No. 22-CV-0497

In the
District of Columbia Court of Appeals

CATHERINE LEACH

Appellant,

v.

ONE PARKING 555, LLC

Appellee.

Appeal from the Superior Court of D.C.
Civil Division
Case No. 2021 CA 000111 B
The Honorable Hiram E. Puig-Lugo

BRIEF OF APPELLEE

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26.1 DISCLOSURE

Appellee, One Parking 555, LLC is a Limited Liability Company, and as such, there is no publicly held corporation that owns 10% or more of its stock. The members of the Limited Liability Company are Kirsten Dolan, Diane Demers, and Mark Skubicki.

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STATEMENT OF THE ISSUES

Appellee, One Parking 555, LLC agrees with the first question raised by Appellant, Catherine Leach but does not agree with the second, third, or fourth questions that Appellant raises because they are duplicative. The sole issue for appeal is did the Superior Court err in finding that Appellant did not adduce sufficient evidence that Appellee had actual or constructive notice of the alleged hazardous condition?

STATEMENT OF THE CASE

Appellee agrees with the Appellant's Statement of the Case except that Appellee disagrees with Appellant's mischaracterization that the step was "unmarked."

APPELLEE'S STATEMENT OF FACTS[1]

Appellant, Catherine Leach ("Appellant") sued Appellee, One Parking 555, LLC ("One Parking") for events that happened in the District of Columbia. (A13-A18, A42, A131). Appellant's Complaint included one count of negligence and one count of negligence *per se* against Defendant, One Parking 555, LLC. (A13-A18, A42, A132). Appellant alleges that on January 25, 2018, she tripped and fell on a single step in a parking garage located at 555 Twelfth Street, N.W., Washington, D.C. 20004. *Id.* Appellant alleges this fall caused her injury. *Id*.

Appellant's daughter, Abigail Leach arrived shortly after the subject occurrence and contends that her mother said, "I thought it was flat. I tripped." *Id.*, (A48-A49). Effective August 19, 2016, One Parking began operating the subject parking garage pursuant to an Office Parking Facility Lease. (A43, A63-A99, A135). Appellant 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 subject parking garage. (A43, A135).

Appellant's expert, Anthony Shinsky's report contains a photograph of the area where Plaintiff alleges she tripped, and he describes the area as follows:

The face of the riser was painted yellow and the garage floor surface

[1] Appellee disagrees with Appellant's Statement of the Facts, and therefore, Appellee provides this Statement consistent with the Statement of Undisputed Material Facts that were included with Appellee's Motion for Summary Judgment. (A29-A32, A42-A45, A131-A139).

> between the newly painted designated walkway and the landing included zebra strip lines approximately 6 inches wide and 24 inches apart. The zebra striped lines ended just short of the single step riser face. The walking surface of the landing was not painted.

(A43, A50-A62, A135-A136). During Appellant's deposition, she testified that she does not remember the subject occurrence. (A43, A114-A117, A136).

Appellant's "forensic engineer," Michael Leshner testified that his "assumption is that [Appellant] did not see the step." (A43, A118-A124, A136-A137). Mr. Leshner *assumes* Appellant did not see the step because in his experience, where people trip on a raised edge and fall forward, "it's because they didn't see it." (A44, A118-A124, A137). Mr. Leshner opined that there is an "optical illusion" because of the way that the stair and parking garage are painted. *Id.*

There are standards that provide "guidance" on how to paint steps so that they are conspicuous, but "there is no codified standard on exactly how it should be done." *Id.* The "guidance suggests several different ways to make a single step conspicuous," including adding handrails and contrasting surfaces. *Id.; see also* (A50-A62). The floor of the subject parking garage is a different shade of gray than the step on which Appellant alleges she tripped. (A44, A118-A124, A138). There is a gap of a few inches between the painted crosshatching on the floor of the subject parking garage before the step on which Appellant alleges she tripped. *Id.* "Facing the landing from the garage floor, (looking south) there was a triple rail guardrail along both sides of the landing . . ." (A44, A50-A62, A138).

One Parking is not aware of any claims or lawsuits from injuries alleged to be suffered in any fall incidents at the same premises or area where this incident occurrence. (A44, A100-A112, A139). Mr. Leshner does not have any information of anyone else complaining that they could not see the step on which Plaintiff alleges she tripped. (A44, A118-A124, A139).

STANDARD OF REVIEW

"In reviewing a trial court order granting a summary judgment motion, we conduct an independent review of the record, and our standard of review is the same as the trial court's standard in considering the motion for summary judgment." *Young v. U-Haul Co. of D.C.*, 11 A.3d 247, 249 (D.C. 2011), *quoting Bruno v. Western Union Fin. Servs., Inc.*, 973 A.2d 713, 717 (D.C. 2009).

