**No. 22-cv-975**

*In the*

# District of Columbia Court of Appeals

GILBANE BUILDING COMPANY,

*Appellant,*

*v.*

CHADWICK WITKOWSKI,

*Appellee.*

*Appeals from the Superior Court of the District of Columbia, Civil Division No.* CAB006865-18 *(Hon. Hiram Puig-Lugo, Judge)*

## BRIEF FOR APPELLANT

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AUGUST 14, 2023

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## LIST OF PARTIES

Plaintiff/Appellee Chadwick Witkowski (an individual)

Defendant/Appellant Gilbane Building Company

## RULE 26.1 DISCLOSURE STATEMENT

The Appellant, Gilbane Building Company, states that there are no parent or publicly held corporations that hold a 10% or more ownership interest in it or own 10% or more of its stock.

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## FINALITY STATEMENT

This matter arises from a Final Order disposing of all parties' claims. That Final Order, which was dated December 2 and entered December 4, 2022, rejected Gilbane's post-trial motions and entered judgment on the verdict awarded by the jury on May 18, 2022 after a three-day trial.

## STATEMENT OF ISSUES

1. Whether Plaintiff made out a *prima facie* case where the evidence at trial showed that no one knows what caused him to trip and fall.

2. Whether Plaintiff presented sufficient evidence to allow a jury to find that his injuries were caused by a hazard for which Gilbane would be liable.

3. Whether the Trial Court erred by reducing Plaintiff's burden of proof on causation.

4. Whether the Trial Court improperly failed to consider all of the evidence in the record when it found that Plaintiff proved a *prima facie* claim of negligence.

5. Whether Gilbane is entitled to judgment as a matter of law.

## STATEMENT OF THE CASE

This premises liability claim arises out of an incident where the Plaintiff-Appellee, Chadwick Witkowski ("Plaintiff"), fell at a construction site. Plaintiff filed a Complaint alleging that he tripped over a tie wire used to secure a sump

pump hose. Compl., at ¶¶ 6-7. Defendant-Appellant Gilbane Building Company ("Gilbane") was the general contractor for the project and a Gilbane employee secured the hose with a tie wire on the date of the accident.

The Superior Court of the District of Columbia, Civil Division (the "Trial Court"), conducted a three-day jury trial of Plaintiff's claims against Gilbane from May 16-18, 2022. At the conclusion of trial, the jury returned a verdict in Plaintiff's favor and awarded him $1,700,000 in compensatory damages. Gilbane subsequently filed post-trial motions seeking judgment as a matter of law that it was not liable, a new trial, or remittitur. The Trial Court denied those Motions by an Order dated December 2, 2022 and entered December 4, 2022 (the "Final Order").

Plaintiff was the sole eyewitness to his accident. The accident happened at the end of the workday and no one else was in the area where he fell. During discovery, Gilbane learned that Plaintiff does not know what caused him to trip and fall. He testified during his deposition and trial that he does not know what caused him to trip and fall. The sole witness to the accident thus acknowledged that he does not know what caused the fall.

Plaintiff reported the accident to his foreman. The foreman surmised that Plaintiff must have fallen over the tie wire. Plaintiff and the foreman then reported to Gilbane that Plaintiff tripped over the tie wire. Gilbane inspected the scene, but

did not identify any physical evidence identifying where Plaintiff fell or what caused him to fall. As such, it accepted and relied on Plaintiff's statements that he tripped on the tie wire when preparing a required report to the GSA.

Gilbane was required to prepare and submit an incident report to the government. Gilbane submitted a Notice of Incident Report stating that Plaintiff tripped over the tie wire. That report was based solely on statements by Plaintiff and his foreman. Neither Plaintiff nor his supervisor actually knew what caused Plaintiff to fall.

Gilbane moved for Summary Judgment prior to trial, a directed verdict during trial, and judgment as a matter of law after trial. Gilbane argued that Plaintiff could not prove that the tie wire caused his fall. Plaintiff does not know what he tripped on, no one else saw him fall, and Gilbane's incident report was based on statements of witnesses who did not know what happened. The Trial Court denied these motions, finding that the incident report was sufficient evidence to allow Plaintiff to reach the jury. Those rulings were error.

## STATEMENT OF FACTS

### I. The Site

The accident happened during a construction involving the construction of a glass-roofed building connected to an existing State Department building. Trial Tr., Day II, 88:5-15 (A383). Kendall Romrell, Gilbane's Superintendent on the project,

described the security as "very strict[.]" Id., at 86:15-87:21 (A384) and 97:12-14 (A392). While the project was ongoing, the construction site was secured with wood fencing, gates, and security guards. Id., at 88:16-22 (A383). Plaintiff agreed that the fencing was "a tall wooden wall" around the work area. Id., at 14:18-20 (A309).

The gates for the work site were not allowed to remain open. Id., at 98:3-10 (A393). To enter the site at the beginning of the day, workers would exchange their drivers' licenses for badges. Id., at 98:17-23 (A393). At the end of the day workers would return the badges for the licenses. Id. Work hours for the project were 6am to 2:30pm. Id., at 98:11-13 (A393). Workers were not allowed to remain in the site after the workday ended. Id., at 98:25-99:3(A393-A394). Security would close and chain the gate at the end of the day. Id., at 99:12-16 (A394). Workers were not allowed back in the site once it had been closed for the night. Id., at 99:17-19 (A394).

