimore City
Case No. 24C-16-004544

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2467

September Term, 2017

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

v.

DENISE HARRISON

Wright,
Graeff,
Reed,

JJ.

Opinion by Graeff, J.

Filed: February 26, 2019

This appeal arises from a jury verdict in the Circuit Court for Baltimore City, finding the Mayor and City Council of Baltimore City ("the City"), appellant, liable for personal injuries that Denise Harrison, appellee, sustained when she stepped in a hole in the sidewalk. The jury found that the City was negligent, and its negligence caused Ms. Harrison's injury.[1] It awarded Ms. Harrison $7,361.05 for past medical expenses and $10,000 for non-economic damages.

On appeal, the City presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in denying the City's motion for judgment because Ms. Harrison did not produce evidence that, prior to her fall on December 1, 2014, the City had actual or constructive notice that the water meter vault she fell into was uncovered?

2. Did the circuit court err in denying the City's request for a jury instruction?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2014, at approximately 3:00 p.m., Ms. Harrison was standing on the corner of Saratoga Street and the 300 block of Bruce Street talking with several family members and friends. She left to walk toward her father's house, which was located at 337 Bruce Street. She walked on the street past her brother's house, located at 307 Bruce Street, walked around a truck parked on the street, then "took a couple of steps on the curb." Ms.

[1] The jury rejected the City's argument that Ms. Harrison was contributorily negligent.

Harrison's entire left leg then fell into a hole in front of the house next door to her brother's house. She stated that she was not sure about the address of the house near the hole, but it was an odd-numbered house, next to her brother's house. A picture of the house, which had a "big red X" on it, was introduced into evidence.

Her brother then drove her to the hospital, where she received X-rays and medication. Although nothing was broken, the fall caused "a lot of swelling" in Ms. Harrison's leg. She later had to use crutches or a cane to get around, had recurring swelling, and went to physical therapy for her injury.

On August 12, 2016, Ms. Harrison filed a complaint against the City, alleging negligence and premises liability. On July 3, 2017, the City filed a Motion for Summary Judgment and requested a hearing on the motion. On August 9, 2017, the circuit court denied the motion, stating that Ms. Harrison had "generated a genuine dispute [of] material fact, specifically whether [the City] had either actual or constructive notice of any alleged defect which may have caused an injury" to her.

Trial began on January 16, 2018. After Ms. Harrison's testimony, Tomika Speas, her daughter, testified. Ms. Speas identified four photographs that she took immediately after Ms. Harrison's fall on December 1, 2014. Three photographs showed the hole into which Ms. Harrison fell, and one photograph showed the hole in conjunction with the vacant building behind it. She stated that she was on Bruce Street the day of the incident talking with family and friends about her grandfather passing away. They said goodbye, her mom went across the street, and she fell into the hole. Ms. Speas testified that she did

not know the street address depicted in the photographs because there was no number on the vacant house. She did testify, however, consistent with her mother's statement, that her mother fell near her uncle's house, 307 North Bruce Street.

Rokea McCullough testified that she had lived at 303 North Bruce Street from August 2012 to June 2014. In February 2014, she called the City to ask that it cover open water main holes in the 300 block of N. Bruce Street. The service requests, which were admitted into evidence, show that Ms. McCullough made service requests on February 25, 2014, and March 10, 2014. The service request from February 25 stated that Ms. McCullough reported to the City that the entire 300 block of Bruce Street was missing water meter covers, that someone responded on February 26, 2014, and "No Problem Found." The March 10, 2014, service request stated: "[P]er citizen several homes are missing meter covers from 308 up on N Bruce St especially 314, 321, 322, 328, 332, 325, and 329." The request noted: "Meter Cover Replaced" on March 11, 2014.

