Circuit Court for Baltimore City
Case No. 24-C-18-000165

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2780

September Term, 2018

GRACIE THOMPSON CLAXTON

v.

MAYOR & CITY COUNCIL OF BALTIMORE

Nazarian,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: December 26, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Gracie Thompson Claxton ("Claxton"), complains that the Circuit Court for Baltimore City erred in granting the Mayor and City Council of Baltimore's ("the City") motion for summary judgment regarding her claim against it for injuries suffered when a park bench collapsed under her. The court found that the subsequent disposal by the City of the broken bench was not spoliation of evidence and that Claxton was unable to provide evidence sufficient to establish a *prima facie* claim of negligence. Further, the court decided to sanction Claxton for failing to adhere to the discovery scheduling order by not providing timely to the City available medical evidence of her injuries. This timely appeal followed. We shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

On the evening of 29 March 2016, Claxton was attending the Baltimore City Festival of Lights at the Inner Harbor. She sat down on one end of a park bench, which collapsed. At the time of the collapse, another individual was sitting on the other end of the bench, but was uninjured. The reason for the collapse was, and remains, unknown.

A pair of patrolling bicycle police officers arrived propitiously on the scene and contacted 9-1-1. Two emergency medical technicians ("EMTs") were dispatched. At the scene, they described Claxton as alert, oriented, and able to stand with some assistance, although complaining of back pain. She was lifted, via stretcher, into the ambulance and taken to the University of Maryland Hospital. Claxton was ordered ultimately to physical therapy for several months and received chiropractic treatments. She was treated initially

by Dr. Angela Swinson, who passed away prior to trial. Claxton was seen next by Dr. Ebrahim Paryavi, who, before trial, relocated to Alaska, without warning to Claxton. Claxton's final doctor was Dr. Jessica Taylor ("Dr. Taylor"), who supervised the last stages of her physical therapy.

Claxton's counsel engaged in a search for the bench debris, but was unsuccessful. According to her counsel, someone—it is unclear who from the record before us—went to the former location of the bench the day following the collapse, but found most of "[t]he bench the next morning [following the injury] was gone and there was just the [ground] prongs [remaining] . . . ." Although neither the exact timeline nor the reason for the removal of the bench debris is established in this record, the parties agree that the debris was removed promptly from the scene following the collapse. Following the formal statutory notification to the City of her claims, Claxton requested the City to produce the bench on multiple occasions, but it failed to do so, claiming it could not find the debris.[1] Thus, Claxton was unable to inspect the bench to determine whether there was a defect in it.

On 10 January 2018, Claxton filed a claim in the Circuit Court for Baltimore City for personal injuries, in accord with the Maryland Local Government Tort Claims Act

[1] The City claimed later, in answers to interrogatories, that the difficulty in locating the bench was, in part, occasioned by Claxton's errant description of where the injury occurred. When asked who the current custodian of the bench was, the City responded "[i]n that the City is not certain of the location of the bench in question, and there are dozens of benches in the vicinity, it is unable to answer this interrogatory at this time." In a supplement to its answers, the City stated "[i]n that the City did not learn the specific location of the bench until July 3, 2018, it cannot state the current custodian of the bench."

("LGTCA").[2] At the start of trial on 11 September 2018, Claxton attempted to call Dr. Taylor as an expert witness. The City objected to any testimony by Dr. Taylor, noting that she had not been identified as an expert witness prior to trial and, further, that she was not qualified to testify to the need for treatment or the cause of Claxton's injury as Dr. Taylor had not commenced treating Claxton until years after the injury was sustained. Focusing on the failure of Claxton to identify Dr. Taylor prior to trial, despite the opportunity to do so, the court sustained the City's objection. The court further excluded all medical documentary evidence, finding that Claxton did not provide the whole of her relevant medical records until two weeks before trial, thus placing the City in an unfair position to defend.

