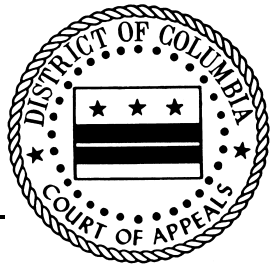
No. 22-CV-0497



Clerk of the Court
Received 10/20/2022 09:09 AM
Filed 10/20/2022 09:09 AM

In the
District of Columbia Court of Appeals

CATHERINE M. LEACH
Plaintiff-Appellant,

V.

ONE PARKING 555, LLC, ET AL.
Defendant – Appellee.

On Appeal from the Superior Court of D.C.
Civil Division
Case No. 2021 CA 000111 B
The Honorable Hiram E. Puig-Lugo
Seeking Reversal of Summary Judgment for Defendant

OPENING BRIEF OF APPELLANT

Kevin M. Leach, Esq.
D.C. Bar No.: 75893
TURBITT LEACH & CRUM, PLLC
8996 Burke Lake Road, Suite 304
Burke, Virginia 22015
Telephone: (703) 323-7000
Facsimile: (703) 323-7224
KevinLeach@TLC.law
Counsel for Appellant Catherine M. Leach

LIST OF PARTIES AND COUNSEL

Plaintiff-Appellant:	Catherine M. Leach
Plaintiff-Appellant's Counsel:	Kevin M. Leach, Esq. Turbitt, Leach & Crum, PLLC
Defendants-Apellees:	One Parking 555, LLC, et al.
Defendants-Appellees' Counsel:	Ellen R. Stewart, Esq. Franklin & Prokopik, P.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

RULES

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CATHERINE M. LEACH,

Appellant,

v. Record No.: 22-CV-0497

ONE PARKING 555, LLC, ET AL.

Appellee,

APPELLANT'S OPENING BRIEF

I. STATEMENT OF JURISDICTION

This appeal is from a final order or judgment that disposes of all parties' claims. Thus, the Court has jurisdiction pursuant to D.C. Court Of Appeals Rule 28(a)(5). (Appendix ("App.") at 273).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred in granting summary judgment to defendant One Parking 555, LLC, by finding that Plaintiff did not meet her burden of showing constructive notice of a dangerous condition.
2. Whether the Superior Court improperly weighed the evidence to determine there was no dangerous condition rather than determining whether there was a genuine issue for trial contrary to the law in Weakley v. Burnham Corp., 871 A.2d 1167 (D.C. 2005) ("On summary judgment, the court does not make

credibility determinations or weigh the evidence.") citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

3. Whether the Superior Court erred in concluding there was no genuine issue for trial regarding constructive notice where the facts indicate the single step riser was not marked according to safety industry standards and codes, (2) two forensic engineers presented uncontradicted evidence that the riser did not conform to industry safety codes and standards, (3) the defendant marked similar single step risers inconsistently in the same garage with proper markings indicating it knew or should have known of the safety hazard, and (4) the defendant was incapable of identifying tripping hazards on the premises because it did not have a qualified employee on staff to manage such risks as required by its lease.

4. Whether the Superior Court erred in finding that One Parking did not have constructive notice of a dangerous condition where (1) defendant did not have a qualified employee on staff to detect such risks it knew or should have known about as required under its Lease, (2) the plaintiff's experts presented uncontradicted testimony that the riser violated industry standards and codes, (3) the Court imposed its own judgment that the riser did not present a

dangerous condition despite two forensic experts' testimony and facts to the contrary and (4) the Court allowed defendant's willful ignorance of the tripping hazard to serve as a defense for lack of notice about the dangerous condition.

III. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a trip and fall by Catherine Leach on an unmarked step up in a parking garage operated by Defendant, One Parking 555, LLC on January 25, 2018. (App. at 15). The defendant sought summary judgment on the basis that defendant and no duty to the plaintiff and the plaintiff's evidence failed to create a jury issue on the element of constructive notice. (App. at 125).

B. Course of the proceedings

The appellant filed the Complaint in this matter on January 14, 2021. (App. at 13). The Defendant's Motion For Summary Judgment was filed on June 3, 2022. (App. at 25). Plaintiff's Opposition was filed on June 10, 2022, (App. at 125), and Defendants' Reply was filed on June 20, 2022. (App. at 273).

C. Disposition of Court Below:

The Court (Puig-Lugo, J.) filed an Order granting One Parking 555, LLC's ("One Parking") Motion For Summary Judgment on June 23, 2022. (App. at 288). The

plaintiff filed a notice of appeal from the ruling on June 29, 2022 on the issue of constructive notice only, as the Court ruled in favor of plaintiff on the issue of duty owed to the plaintiff by defendant. (App. at 296). A briefing order was issued on September 15, 2022 setting the due date for Appellant's opening brief and appendix on October 25, 2022. The Appellee's brief is due on November 25, 2022.