Ms. McCullough viewed the photographs taken by Ms. Speas. She stated that the hole depicted in the photos in front of the vacant house was present in February 2014. [2]

Ms. McCullough testified that, when she called the City to report the missing water meter covers, the City stated that someone would investigate the issue in approximately a week. When no one from the City came, she called again on March 10, 2014. Someone from the City came out, but they said that she did not specify that the problem was the

[2] On cross-examination, Ms. McCullough testified that she did not know the address that was depicted in the photographs.

"water main cover," so they did not have "the equipment for the water main cover." The hole depicted in Ms. Speas' photographs was not fixed prior to the time she moved in June 2014.

The City presented no witnesses. On January 17, 2018, the jury rendered its verdict, finding the City liable for negligence. This appeal followed.

DISCUSSION

I.

The City's first contention is that the circuit court erred in denying its motion for judgment because Ms. Harrison "presented no evidence" that "the City had received actual or constructive notice that the water meter vault in question was uncovered." Although the service request documents showed that Ms. McCullough made calls to report uncovered water meters, the City argues that these documents do not "establish actual notice to the City of the place where [Ms.] Harrison fell, because no one testified as to the address of her fall," and therefore, "she did not prove that the location of her fall was one of the addresses listed in the 311 reports on which she relies." Moreover, the City argues it had no constructive notice of the uncovered water meter vault because Ms. Harrison presented "no evidence of that location at all." It asserts that the reports cannot be evidence of a dangerous condition because they were "not specific enough," and they predated Ms. "Harrison's fall by more than eight months."

Ms. Harrison contends that "[t]he trial court did not abuse its discretion in denying the City's motion for judgment because [she] presented ample evidence to permit the jury

to resolve the issue of whether the City had actual or constructive notice that the water meter vault in question was uncovered." Ms. Harrison adds that "there is absolutely no requirement under Maryland law that requires a plaintiff to establish the exact street address of a defective condition in order to prevail on a premises liability claim," and in any event, she contends that the record "is replete with evidence and testimony regarding the specific location" where she fell. She asserts that the City had notice of the defective condition based on the February 2014 report that "the entire 300 block" was missing water meter covers and the March 2014 report that homes from "308 up on North Bruce Street" were missing covers. Ms. Harrison asserts that, because "she was crossing at 307 N. Bruce Street heading toward[] her father's house at 337 N. Bruce Street . . . . there was more than sufficient evidence for the jury to infer that the missing cover was one of those previously reported."

A.

Proceedings Below

At the conclusion of Ms. Harrison's case, the City made a motion for judgment, arguing that, because 309 North Bruce Street was not one of the properties mentioned in the March 10, 2014, service report, the City did not have actual notice of the defect.[3] It

[3] The City stated that it could assume that the address of the house with the hole in front was 309 because Ms. Harrison testified that she had walked past her brother's house, 307 North Bruce Street, on her way to her father's house at 337 North Bruce Street, so she was going up the street. The City asked the circuit court to take judicial notice that 309 is the house next door to 307, and it stated in closing argument to the jury that the hole in front of the house next door to Ms. Harrison's brother's house was 309 N. Bruce Street,

asserted that, because there was no evidence showing the length of time that the cover was missing, it did not have constructive notice, and the jury could not determine if it had a reasonable opportunity to repair. Accordingly, the City argued that the evidence Ms. Harrison had presented was "not sufficient to go forward to the jury," and the City was entitled to judgment as a matter of law.

Ms. Harrison disagreed. She argued that she had shown that the City had both actual and constructive notice through the service requests entered as exhibits and Ms. McCullough's testimony that, as of June 2014, the defects remained.