Pursuant to Sup. Ct. Rule of Civil Procedure 56(a), summary judgment *shall* be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The nonmoving party "must show that a fact alleged to be in dispute is

material, and that there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Sayan v. Rigg Nat. Bank of Washington, D.C.*, 544 A.2d 267 (D.C. 1988), *citing Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979) (internal quotations omitted). "[C]onclusory conjecture" is not sufficient to overcome summary judgment. *Charlton v. Mond*, 987 A.2d 436, 441 (D.C. 2010). "If the adverse party fails to provide evidence establishing that the factfinder could reasonably decide in his favor, then summary judgment shall be entered[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1245 (D.C. 2009), *quoting Brown v. George Washington University*, 802 A.2d 382, 385 (D.C. 2002).

SUMMARY OF THE ARGUMENT

This action arose from an alleged trip and fall incident inside a parking garage operated by One Parking. Appellant argued that she tripped on a single stair riser because she allegedly did not think it was properly marked, but she failed to adduce any evidence that a dangerous condition existed. At the close of discovery, One

Parking moved for summary judgment because Appellant failed to adduce evidence sufficient to establish that One Parking had actual or constructive notice of any alleged hazardous condition. In her Objection to the Motion for Summary Judgment and again in her Brief, Appellant speculates about the existence of an allegedly hazardous condition. However, there is no evidence to support Appellant's allegations that a hazardous condition did exist or that One Parking had notice of any alleged hazard. Appellant's expert witnesses admitted that there is no codified standard on how to paint steps so that they are conspicuous. Each expert opined about different ways to make a step conspicuous, and the subject stair uses several of those methods (i.e. handrails and contrasting surfaces).

The Superior Court for the District of Columbia was correct in finding that there was no evidence in the record that would allow a reasonable jury to find that a hazardous condition exists or that One Parking had notice of any alleged hazard. This Court should answer all four of Appellant's questions in the negative[2] and find that the trial Court did not err in finding that there is no dispute of material facts and that Appellant failed to adduce sufficient evidence of notice.

[2] Appellant's Brief identifies four "issues." However, the issues are duplicative, and therefore, Appellee will address all of its arguments collectively in response to the first issue addressed in Appellant's Brief, which is the sole issue that is raised in this appeal – whether the Superior Court erred in finding that Appellant did not meet her burden of showing constructive notice of a dangerous condition.

ARGUMENT

Appellant failed to meet her burden of proof that One Parking had actual or constructive notice of an alleged hazard.

"[T]he mere happening of an accident does not impose liability or permit an inference of negligence." *Napier v. Safeway Stores, Inc.*, 215 A.2d 479 (D.C. 1965). "[T]o show constructive notice, Plaintiff must show: (1) 'that a dangerous condition existed,' and (2) 'that the dangerous condition existed for such a duration of time that the [Defendant] should have been aware of it if [it] had exercised reasonable care.'" (A294), *quoting Wise v. United States*, 145 F. Supp. 3d 53, 61 (D.D.C. 2015). A property operator "is not an insurer of the condition of his [property]" and its "duty is to exercise reasonable care to keep his place of business safe for the customer using it." *Seganish v. District of Columbia Safeway Stores, Inc.*, 406 F.2d 653 (U.S. App. D.C. 1968). "To create a jury question in a negligence case, the plaintiff must produce evidence from which a reasonable juror may conclude that a certain hazard caused the injury *and* that the defendant had actual or constructive notice of the hazard." *Marinopoliski v. Irish*, 445 A.2d 339, 341 (D.C. 1982) (emphasis in original), *citing Howard v. Safeway Stores, Inc.*, 263 A.2d. 656 (D.C. 1970).

"Where actual notice to the proprietor of an existing dangerous condition cannot be shown, it is incumbent upon the injured customer **to establish a factual predicate sufficient** to support a finding that the condition existed for such length of time that it should have become known and have been corrected. To do so, **facts**

must be presented from which a reasonable inference of constructive notice can be drawn" *Safeway Stores v. Morgan*, 253 A.2d 452, 453 (D.C. 1969) (emphasis added); *see also Wilson v. Washington Metropolitan Area Transit Authority*, 912 A.2d 1186 D.C. 2006). The plaintiff must adduce some factual evidence because "speculation is not the province of a jury, for the courts of this jurisdiction have emphasized the distinction between logical deduction and mere conjecture." *Kincheloe v. Safeway Stores, Inc.*, 285 A.2d 699, 701 (D.C. 1972); *Marinopoliski v. Irish*, 445 A.2d 339, 341 (D.C. 1982) ("Juries cannot be permitted to engage in idle speculation.").

This action arises from Plaintiff's alleged trip and fall on a single stair. Single steps are required to be "conspicuous," but "there is no codified standard on exactly how it should be done," only "guidance" on how to paint steps so that they are conspicuous. (A120). Indeed, Plaintiff's expert testified that he has not seen "any published examples of the correct or incorrect way to paint around a single step." (A122-A123). The "guidance suggests several different ways to make a single step conspicuous," including adding handrails and contrasting surfaces. (A121); (A50-A62). The floor of the subject parking garage is a different shade of gray than the step on which Plaintiff alleges she tripped. (A121). Mr. Shinsky notes in his report, "[t]he face of the riser was painted yellow." (A. 53). There is painted crosshatching on the garage floor prior to the step on which Plaintiff alleges she tripped, and Mr.