Following the court's ruling on the medical records, Claxton asked the court to recognize spoliation of evidence by the City regarding the collapsed bench. Alleging there was a defect that caused the bench to collapse, Claxton posited that, preceding trial, the City destroyed the evidence in anticipation of litigation, thus making it unavailable for inspection. She claimed that knowledge of her injury by the EMTs who treated her was sufficient to put the City on notice of probable litigation to follow, and thus destruction of the bench was spoliation. The City disputed this claim, stating that it was unknown who took the bench debris away and that it could have been any of a number of groups, including some not connected to the City.[3] Further, the City pointed out that, although the reason the

[2] Timely statutory notice of the claim was provided to the City on 28 July 2016, nearly four months after the injury was sustained.

[3] Counsel for the City stated "it could have been [the] Waterfront Partnership. It could have been [the] Department of Transportation. Probably not Rec and Parks . . . ."

bench was removed was unknown, it was likely done to avoid the possibility that someone would trip over the debris, rather than to prevent Claxton from inspecting it.

Contributing to the difficulty in locating the bench debris was confusion over the exact location where the injury occurred (and thus on whose property the injury occurred), and which bench Claxton contended was the relevant one. Initially, in her July 2016 LGTCA notice letter to the City, Claxton claimed the bench had been located on property at 201 East Pratt Street. Following a request by the City for more specific information, Claxton changed the address to 700 Light Street, noted by the court to be the "generic address for Harbor Place." The City determined eventually that Claxton's injury occurred in a part of the Inner Harbor called West Shore Park, located closest to the 500 block of Light Street. The Court found that spoliation was not present in this case as, even assuming the City was responsible for the disposition of the bench debris, knowledge of probable litigation before the debris disappeared was not imputed to the City merely because the EMTs participated in the initial evaluation of Claxton's injury and transportation to the hospital. Further, the court took note of the length of time between the incident and the filing of the (LGTCA) notice of claim in July, and surmised that the bench was "probably long gone by that time."

Turning to the negligence claim *vel non*, the court asked Claxton whether she could "prove [the City had] notice of defect," a vital element of her claim. She offered pictures of where the bench was at the time of the injury, which the court accepted as evidence of an accident and removal of the debris, but little else. Noting a recommendation on the website of the original vendor of the bench that the owner of the bench inspect it and tighten

its bolts every six months, which the City failed admittedly to do, Claxton claimed the City had constructive notice of a defect caused by lack of proper maintenance. The court determined that there was no constructive notice, and, without any additional evidence of notice, Claxton could not satisfy her burden to prove a triable negligence claim. Thus, the court granted the City's motion for summary judgment.

QUESTION PRESENTED

Claxton presents the following questions for our consideration:

I. Did the Trial Court err in granting Appellee's motion for summary judgment and rejecting Appellant's motion for sanctions based on spoliation of the evidence?

II. Did the Trial Court err in failing to admit the testimony of a treating doctor, as well as medical reports and bills, under circumstances where witnesses were unavailable to testify at trial?

STANDARD OF REVIEW

This court reviews ordinarily the action on a request for spoliation sanctions under an abuse of discretion standard. *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 51 (2018) (using the abuse of discretion standard for imposition of sanctions); *Solesky v. Tracey*, 198 Md. App. 292, 309 (2011), *aff'd*, 427 Md. 627 (2012) (overturned on other grounds by Md. Code, § 3-1901) (reviewing the refusal to impose sanctions under an abuse of discretion standard). Further, "[w]hen reviewing the circuit court's imposition of sanctions for discovery abuse, we are bound to the court's factual findings unless we find them to be 'clearly erroneous.'" *Klupt v. Krongard,* 126 Md. App. 179, 192 (1999) (quoting Md. Rule 8-131(c)).

When reviewing the granting of a motion for summary judgment, we review without deference the decision as a question of law. *Baltimore County v. Kelly*, 391 Md. 64, 73 (2006). "[I]t is well settled that 'the determination by the trial court of the expert qualifications of a witness will only be disturbed on appeal if there has been a clear showing of abuse of the trial court's decision." *Wantz v. Afzal*, 197 Md. App. 675, 682 (2011) (quoting *Rollins v. State*, 392 Md. (455), 499-500 (2006)). Further, "ordinarily a trial court's ruling on the admissibility of evidence [is] reviewed for abuse of discretion." *Gordon v. State*, 431 Md. 527, 533 (2013).