IV. STATEMENT OF THE FACTS

This case involves a trip and fall that occurred on January 25, 2018 in an underground parking garage in Washington D.C. (App. at 13-18). As plaintiff approached the P3 stairwell landing of the defendant's parking garage she tripped on a single step riser which was not properly marked and created an appearance of a flat surface. (App. at 130). Plaintiff's liability experts, Anthony Shinsky of Robson Forensic, (architect) and Michael Leshner, P.E., (safety expert/engineer) concluded that the riser a was dangerous condition because it was not properly marked according to D.C. Property and Maintenance Code and industry safety standards. (App. at 130)(See, Robson Forensic, report Exhibit A); (Michael Leshner, P.E. report, Exhibit B). Defendant One Parking 555, LLC ("One Parking") has no safety expert to contest the plaintiff's expert opinions. (Id.)

As discussed below, One Parking (as the sole tenant, occupier and operator of the property by Lease dated August 9, 2016) owed the same duty of care as if it were

the owner under D.C. Jury Instruction 10.04. (App. at 131). Defendant was required to inspect the premises for dangerous conditions it knew or should have known about, regardless of whether the condition existed before or at the time of the Lease. (App. at 131); See, D.C. Jury Instruction 10.03; Daly v Toomey, 212 F. Supp. 475, 479 (D.D. C. 1963); Sandoe v. Lefta Associates, 559 A.2d 732, 741-743 (D.C. 1988.) One Parking never inspected the premises for latent dangers, and in fact, defendant had no qualified employee to perform such inspections due to budget constraints. (App. at 131); (See, Mark Pratt, Corporate Designee deposition, Exhibit C, p. 173:8-22). Defendant sought to blame the owner for any defective conditions, contending it owed no duty to the plaintiff as the occupant and operator of the premises. There is no authority that supports defendant's claim. See, Daly v. Toomey, supra, 212 F. Supp. at 479. The trial court below agreed that the defendant did in fact owe a duty to the plaintiff to maintain the premises in a safe condition. Therefore, the issue of whether defendant owed a duty to plaintiff is not on appeal by any party and the discussion herein is provided for the Court's background and understanding. (App. at 288).

Defendant One Parking cannot claim lack of constructive notice of the defect when the defect existed for a year and a half before the fall at issue, the defect was visible to defendant's agents and employees on a daily basis, and defendant failed to

have qualified personnel to detect the dangerous condition on property it agreed to manage in a "businesslike, first class and efficient manner at all times during the Term of this Lease." (App. at 131); (See, Lease, Exhibit D, section 5(a)).

The additional facts pertaining to this appeal are set forth below as plaintiffs concise statement of genuine issues.

A. PLAINTIFF'S CONCISE STATEMENT OF GENUINE ISSUES

For the Court's convenience, the plaintiff's concise statement of genuine issues corresponds to the defendant's statement of undisputed material facts:

1. Admit (App. at 131)
2. Admit (App. at 132)
3. Admit (Id.)
4. Admit (Id.)
5. It is admitted that plaintiff's daughter heard the plaintiff state, "I thought it was flat. I tripped." Plaintiff disputes that the inference that this is the only allegation that the unmarked riser caused the fall. The Complaint states that plaintiff, "On January 25, 2018 … was an invitee and/or patron of the business, premises, parking garage, and/or building controlled, inspected, maintained, managed, operated, and/or repaired by Defendants One Parking, LLC. …[A]s the plaintiff attempted to walk to a stairway door at the lower

level of the parking garage located at 555 Twelfth Street, N.W., Washington, D.C. 20004, she tripped an fell on an improperly marked and inconspicuous single step and, as a result, she sustained serious and permanent injuries. … It was the duty of the defendants to exercise ordinary care…. Notwithstanding said duty, the defendants did carelessly, negligently, and recklessly, fail to exercise ordinary care under the circumstances to keep the premises reasonably safe, and failed to control, inspect, operate, maintain, manage, and/or repair the business premises, parking garage, and/or building, and failed to warn of dangerous, and/or hazardous conditions that would not be readily apparent to a person, such as plaintiff, coming onto the property. (App. at 13); (See, Complaint at para. 6-9.) Plaintiff's answers to interrogatories also state that her husband, a witness to the event walking behind her stated, "we were walking through the bottom level of the parking garage looking for an elevator to get to the street after parking the car. We saw a door for a staircase and began walking toward it…. I was walking in a normal fashion and suddenly tripped on a concrete riser that was not painted with a yellow tape or paint on the top or the riser to indicate there was a step." (See, Answer to Interrogatory, 6, Exhibit E). The affidavit of Kevin Leach, Exhibit F, states that, "After parking the vehicle my wife and

I were walking toward a stairwell door for an exit to the street level. My wife was walking a few steps in front of me with her hands in her pockets. As she was walking toward the stairwell area, she was looking forward toward the door, she was not talking or distracted, and was not carrying anything in her hands. As she approached the stairwell area, I heard her foot strike the single step riser that appeared to be a flat surface. She immediately fell forward and struck her face and forehead on the cement with great force. The single step had no warnings or conspicuity tape or paint on its surface indicating a change in level. The single step appeared to blend into the yellow lines as a flat surface." (App. at 132); (See, Kevin Leach affidavit, Exhibit F, para. 4-7).