In considering the City's motion, the court suggested that, based on the evidence, the jury could find that the cover "went missing in February and was overlooked, not addressed, ignore[d]." The court ultimately denied the motion, stating that Ms. Harrison had

> produced sufficient evidence for this matter to proceed to the jury. And I think what is clear is that this report prepared by the City per citizen, "Several homes are missing meter covers from 308 up" gives the City constructive notice of the whole set of meter water covers from 308 up to the end of the block and that may give rise to an independent duty to inspect all of them on the block, and that's what they could find.
>
> That if you're out there, you might want to look at all of them because a citizen is saying that, you know, this is a problem in the whole block and who knows, I don't know, do people take them off and sell them for metal? I mean, do people use them and take them to junkyards and that sort of thing? I know there's one case where an employee down in Anne Arundel County was apparently selling them or something and so [they] may have some street value especially in the City where we know there's a high level of addiction

which had not been identified as an address with a missing water meter cover. Given this trial record, the City's assertion at oral argument that it did not know the location of the hole in which Ms. Harrison fell is perplexing, at best.

> and people are doing any and everything they can sometimes to just come up with money to feed addiction. And so for those reasons your motion is denied.

The City did not present any evidence in its case. It then renewed its motion, which the court denied.

B.

Standard of Review

This Court recently explained the relevant standard of review for a circuit court's denial of a motion for judgment:

> We review a trial court's decision to grant or deny a motion for judgment applying the *de novo* standard of review. *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012). "In the trial of a civil action, if, from the evidence adduced that is most favorable to the plaintiff, a reasonable finder of fact could find the essential elements of the cause of action by a preponderance standard, the issue is for the jury to decide, and a motion for judgment should not be granted." *Id.* (citation omitted).

Wallace & Gale Asbestos Settlement Trust v. Busch, 238 Md. App. 695, 705, *cert. granted*, 462 Md. 84 (2018). *Accord C & M Builders v. Strub*, 420 Md. 268, 291 (2011) (Appellate courts reviewing the denial of a motion for judgment perform the same task as the circuit court, affirming the denial of the motion "if there is 'any evidence, no matter how slight, that is legally sufficient to generate a jury question.'") (citations omitted).

C.

Notice

In an action for negligence, the plaintiff must prove: "'1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty,

3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of duty.'" *Marrick Homes LLC v. Rutkowski*, 232 Md. App. 689, 698 (2017) (quoting *Rowhouses, Inc. v. Smith*, 446 Md. 611, 631 (2016)). The issue presented in this case relates to the duty owed by a municipality if it receives notice of a dangerous condition.

This Court recently explained:

> As a general rule, a municipality has a duty to maintain its public works in good condition. *Smith v. City of Baltimore*, 156 Md. App. 377, 383 (2004). That duty is not absolute, however, and the municipality is not an insurer. *Id.* If an entity is injured because the municipality failed to maintain its public works and the municipality had actual or constructive notice of the bad condition that caused the damage, the municipality may be held liable in negligence. *Id.*

Colbert v. Mayor and City Council of Baltimore, 235 Md. App. 581, 588 (2018).

Thus, to establish that the City had a duty here, Ms. Harrison had to produce evidence that permitted the jury to find that the City had actual or constructive notice of the alleged defect. Actual notice is "'knowledge on the part of the corporation, acquired either by personal observation or by communication from third persons, of that condition of things which is alleged to constitute the defect.'" *Id.* (quoting McQullin, *The Law of Municipal Corporations*, § 54:176 (3d ed., July 2017 update)). "Constructive notice is notice that the law imputes based on the circumstances of the case." *Colbert*, 235 Md. App. at 588. "'A municipality is charged with constructive notice when the evidence shows that—as a result of the 'nature' of a defective condition or the 'length of time it has existed'—the municipality would have learned of its existence by exercising reasonable

care.'" *Id.* (quoting *Hartford Cas. Ins. Co. v. City of Baltimore*, 418 F.Supp.2d 790, 793 (D.Md. 2006)). *Accord Smith*, 156 Md. App. at 386 ("[W]hen the evidence shows that a 'bad condition' is such that, by virtue of its nature or the length of time it has existed, the municipality would have learned of it by the exercise of due care, the municipality may be found to have constructive knowledge of its existence.").