DISCUSSION

I. Spoliation

Claxton challenges the trial court's refusal to find that the City committed spoliation of evidence, claiming the City knew the condition of its bench and its role in causing her injury, and failed to preserve the bench debris despite knowing at the time of its removal that litigation was probable. The destruction of the evidence over which, Claxton claims, the City had exclusive control, precluded her from inspecting the bench and frustrated her ability to prove her claim of negligence against the City. The City contends that litigation was not perceived as imminent at the time the bench debris was removed as imputed notice of an injury alone is not enough to establish sufficiently the imminence of probable litigation.

The purpose of the spoliation doctrine in Maryland is to protect against a scenario where a party will "support its claims or defenses with physical evidence that it has

destroyed to the detriment of its opponent." *Cumberland Ins. Grp. v. Delmarva Power*, 226 Md. App. 691, 698 (2016). Spoliation itself is defined as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence . . . ." *Keyes v. Lerman*, 191 Md. App. 533, 537 (2010) (quoting Black's *Law Dictionary*, 8th ed. (2004) at 1437). In determining whether a spoliation sanction is proper, Maryland trial courts look to whether there has been "(1) An act of destruction; (2) Discoverability of evidence; (3) An intent to destroy the evidence; (4) Occurrence of the act at a time after suit has been filed, or, if before, at a time when the filing is fairly perceived as imminent." *Klupt v. Krongard*, 126 Md. App. 179, 199 (1999) (citing *White v. Office of the Pub Def. for Md.*, 170 F.R.D. 138, 147 (1997)).

For purposes of this appeal, we consider only whether the trial court abused its discretion in determining whether *Klupt*'s fourth spoliation element was satisfied, as the trial court did not elaborate in rendering its decision regarding the first three elements. Claxton argues that the City knew of her injury and its severity immediately after the incident. Those facts alone, according to her, are enough to show the City should have been on alert for litigation and should have preserved the potential evidence. The City contends that, even assuming that it was minions of the City that removed the bench debris, the persons who did so were not likely sensitive of the nuances of possible litigation and that the bench debris was removed as a part of the regular course of business, i.e., maintenance and preventing someone from falling over it. The trial court agreed with the City's argument, noting the difficulty in finding spoliation "since nobody knew there was a case at the time . . . [it] doesn't appear like . . . anybody did anything out of the ordinary

to try to make the bench go away." Further, the City notes that it was not until four months after the injury that the LGTCA notice of claim was received and that, prior to that notice, litigation could not be perceived as imminent, as every injury does not create a situation where litigation is probable. Again, the trial court agreed, finding that, even if the EMTs who took Claxton to the hospital had a "slightly stronger suspicion than usual . . . I doubt they thought for more than a minute about whether someone's going to sue the City over this."

The trial court did not abuse its discretion in denying a spoliation sanction. An inference that Claxton's injury alone was enough to assume litigation was imminent or probable is not one required to be drawn by the City or the trial court on this record. Approximately four months elapsed between the injury and the filing of the LGTCA statutory notice. Further, not every injury creates a scenario where litigation is perceived as imminent or probable. Even though Claxton was taken to the hospital after her injury, the City was not on notice of possible litigation prior to removal of the bench debris from that act alone.

II. Summary Judgment

Appellant contends that the trial court erred in granting summary judgment to the City, claiming that she generated a genuine dispute of material fact that should have been determined by a jury. In response, the City argues that, because Claxton's claim was based on negligence, neither the record nor the proffered testimony at the motion hearing created a triable dispute as to a breach of duty. Thus, the judge was correct as a matter of law in

granting the motion for summary judgment in favor of the City.