6. It is admitted that the parking garage is owned by 555 12th REIT, LLC. ("REIT"). Plaintiff disputes the inference that defendant One Parking 555, LLC, as sole tenant, occupier, and operator of the Parking Facility, was not responsible for the safety of the premises under its Lease. (App. at 133); (See, Office Parking Facility Lease, dated August 19, 2016. (Exhibit D).
7. It is admitted that Manufacturers Life Insurance Company (Man Life) was named as the property manager and Jones Lange LaSalle Americas (JLL) was named sub-property manager of the parking garage on January 7, 2014.

Plaintiff disputes the inference that these entities were responsible for the incident on January 25, 2018. One Parking signed the Lease for the Parking Facility property "as is" on August 19, 2016 and became responsible for the safety of the premises including inspection, maintenance, repair, and warning of dangerous conditions it knew or should have known about, including the defective riser. (App. at 133); (See, Office Parking Facility Lease, Exhibit D); (D.C. Standard Jury Instructions 10.04 and 10.03).

8. Plaintiff disputes that JLL was responsible for the day to day on site management of the parking garage *on January 25, 2018*. JLL was named sub-property manager on January 7, 2014 and One Parking became responsible for the inspection, maintenance, repair and safety of the property *two years and a half years later* on August 19, 2016. (App. at 134-135); (Shinsky report, Exhibit A, p. 2-3); (See, Office Parking Facility Lease, Exhibit D). Defendant One Parking (not JLL) was the sole tenant and operator the Parking Facility on January 25, 2018. (See, deposition of Mark Pratt, Corporate Designee, Exhibit C, p. 172:17-20). The Lease with 555 12th REIT, LLC states in **6.0 Maintenance and Repairs, Equipment and Signage (a) "**Tenant shall at all times during the term maintain the Parking Facility in good order and repair and in a clean and *safe condition*. Tenant,

at its sole cost and expense, shall perform all maintenance and cleanings as reasonably necessary to maintain the Parking Facility at all times in clean condition and in compliance with all applicable Legal Requirements, including, without limitation, the following: … *(iv) Floor Striping and curb painting*. (Id.); (See, Lease, Exhibit D, p.7, 6(a)) (emphasis added). The Parking Facility Lease, section 1, identifies the premises to be operated as the *entire* parking facility premises, without reservation. One Parking was also responsible for operating the premises "as is", and thereby accepted responsibility for managing and correcting any pre-existing dangerous conditions. (Id., para. 6(c)("Tenant shall accept the Parking Facility in its "as is" condition…"). Defendant One Parking failed to understand its Lease and legal obligations because it never had a safety officer or employee on its staff to inspect for dangerous conditions on the premises. (Pratt deposition, Exhibit C at p. 173:8,-74:3) .One Parking admitted that its budget did not allow for a safety officer to inspect the premises for hazards and the owner was not willing to subsidize that position, even if it was for the betterment of their location. (Id., p. 173:11-22).

9. Plaintiff admits that a substantial garage rehabilitation project was undertaken in 2015 (three years before the plaintiff's fall). However,

Plaintiff disputes the relevance of this statement. Pursuant to the Lease on August 18, 2016, One Parking became sole tenant, operator and operator of the entire parking facility. The Lease required One Parking to make the premises safe, including inspecting for dangerous conditions like the improperly marked riser in this case. One Parking did not make any such inspections and did not employ a safety officer to assess safety risks due to budget constraints. (App. at 135); (Pratt deposition, Exhibit C, at p. 173:8,-74:3)

10. No dispute that One Parking began operating the subject parking garage pursuant to the Lease dated August 19, 2016. (Id.)

11. No dispute that plaintiff alleges that she tripped and fell on an improperly marked and inconspicuous single step which led up to a stairwell landing on the P3 level of the parking garage at issue. (Id.)

12. No dispute as to Mr. Shinsky's description of the area where the plaintiff tripped and fell. It is disputed that this is Shinsky's full description of the hazard. Mr. Shinksy describes the riser as a "dangerous condition" that caused Mrs. Leach to trip, fall, and be injured stating, "The single riser step up between the garage floor and the stairwell landing was an inconspicuous hazard in the larger environment. The yellow painted lines were confusing

and created an optical illusion for Ms. Leach that the yellow painted riser was a stripe on the garage floor indicating the edge of a designated walkway." (App. at 135- 136); (Shinsky report, Exhibit A p. 5, section 4.1).