Whether a municipality had notice of a defective condition usually is a question of fact, and therefore, it is a question for the jury. *See Magaha v. City of Hagerstown*, 95 Md. 62, 75 (1902) (it was the jury's job to determine whether there was actual or constructive notice); *Perfetti v. Marion County*, 985 N.E.2d 327, 333 (Ill. App. Ct. 2013) (the issue of notice normally is a question of fact); *City of Tulsa v. Pearson*, 277 P.2d 135, 137 (Okla. 1954) ("Whether the municipal corporation had actual notice of the defective condition, or whether it had existed for a sufficient period of time for the municipal corporation to be advised of its existence by the exercise of ordinary care, are questions of fact for the jury under proper instructions from the court."); *Kerr v. City of Salt Lake*, 322 P.3d 669, 680 (Utah 2013) (whether city had constructive or actual notice in municipal negligence action was a question for the jury precluding a grant of a motion for directed verdict); *City of Norfolk v. Hall*, 9 S.E.2d 356, 360 (Va. 1940) ("Whether a city has notice of a defective condition in a street, whether due and proper care was exercised by it in keeping that street in a reasonably safe condition . . . are, ordinarily, questions for the jury, depending upon the circumstances of the particular case.").

Here, viewing the evidence in the light most favorable to Ms. Harrison, a reasonable finder of fact could find that the City had notice of the hole in which Ms. Harrison fell. The evidence showed that Ms. McCullough called the City to request that it cover open water meter holes in the 300 block of N. Bruce Street. The service requests indicate that, in February, she advised that the entire block was missing water meter covers, and in March, she advised that several homes "from 308 up" were missing water meter covers.

Ms. McCullough further testified that the hole depicted in the photo that Ms. Harrison's daughter took was present in February 2014, and that it was not fixed prior to the time she moved in June 2014. This evidence created a question for the jury whether the City had notice of the hole but failed to fix it. Accordingly, the circuit court did not err in denying the City's motion for judgment.

II.

The City next contends that the circuit court erred in denying its requested jury instruction. It asserts that the pattern jury instruction that the circuit court gave had "two crucial and prejudicial defects," which could have been remedied had the court used the City's proposed modified instruction.

Ms. Harrison contends, initially, that the City's argument is not preserved for appeal because it failed "to register a timely objection after the jury was instructed." As we explain below, we agree with Ms. Harrison that the issue is not properly before us, albeit on different grounds.

The City asserts in its brief that it requested the court to give an instruction modifying Maryland Pattern Jury Instruction 23:7, which provides:

> A local government has a duty to keep its public sidewalks, streets, and highways in repair. When defective or unsafe conditions are known or should be known to the government, it has a duty to give adequate warnings of these conditions. The government is considered to have such knowledge when the defect or unsafe condition is such that it could or should have been discovered by the exercise of ordinary care.

It asserts that it requested the court to give the following instruction:

> DUTY OWED BY A MUNICIPAL CORPORATION.
>
> "Generally, a municipal corporation owes a duty to persons lawfully using its public streets and sidewalks to make them reasonably safe for passage. This duty is not absolute and the municipality is not an insurer of safe passage." [*Smith v. City of Baltimore*, 156 Md. App. 377, 383 (2004)]. "[T]here must be a limit to such liability, and it cannot be held responsible for injuries caused by every depression, difference in grade, or unevenness in sidewalks." [*Martin v. Mayor and Council of Rockville*, 258 Md. 177, 181–82 (1970)]. "[S]lightly irregular defects do not subject municipalities to liability for negligence." [*Id.* at 181]. There is no "duty on municipalities to conduct regular inspections of their roadways." [*Smith*, 156 Md. App. at 385].
>
> REQUIREMENT OF PRIOR NOTICE.
>
> Before a municipality may be held liable in negligence, it must be shown that it "had actual or constructive notice of the dangerous condition that caused the injury." [*Id.* at 383–84.]
>
> "[W]hen the evidence shows that a 'bad condition' is such that, by virtue of its nature or the length of time it has existed, the municipality would have learned of it by the exercise of due care, the municipality may be found to have constructive knowledge of its existence." [*Smith*, 156 Md. App. at 386.] "If the defect be of such a character as not to be readily observable, actual notice to the municipality must be shown." [*Keen v City of Havre de Grace*, 93 Md. 34, 39 (1901).]