Summary judgment is granted appropriately by a trial judge when "there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 365 (2017). For Claxton to succeed on her claim of negligence against the City, she needed to 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 . . . ." *Warr v. JMGM Grp., LLC,* 433 Md. 170, 181 (2013). As Claxton's claim of negligence is based on a premises liability theory, she was obliged to prove existence and knowledge of a dangerous condition on the part of the City. *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 186 (2015).

Claxton wished the circuit court to recognize that a jury could draw inferences that the City was under a duty to inspect the bench, that had it inspected the bench it would have found a defect, and that its failure to do so is a breach of the City's duty owed to her. We cannot find that the trial court abused its discretion in granting summary judgment. Claxton points out that the website of the manufacturer of the presumed bench recommends "checking connections every six months and more often if the product is in a high-use area."[4] This, according to Claxton, created a duty on the City to inspect the bench every

[4] Landscape Forms, *Care & Maintenance* (May 2, 2019) http://landscapeforms.com/en-US/LFI%20Material%20Tech%20Sheets/care_maintenance.pdf, (last visited Nov. 18, 2019).

six months, which duty it breached by failing to do so. Of course, this asserted duty (and the failure to honor it) assumes something would have been discovered that, if corrected, might have averted the collapse of the bench in this case. The manufacturer's recommendations however, are not sufficient to establish the duty to inspect and a breach thereof for a failure to do so.[5] As we have held in the past, one cannot "infer constructive notice from an alleged failure to conduct reasonable inspections." *Zilichikhis*, 223 Md. App. at 190.

Regardless of the manufacturer's recommendations, even if Claxton were able to establish as a breach of duty the failures to inspect the bench and tighten its fastenings every six months (or more frequently), there is nothing to show that this breach was the cause of her injury. As the trial court noted, "we don't know what was happening with that bench ten minutes or even a day before hand." According to Claxton, the bench appeared serviceable immediately prior to her sitting on it, bolstered by the allegation that another individual was seated safely on the other end of the bench at the time of the collapse (but apparently was not injured by the collapse). Claxton is operating under the assumption that the bench collapsed as a result of some defect, but failed to point to competent and admissible evidence to support this claim, only speculating as to the cause. Even if the bench did collapse because of "some kind of wood rot," or "bolts that were missing," as

[5] Even if Claxton were able to establish that the failure to inspect and tighten the fastenings every six months was a breach of the City's duty to her, she did not provide legally cognizable evidence to show what the duty was at the time of the injury. The manufacturer's recommendations cited by Claxton are dated 23 March 2016, six days prior to the injury.

she claims, without supporting evidence she was unable to muster a prima facie case that the City was negligent. Accordingly, the trial court did not err in granting the motion for summary judgment in favor of the City.

III. Expert Medical Witness and Evidence

Regarding the court's decision to exclude the testimony of Dr. Taylor, as well as all of Appellant's medical records accumulated by other physicians prior to Dr. Taylor's involvement in her care, Claxton does not provide legal reasons for why the court erred, beyond purported unfairness. The City responds by arguing that the circuit court's decision was not an abuse of discretion. We agree with the City. The decision whether to admit or exclude evidence is one vested in the first instance in the trial court and will only be overturned ordinarily where its discretion is abused. *Wareheime v. Dell*, 124 Md. App. 31, 44 (1988). This standard applies also to the issuance of sanctions for failures of discovery. *Rodriguez v. Clarke,* 400 Md. 39, 56 (2007). The trial court complied with Md. Rule 2-433 (a), which states that "if [the court] finds a failure of discovery, [it] may enter such orders in regard to the failure as are just, including . . . an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence . . . ." Claxton admits, as she must, her failure to follow the scheduling order when she provided the whole of her medical records just two weeks before trial and attempted to introduce Dr. Taylor as an expert witness for the first time at trial, nearly six months after the deadline for designating expert witnesses. The court found that it was not "fair to the defense to have to fight against medical records that

they only got about two weeks before trial." As the trial court has great discretion in applying these sanctions, and there was ample evidence on the record that Claxton violated the scheduling order, we affirm the decision of the trial court to exclude the proffered evidence.

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