13. No dispute that the plaintiff does not remember the subject occurrence due post-traumatic amnesia from a traumatic brain injury. It is disputed that this statement reflects the facts of the trip and fall. The plaintiff's husband witnessed the event as set forth in his affidavit and in the plaintiff's answers to interrogatories. (App. at 136); (Kevin Leach, Affidavit, Exhibit F):

"As she [plaintiff] was walking toward to the stairwell area, she was looking forward toward the door. She was not talking or distracted, and was not carrying anything in her hands." (App. at 136); (Affidavit, Exhibit F, Paragraph 5.)

"As she approached the stairwell area, I heard her foot strike the single step riser that appeared to be a flat surface. She immediately fell forward and struck her face and forehead on the cement with great force." (Id., para. 6)

"The single step riser had no warnings or conspicuity tape or paint on its surface indicating a change in level. The single step appeared to blend into the yellow lines as a flat surface. (Id., para. 7)

"My wife did not fall as a result of fainting, dizziness, or distraction. She tripped and fell as a result of walking into the unmarked single step that appeared to be flat." (Id., at para. 9).

The plaintiff's daughter Abigail Leach also heard the plaintiff say she tripped and fell because she thought the surface was flat. (App. at 136); (See, Abigail Leach Affidavit, Exhibit G).

14. No dispute that expert engineer Michael Leshner's stated that he assumed that the plaintiff did not see the step. The facts of the trip and fall event are described by the plaintiff's husband who witnessed the event and daughter Abigail Leach who witnessed the event shortly after it occurred and heard the plaintiff say she tripped because she thought the surface was flat. (App. at 136-137).

15. No dispute that expert engineer Michael Leshner assumed plaintiff did not see the step because in his experience, where people trip on a raised edge and fall forward, it is because they didn't see it. (App. at 137); (See, Leshner deposition, Exhibit H, p. 7:8 -22; 26:13.)

16. No dispute that expert safety engineer Michael Leshner opined that there was an optical illusion created by the improper curb marking. It is disputed that this opinion represents the sole basis for the optical illusion of the flat

surface. The facts are described by the plaintiff's husband who witnessed the event indicates plaintiff walked into the curbing as though it was flat, and daughter Abigail Leach who heard the plaintiff say she tripped because she thought the surface was flat. (Id.)

17. Disputed that there are no standards on how the riser should be safely marked. "The District of Columbia has a Property and Maintenance Code that says the means of egress shall comply with the fire code, and the fire code requires that it be free of hazards." (Leshner deposition, Exhibit H, p. 19:7-17). Mr. Leshner also stated that ways to use visual cues to facilitate step identification include [sloping] handrails, delineated nosing edges, tactile cues, warnings signs, contrast in surface colors, accent lighting, use of ramp instead of step, contrasting marking stripe on each stepping surface at the nosing or leading edge.) In this case, the defendant's own markings of the riser on a parking garage level above P3 indicates that defendant knew or should have known how the riser should be safely marked. Defendant's own standards were not followed on the P3 level riser at issue. (App. at 137); (See, Shinsky report, Exhibit A, p. 7, photo 2.) The hazard at issue was not identified because One Parking did not have a safety professional on its staff to perform safety inspections due to budgetary restrictions. (App. at 137);

(See, Mark Pratt, corporate designee deposition, Exhibit C, p. 173:8-22). Mr. Leshner also opined, "if the owner or lessee had engaged a safety professional to review the building, they would have spotted this in a minute." (App. at 137- 138); (Leshner deposition, Exhibit H, p. 34:8-11).

18. Disputed as stated. See, answer to 17 above. (App. at 138).

19. Disputed to the extent the description suggests different shades of gray implies there is no hazard. This surface is not conspicuous by itself to warn of the dangerous condition. The photograph of the riser on another level of the same garage with conspicuity markings on the surface edge indicates how the riser requires proper contrast to properly warn invitees. (App. at 138); (Shinsky report, Exhibit A, p. 7)

20. Disputed as stated. Plaintiff admits there is a gap of a few inches between the yellow lines and the riser but this is a de minimus "gap" that does not avoid the illusion of a flat surface. (App. at 138); (See Shinsky report, Exhibit A, p. 7, photograph 2). Mr. Shinsky's report states, "adequate delineation of the single step would have included proper markings, warning signs, and a sloped handrail. *Guidelines for Stair Safety, Section 2.2.1* requires making the edge of stair treads as follows: … Mark the edge of each tread with a single built in or painted stripe which (1) contrasts notably

with the remainder of the tread in color and texture…" (App. at 138); (Id., p. 9).

21. Disputed to the extent that a guardrail along both sides of the landing serves to properly warn of the dangerous condition. The non-sloping guardrail is a "barrier" directing the flow of traffic, but does not serve as a warning of a step. (App. at 138); (Leshner deposition, Exhibit H, p. 46:8- 47:5.) See, answer to 20 above.

22. Disputed to the extent that lack of awareness of any other claims or injuries at this location by defendant serves to establish the riser at issue was not a hazard. "If no one had ever fallen there, it would still be a hazard. A hazard is an accident waiting to happen." (App. at 139); (Leshner deposition, Exhibit H, p. 54:2-5).