The transcript reflects the following colloquy between counsel and the circuit court:

THE COURT: . . . Then we go to 23.7. And I know the City has asked to have a modification. Do you want to be heard on that or do you want me to just go ahead and rule?

[Counsel for the City]: I would like to be heard on it, because I think that State bar pattern instruction simply doesn't represent the, perhaps, subtle but significant difference between the applicable decisional law and the State bar instruction. So I do want to be heard on it and I would ask the Court to use the instruction in the way that we have designed it so that the instruction will actually represent the law applicable to this case. Thank you.

THE COURT: Thank you. Do you wish to be heard, Plaintiff?

[Counsel for Ms. Harrison]: Briefly, Your Honor. The Maryland pattern jury instructions gave due consideration to the cases that my colleague[] cited to in her written brief. In fact, they were contained in the . . . dicta of the Maryland pattern jury instructions. These instructions post-date the case law. The individuals who spent hours and days and years creating these instructions certainly considered the information presented in the City's request for an amended jury instruction. The request by the City include[s] requests pertaining to notice. In the three-part test that is applied, it looked at, in light of the jury instruction that exist[s], the instruction that exist[s] does encompass the accurate law for this situation.

THE COURT: Thank you. I'm going to give the pattern and my position on it was the proposed—

[Counsel for the City]: Just exception for the record, Your Honor.

THE COURT: I understand. The proposed instruction 23 crafted by the City I think goes above and beyond what the jury needs to hear and is not specifically tailored to the facts of this case. I took a look at that instruction.

First off, with regard to the duty not being absolute, that can be argued. And the language "There must be a limit to such liability and it cannot be held responsible for the injuries caused by every depression, difference, and grade, or unevenness in sidewalks." That's not tailored to the facts of this case. "Slightly irregular defects do not subject municipality to liability for negligence." That's just not this case.

And so you can argue the law as it has been put down by the Court, but the instruction as crafted does not come close to the facts of this case.

> This is not a case where somebody is saying the sidewalk was uneven, or there was a depression in the asphalt, or something like this. This is a case where there's an allegation that a hole is open which is totally different from somebody having a slip or trip and something that it's just a minor defect in the street.
>
> And so the Court will certainly allow you to argue the law as you see it in Instruction No. 23. The Court does not find this particular instruction as tailored to the facts of this case, and so the Court is going to give the pattern instruction.

The circuit court then instructed the jury. Counsel for the City did not object again at the conclusion of the jury instructions.

The City's contention that the court erred in failing to give its requested instruction is not properly before us. Although there was discussion of a request for an instruction, we could not find in the record the specific instruction requested.[4] Under these circumstances, this issue is not properly presented to this Court. *See Hopkins v. Silber*, 141 Md. App. 319, 331 (2001) (declining to consider whether failure to list contributory negligence in answers to interrogatories barred issue going to jury because "neither the extract nor the record contain[ed] a copy of either appellant's interrogatories or appellee's answers" to those interrogatories); *Mora v. State*, 355 Md. 639, 649-50 (1999) (declining to address issue regarding expungement orders where they were not in the appellate record, noting that "it

[4] At oral argument, neither counsel was able to point to a place in the record where the requested instruction could be found.

is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed").[5]

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

[5] We note that, if the requested instruction were in the record, and if it was as set out by the City, we would be inclined to find no abuse of discretion by the circuit court in declining to give the requested instruction. As the circuit court stated: "the instruction as crafted does not come close to the facts of this case."