Leshner confirmed that there is a gap between the crosshatching on the floor before the step. (A122). He further testified that there is no "particular distance" required to be between any crosshatching and a single stair." *Id.* Mr. Shinsky states in his report, "[f]acing the landing from the garage floor, (looking south) there was a triple rail guardrail along both sides of the landing . . ." (A53). Mr. Shinksy used the term "guardrail" whereas Mr. Leshner referred to the railings on either side of the stairwell as "barriers" that tell a pedestrian "don't step off there." *Id.;* (A123). The different terms used are not relevant as they all mean the same thing – there were rails on either side of the stairwell landing, which was one way to make this step conspicuous pursuant to the applicable "guidance." (A121); (A50-A62). The trial court correctly described the stair as follows:

> The photograph of the step at issue does not depict a dangerous condition at all. Notably, the lower part of the photograph shows a gray pavement area leading up to the step. Diagonal yellow lines draw attention to the step as one approaches. At that point, the vertical riser leading to the thread is painted bright yellow, providing a yellow horizontal marker announcing a change in elevation. And the thread which extends into a landing is colored a dark tone resembling black. Overall, there is nothing reflecting a defective step, and the contracts in coloration provide stark visual notice that a change in elevation is about to occur.

(A294). There is no evidence that there was an alleged dangerous condition in existence or that One Parking had notice that this area was allegedly dangerous, and thus, Appellant's claim for negligence fails. Appellant's claim for negligence *per se* likewise fails because her own expert admitted that there is no codified standard

on how to make a step conspicuous. (A120).

Contrary to Appellant's allegation, the trial court did not make any credibility determinations or improperly weigh the evidence. The trial court correctly observed that Appellant "fails to present specific facts showing 'that a dangerous condition existed.'" (A294). The only *facts* that exist are Appellant fell on a single step, the pavement leading up to the step was a different color than the landing, there was a gap in between the crosshatching on the floor and the single step, the vertical riser leading to the tread was painted bright yellow, and the stair landing had rails on both sides. Appellant's experts conceded that there is no set standard or requirement regarding *how* to make a single step conspicuous, and Appellant did not produce any *facts* that the subject stair was inconspicuous. The unsupported opinions of Mr. Leshner and Mr. Shinsky that this stair was a dangerous condition are not sufficient to overcome summary judgment because there is no factual basis for their opinions, they are the "quintessential *ipse dixit* justification." *Russell v. Call/D, LLC*, 122 A.3d 860, 869 (D.C. 2015); *see also Charlton v. Mond*, 987 A.2d 436, 441 (D.C. 2010) ("conclusory conjecture" is not sufficient to overcome summary judgment.").

One Parking is not aware of any claims or lawsuits from injuries alleged to be suffered in any fall incidents at the same premises or area where this incident occurrence. (A109). As noted by the Honorable Hiram Puig-Lugo, "the absence of any prior injuries or complaints in that area undercut [Appellant's] argument that

the step represented a 'dangerous condition.'" (A294). Appellant is the only known person to have fallen at this stair, which contradicts her allegations that this condition was dangerous or hazardous. During his deposition, Mr. Leshner testified that he does not have any information of anyone else complaining that they could not see the step on which Plaintiff alleges she tripped. (A124). The absence of any other incidents further demonstrates that One Parking had no notice of any alleged hazard. *See Haney v. Marriott Int'l, Inc.*, 2007 WL 2936087 at *6 (D.D.C. Oct 9, 2007) (summary judgment in favor of defendant was appropriate because "plaintiff overlooks the fact that the lack of prior incidents is relevant to the question of whether defendant had actual notice of the purported defect").

"If the adverse party fails to provide evidence establishing that the factfinder could reasonably decide in his favor, then summary judgment shall be entered[.]" *Anderson*, *supra*, 477 U.S. at 249. Appellant failed to adduce evidence sufficient to allow a factfinder to reasonably decide in her favor, specifically, she did not adduce any evidence that a hazardous condition existed or that One Parking had notice of any alleged hazard.

CONCLUSION

Appellant did not adduce any evidence that a hazardous condition existed. Her own experts admit that there is no set standard for how to make a step conspicuous, and the subject stair is marked using multiple means that Appellant's

experts suggested for making a step conspicuous, including handrails and contrasting colors. Because Appellant failed to establish that an alleged hazard existed, she likewise failed to adduce any evidence that One Parking had notice of any alleged hazard.

The Superior Court for the District of Columbia did not err in finding that there was no evidence in the record that would allow a reasonable jury to find that One Parking was on notice of an allegedly hazardous condition that led to Appellant's alleged fall, and there was no error in awarding One Parking summary judgment.

WHEREFORE, One Parking 555, LLC respectfully requests that this Court answer the issues in the negative, holding that Appellant failed to adduce evidence of negligence and providing One Parking 555, LLC such other and further relief as justice and the nature of its cause may require including, but not limited to, all costs.

/s/ Ellen R. Stewart

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of November, 2022, a copy of Appellee's Brief was served via electronic filing and on November 28, 2022, a copy was mailed via first-class mail, postage prepaid to:

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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.

Signature

22-CV-0497
Case Number(s)

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