23. No dispute as to paragraph 23. See, response to 22 above. (App. at 139).

V. SUMMARY OF ARGUMENT

The Court erred by ruling that plaintiff did not present specific facts that a dangerous condition existed. (App. at 294). Two forensic engineers opined that "the single step was dangerous because it was unnecessary, was not adequately delineated through painted markings, handrails and signage, " (App. at 162), and "the single step and lines violated industry codes, standards and regulations"

(App. at 172), creating an optical illusion that made the step inconspicuous. The expert reports were uncontradicted but were disregarded by the Court. (App. at 279-280). The facts showed that plaintiff walked toward the single step riser, not talking, not distracted, and not carrying anything in her hands, when her foot struck the riser and she fell forward. The single step appeared to blend into the yellow lines as a flat surface. (App. at 247, 249.) When asked by her daughter, what happened, the plaintiff, while bleeding profusely, exclaimed, "I thought it was flat. I tripped." (App. at 249.) The riser was not marked in the same manner as the riser on the floor directly above the accident location, which riser had proper conspicuity tape or paint on its top surface according to industry standards and codes. (App. at 157). Viewing the facts in the light most favorable to plaintiff, a reasonable jury could conclude the riser at issue was improperly marked and therefore created a dangerous condition that the defendants knew or should have known about.

The Court's decision granting summary judgment violates the rule that a Court may not weigh the evidence to determine the truth on its own but may only identify if there are issues of fact for trial in a motion for summary judgment. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249, 106 S.Ct. 2505, 91 Led.2d 202 (1986)("[A]t the summary judgment stage the judge's function is not himself to

weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); Weakley v. Burnham Corp., 871 A.2d 1167, 1173, 1177 (D.C. 2005)("With due respect to the court in Cumberland and to the trial judge in this case, we are of the opinion that this standard is too exacting, especially where, as here, the plaintiff has produced expert evidence … to the effect that every encounter with an asbestos product contributes significantly to the contracting of asbestosis.").

In this case, the Court improperly disregarded expert evidence and weighed the facts by itself to determine no reasonable jury could conclude that a dangerous condition existed in the riser even though it did not conform with the industry standards or codes, did not conform with the defendant's other riser markings on the floor above, and the plaintiff credibly exclaimed under the stress of the moment, while bleeding profusely, "I thought it was flat. I tripped." (App. at 249). There clearly exists a genuine issue for trial. Anderson, supra, at 249; Weakly, supra, at 1177.

The Court also erred when it ruled the absence of prior injuries or complaints is evidence that the step represented a dangerous condition. (App. at 279-280). Such evidence is inadmissible hearsay and misleading as throwing no light upon the facts of the case before the jury. See, e.g. Sanitary Grocery Co. v. Steinbrecher, 183 Va.

495, 499-500, 32 S.E.2d 685, 686-87 (1945); D.C. Rule of Evidence 403; Oh v. National Capital Revitalization Corporation, 7 A.3d 997, 1010-1011 (D.C. 2010).

Finally, the Court erroneously based its ruling on the statement that plaintiff's expert witness opined that additional signage was advisable but not required. (App. at 280). This statement disregards both plaintiffs' experts' opinions that the defendant failed to exercise ordinary care because the riser violated safety codes, industry standards including ASTM F 1637-13, NFPA 101 Life Safety Code, and the District Of Columbia Property and Maintenance Safety Code 702.1, which established a dangerous condition existed on the premises because it was not properly marked. (App. at 151, 161). A jury could reasonably conclude that the defendant did not exercise ordinary care to make the premises safe when it failed to mark both risers equally, failed to comply with industry standards and safety codes, and failed to have a qualified person on its staff to inspect for safety hazards. The Court improperly weighed the evidence to determine that no issue of fact existed as to the defendant's constructive notice of a dangerous condition on the riser and the Order granting summary judgment to defendant should be reversed.

VI. ARGUMENT

A. Standard of Review

"On appeal, this court reviews summary judgment de novo, conducting an independent review of the record and applying the same substantive standard used by the trial court." Murphy, supra, 924 A.2d at 991; see also Weakley, supra, 871 A.2d at 1173. We determine the existence of any genuine issue of material fact by reviewing the pleadings, depositions, admissions and any affidavits on file. Graff v. Malawer, 592 A.2d 1038, 1040 (D.C. 1991); Holland v. Hannan, 456 A.2d 807, 815 (D.C.1983). We view the record in the light most favorable to the non-moving party. Murphy, supra, 924 A.2d at 991; Weakley, supra, 871 A.2d at 1173. The party opposing summary judgment "is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." Beard, supra, 587 A.2d at 198; see also Holland, supra, 456 A.2d at 815. "**On summary judgment, the court does not make credibility determinations or weigh the evidence**." Weakley, supra, 871 A.2d at 1173 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); accord Holland, supra, 456 A.2d at 814-15. Rather, the court reviews the record to see if it "demonstrates that there is no genuine issue of material fact on which a jury could find for the non-moving party." Holland, supra, 456 A.2d at 815. Thus, "if an impartial trier of fact, crediting the non-moving

party's evidence, and viewing the record in the light most favorable to the non-moving party, may reasonably find in favor of that party, then the motion for summary judgment must be denied." Weakley, supra, 871 A.2d at 1173. See, Tolu v. Ayodeji, 945 A.2d 596 (D.C. 2008).

B. The Defendant Had Constructive Notice Of The Dangerous Condition

The Court's decision states that "plaintiff fails to present specific facts showing that a dangerous condition existed." The record, however, establishes substantial factual evidence that the trip and fall occurred due to a dangerous condition that created an optical illusion causing the plaintiff to trip and fall:

1. Affidavit of Kevin M. Leach

"After parking the vehicle my wife and I were walking toward a stairway door for an exit to the street level. My wife was walking a few steps in front of me with her hands in her pockets. As she was walking toward the stairwell area, she was looking forward toward the door, she was not talking or distracted, and was not carrying anything in her hands. As she approached the stairwell area, I heard her foot strike the single step riser that appeared to be a flat surface. She immediately fell forward and struck her face and forehead on the cement with great force. The single step riser had no warnings or conspicuity tape or paint

on its surface indicating a change in level. The single step appeared to blend into the yellow lines as a flat surface." (App. at 247). The Court improperly disregarded this evidence demonstrating that the improper markings caused the appearance of a flat surface and therefore created a tripping hazard.

2. Affidavit of Abigail Leach

"I asked my mother what happened and she said, "I thought it was flat, I tripped." (App. at 249). The Court improperly disregarded this evidence of how the improper markings caused an optical illusion of a flat surface to create a tripping hazard instead of viewing the testimony and inferences in light most favorable to the plaintiff.

3. Forensic Expert Engineer Reports By Anthony Shinsky and Michael Leshner

The plaintiff also presented two forensic expert reports establishing the dangerous condition of the riser:

a. Anthony J. Shinsky, AIA, NCARB, BI-ICC, Robson Forensic:

1. Mrs. Leach was caused to trip and fall because the single riser step up between the garage floor and the stairwell landing was an inconspicuous hazard in the larger environment. The yellow

painted lines were confusing and created an illusion for Ms. Leach that the yellow painted riser was a stripe on the garage floor indicating the edge of the designated walkway. (App. at 155).

2. The single riser stair was not reasonably conspicuous due to its lack of effective delineation, lack of handrails, and the lack of effective warnings or signs or the use of other visual cues to indicate the presence of the single step. (App. at 156)
3. The markings of another single step riser provided proper conspicuity tape marking the surface of the single step which were not included on the step up at issue. (App. at 157).
4. The single step was unreliably detectable by patrons. The painted zebra stripes and painted riser face made the area confusing without adequately identifying the change of elevation up to the landing. The Handbook of Warnings provides technical information on preventing injuries from falls: "Simply put, designs and conditions that violate a pedestrian's normal expectation or for which sensory cues are not sufficient to indicate a hazard, tend to result in fall incidents. These situations

can be categorized into four basic conditions of the walking surface: (2) unexpected changes in level." (App. at 161).

5. Washington D.C. has its own version of a property maintenance code. At the time of Ms. Leach's trip and fall, the City enforced the 2013 DC Property Maintenance Code, with Amendments. The Code reads in part:

> 301.2 Responsibility; The owner of the premises shall maintain the structures and exterior of the property in compliance with these requirements, except as otherwise provided for in this code…
>
> And
>
> 305.4 Stairs and walking surfaces: Every stair, ramp, landing, balcony, porch, deck or other walking surface shall be maintained in sound condition and good repair and maintained free from hazardous conditions. (App. at 162).

6. It would have been a simple matter for the property owner and/or their property manager to have either removed the single step transition, replacing it with a sloped surface at the time of the rehabilitation work. If that was not accomplished, then adequate markings, visual cues and a placard warning sign indicating the presence of the step should have been provided. The failure to

do so was unreasonable and caused Ms. Leach to trip, fall and be injured. (App. at 162).

The Court improperly disregarded the entire expert report of Robson Forensics' architect, Anthony J. Shinsky, AIA, NCARB, BI-ICC, contrary to the dictates of Weakley, supra to conclude the riser step up did not present a dangerous condition. Thus, the Court's order granting summary judgment should be reversed and the case remanded for trial.

b. Michael Leshner, P.E.

Mr. Leshner's report, Photo 2, shows the location of the incident, with Ms. Leach's blood on the ground. He correctly notes that she was walking toward the door and did not see that there was a single step. (App. at 167). As shown in photos 2,3, and 4, the yellow striping on the floor and vertical step riser create an optical illusion that makes the step inconspicuous. All the yellow painted surfaces appear to be on the same plane. (App. at 169). Photo 5 depicts how a minor alteration of the scene to make the separation of the yellow lines from the riser more apparent removes the expectation that the surface will remain flat. This visual cue removes the optical illusion that there is no step up. (App. at 170).

Mr. Leshner's report states that the single step up where this incident occurred was not conspicuous but was in fact hazardous because it gave the appearance to the

plaintiff, from her angle, that there was no step up. This type of marking violated the District of Columbia Property Maintenance Code 702.1 requiring a safe, continuous and unobstructed path of travel that complies with the fire code. The fire code requires a ramp for changes in level of less than 21 inches, or a stair that is properly marked. The Court improperly disregarded the forensic report of Michael Leshner, P.E., and determined on its own, that no reasonable jury could conclude that the improperly marked riser could be a dangerous condition, contrary to the dictates of Weakley, supra. Thus, the Order granting summary judgment should be reversed.

C. The Court Improperly Usurped The Jury's Role To Decide The Issue Of Constructive Notice And Credibility Of The Plaintiff.

The party opposing summary judgment "is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." Beard, supra, 587 A.2d at 198; see also Holland, supra, 456 A.2d at 815. "**On summary judgment, the court does not make credibility determinations or weigh the evidence**." Weakley, supra, 871 A.2d at 1173 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); accord Holland, supra, 456 A.2d at 814-15. Rather, the court reviews the record to see if it "demonstrates that there is no genuine issue of material fact on which a jury could find for the non-moving

party." Holland, supra, 456 A.2d at 815. Thus, "if an impartial trier of fact, crediting the non-moving party's evidence, and viewing the record in the light most favorable to the non-moving party, may reasonably find in favor of that party, then the motion for summary judgment must be denied." Weakley, supra, 871 A.2d at 1173. See, Tolu v. Ayodeji, 945 A.2d 596 (D.C. 2008)

Here, the plaintiff's exclamation to her daughter that she thought the surface was flat, made under the stress of the moment, and immediately after falling, bleeding profusely, indicates a high degree of reliability because she had no time for reflection and the circumstances are such that a jury could conclude she perceived the surface was flat as marked. (In addition, her husband testified that the plaintiff was walking normally, looking straight ahead, not distracted and struck the riser as though it was a flat surface.) Under Weakley, the Court should not have disregarded the plaintiff's statement, or the facts from the eye witness, in favor of weighing the plaintiff's credibility and in the light least favorable to the plaintiff. The Court's decision violated the rules governing summary judgment motions under long-standing D.C. law, and the Order should be reversed.

D. The Defendant Had Seventeen Months To Detect The Dangerous Condition.

In order to prove constructive notice a plaintiff must present evidence that a dangerous condition existed for such a duration of time that, had reasonable care been exercised, the hazard would have been discovered. Lynn v. District of Columbia, 734 A.2d 168, 171-72 (D.C.1999) (reversing the trial court's grant of summary judgment because a genuine issue of fact regarding constructive notice existed); Marinopoliski, supra, 445 A.2d at 341 (affirming directed verdict because there was no basis for the jury to reasonably conclude that the hazard created was foreseeable).

In determining whether notice is sufficient to rise to the level of constructive notice, each case "must be determined by its peculiar circumstances." Lynn, supra, 734 A.2d at 170." See, Wilson v. Wmata, 912 A.2d 1186 (D.C. 2006). See, also, Hines v. Safeway Stores, Inc., 379 A.2d 1174,1175 (D.C. 1978) ("[c]onstructive notice is but a shorthand way of saying that **shopkeepers are under a duty to police their premises with enough frequency to prevent the existence of dangerous conditions for unreasonably prolonged periods**") (emphasis added); Anderson v. Woodward & Lothrop, 244 A.2d 918 (D.C.1968) (the condition must have "existed for such a length of time that, in the exercise of reasonable care, its existence should

have become known and corrected.") (emphasis added); Smith v. Safeway Stores Inc., 298 A.2d 214, 217 (D.C.1972) (finding no constructive notice where plaintiff only proved "mere presence on the floor of a single piece of debris for an undetermined period which might indicate neither that the grocer caused it to be there nor that he knew or should have known that it was there.") (emphasis added).

Here, defendant's Lease required One Parking to make the premises safe, including inspecting for dangerous conditions like the improperly marked riser. (App. at 131). Defendant, moreover, agreed to discharge its duties in a businesslike, first class and efficient manner at all times during the Term of this Lease. (App.at 131). One Parking, however, did not make any safety inspections because it did not employ a safety officer or other qualified employee to assess safety risks due to budget constraints. (App. at 135, paragraph 9). One Parking began operating the subject garage pursuant to the Lease dated August 19, 2016. (App. at 134, paragraph 8), and the plaintiff's fall occurred on January 25, 2018. (App. at 15). The defendant had seventeen months to conduct a safety inspection but did not do so. (App. at 134). Under D.C. law, the defendant had constructive notice of the dangerous condition at issue which it knew or should have known about and corrected, but breached its duty to police their premises with enough frequency with *qualified personnel* to prevent the existence of the dangerous condition for unreasonably prolonged periods. See,

Hines v. Safeway Stores, Inc., 379 A.2d 1174,1175 (D.C. 1978). As Michael Leshner, P.E. testified, "If the owner or lessee had engaged a safety professional to review the building, they would have spotted this [dangerous condition] in a minute." (App. at 138, paragraph 17.) The Court's decision granting summary judgment to the defendant should be reversed.

E. A Jury Question Exists As To Whether The Defendant Acted With Ordinary Care To Make The Premises Safe By Not Hiring Qualified Personnel To Detect Safety Issues On The Premises.

The applicable standard for determining whether an owner or occupier of land has exercised the proper level of care to a person lawfully upon his premises is reasonable care under all of the circumstances. Holland v. Baltimore & Ohio R.R. Co., 431 A.2d 597, 599 (D.C.1981) (en banc); Blumenthal v. Cairo Hotel Corp., 256 A.2d 400, 402 (D.C. 1969) ("This jurisdiction does not recognize varying standards of care depending upon the relationship of the parties but always requires reasonable care to be exercised under all the circumstances"). See, Sandoe v. Lefta Associates, 559 A.2d 732, 738 (D.C. 1988).

If the trial court's order is allowed to stand, it will be the first time the D.C. Court of Appeals has endorsed the defense that a commercial property owner serving the public may escape liability by claiming willful ignorance of existing hazards.

This decision sets a dangerous precedent by creating bad public policy in the District of Columbia that would have *many* negative repercussions to the public who expect that commercial building owners and occupants will manage their property safely. Here, two forensic engineers for the plaintiff have established that the riser was a dangerous condition, but the defendant did not recognize the hazard because it had budget constraints and did not hire a necessary a safety professional to inspect the premises. (App. at 61); (App. at 172). The Court should not excuse defendant's ignorance of safety standards or allow it to escape liability by breaching contractual obligations to operate the premises safely. The Court's decision that the defendant had no constructive notice encourages similar irresponsible behavior by other commercial enterprises serving the public in the District of Columbia. From a policy perspective, the Court's decision must be reversed to ensure public safety and avoid creating loopholes for the non-performance of commercial property owner/occupant contractual obligations.

VII. CONCLUSION

For all of the foregoing reasons, counsel for the plaintiff respectfully requests that the Court reverse the order granting summary judgment to One Parking, Inc and remand this matter for trial.

Respectfully Submitted,
CATHERINE M. LEACH
By Counsel

/s/ Kevin M. Leach, Esq.
Kevin M. Leach, Esq.
D.C. Bar No.: 75893
TURBITT, LEACH & CRUM, PLLC
8996 Burke Lake Road, Suite 304
Burke, Virginia 22015
Telephone: (703) 323-7000
Facsimile: (703) 323-7224
KevinLeach@TLC.Law
Counsel for Appellant Catherine M. Leach

REQUEST FOR ORAL ARGUMENT

COMES NOW Appellant Catherine M. Leach and requests oral argument on this matter. So far as appellant has ascertained, no D.C. Appeals Court case has granted summary judgment to a defendant where the trial court has so clearly weighed the evidence in the face of many issues of fact pertaining to constructive notice of a dangerous condition. The decision violates long-standing D.C. law governing the trial of such matters and should not be allowed to stand. Allowing a parking garage owner or occupant to operate the premises, but claim ignorance of dangerous conditions by failing to have qualified employees to inspect and detect hazardous injuries it agreed to manage, is an absurd result that will create many other safety concerns for the citizens of the District of Columbia. The decision should be overruled and the case remanded for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October 2022, I electronically filed the foregoing with the Clerk of Court, using the E-Filing system and documents were sent via electronic mail and regular mail to:

Ellen R. Stewart, Esq.
D.C. Bar No.: 1011952
FRANKLIN & PROKOPIK, P.C.,
Two North Charles St., Suite 600
Baltimore, Maryland 21201
Telephone: (410) 230-2670
Facsimile: (410) 752-6868
estewart@fandpnet.com
Attorneys for Defendant,
One Parking 555, LLC

One Parking 555, Inc.
c/o The Registered Agent Company
1100 H. Street, N.W., Suite 840
Washington, D.C. 20005

/s/ Kevin M. Leach, Esq.
Kevin M. Leach, Esq.
D.C. Bar No.: 75893
TURBITT, LEACH & CRUM, PLLC
8996 Burke Lake Road, Suite 304
Burke, Virginia 22015
Telephone: (703) 323-7000
Facsimile: (703) 323-7224
KevinLeach@TLC.Law
Counsel for Appellant Catherine M. Leach

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kevin M. Leach	22-CV-0497
Signature	Case Number(s)
Kevin M. Leach	10/20/2022
Name	Date
KevinLeach@tlc.law	
Email Address	