The accident happened in an area in front of the building under construction. See id., at 90:18-91:11 (A385-A386). There was an open area between the security gate on one side of the front exterior of the building and a construction dumpster on the other. Id., at 93:13-94:10 (A388-A398). The dumpster was enclosed on two sides by the wooden construction fence. See Pl. Ex. 1 (A534). A third side was near existing structures on the property. Id. The fourth side, which was one of the

long sides of the rectangular dumpster, was next to the open construction area. Id. The security gate was across the open construction area, opposite the dumpster. Trial Tr., Day II, at 89:4-20 (A384). Between the dumpster and the security gate was a construction area consisting of uneven terrain covered by gravel and construction debris, including broken concrete, cinder blocks, and plywood. See Trial Tr., Day II, at 32:16-33:1 (A327-A328); Pl. Ex. 1 (A534); see also Sames Dep., at 36:6-37:6 (A51-52).

The tie wire at issue connected to a sump pump hose lying near the dumpster parallel to the side adjacent to the open construction area. Pl. Ex. 1 (A534). The other end the tie wire attached to metal item, the end of which is visible in Plaintiff's Exhibit 2. Pl. Ex. 2 (A535). The end of the dumpster is also visible in that picture. Id.

## II. **The Tie Wire**

The tie wire held a sump pump hose in place. Trial Tr. Day II, at 111:1-4 (A406). The pump was used to remove water from the building's basement. Id., at 112:7-8 (A407). If the hose was not secured, it would fall back into the basement, preventing the pump from removing the water from that area. Id., at 111:5-10 and 111:23-112:15 (A406-407). The weather forecast called for a storm overnight and Gilbane's Superintendent, Kendall Romrell wanted to make sure that the sump pump would function. Id., at 111:18-22 (A406).

Mr. Romrell placed the tie wire at the end of the day on the date of the accident. Id., at 111:9-13 (A406). Workers were on their way to the security gate as he tied the wire in place. Id., at 112:16-19 (A407). Mr. Romrell was not aware of any workers in the area when he tied the wire. Id., at 112:25-113:3 (A407-A408). He planned to remove the wire first thing the next morning. Id., at 112:20-22 (A407). After he secured the hose, he went to the office to get caution tape to flag the wire. Id., at 113:4-17 (A408). When he returned to the site, security guards had already locked the gate for the night. Id., at 113:8-10 (A408). The security guards had already left and he did not have a key to get into the site without security. Id., at 114:20-115:1 (A409-A410).

## III. **The Accident**

Plaintiff testified that the ground was very wet, with standing puddles. Trial Tr., Day I, 151:10-13 (A270). He was leaving the job site when he decided to use the restroom. Id., at 151:21-25 (A270). The Port-A-Potties were located behind the dumpster. Id., at 156:21-23 (A275). Plaintiff had to squeeze between the security fence and the dumpster to access the Port-A-Potties. Id., at 156:17-20 (A275). He was not paying attention to what was on the ground as he approached the dumpster:

> "Q. So, you weren't paying attention to anything that was on the ground in front of you, were you?

A. No, I was not."

Trial Tr., Day II, at 52:6-8 (A347). According to Nick Sames, the area included really big rocks that could cause a worker to twist his ankle. Sames Dep., at 31:1-14 (A46). Even though he was walking through an active construction site with uneven terrain, gravel, broken concrete, and other debris, Plaintiff was not paying attention to anything on the ground as he walked. Trial Tr., Day II at 52:9-13 (A347).

Plaintiff is not aware of anyone else in the area when the accident occurred:

"Q. … At this point there was nobody else around in that entire layout area; is that right?

A. To my knowledge, no."

Id., at 48:23-25 (A343). He assumes that there must have been other workers in the basement, but to his knowledge no other workers were in the yard where the accident happened. Id., at 49:1-16 (A344). He is not aware of anyone who saw him while he was on the ground or who observed the exact location where he fell. Id., at 56:7-12 (A351). The first thing he did after he picked himself up was to look around to confirm that no one saw him fall. Id., at 50:16-19 (A345). To his knowledge, no one else saw him fall. Id., at 55:24-56:1 (A350-A351); see also Trial Tr. Day I, at 153:2-6 ("Nobody saw me fall.") (A272).

Plaintiff did not look to see what he tripped on after the accident. Trial Tr., Day II, at 51:18-21 (A346). Instead, he got up and went to the restroom. Id., at 53:13-17 (A348). After going to the restroom, he walked through the same area again. Id., at 54:12-55:4 (A349-A350). He did not see what he fell on when he returned. Id., at 55:5-9 (A350). Indeed, he never saw the tie wire on the date of the accident:

> "Q. … On the day of this incident, there was no time ever that you saw a tie wire or sump pump hose at the time that you fell; is that right?
>
> A. That's correct.
>
> Q. Or at the time that you walked back past it after you fell, correct?
>
> A. That's correct.
>
> Q. And, in fact, if it had been in place you would have had to step directly over it again to get out, right?
>
> A. I was in so much pain from my knee that all I thought about was my knee.
>
> Q. So, just so we're understanding, you never at any time saw what you fell over on that day, right?
>
> A. Correct."

Id., at 55:10-23 (A350).

In addition to not seeing the tie wire, Plaintiff did not feel the tie wire when he fell. When asked at trial if he felt a tie wire on his shin as he fell, Plaintiff responded that the accident "happened so suddenly that [he] didn't have time to even get [his] hands in front of [him]." Id., at 57:24-58:4 (A352-A353). Plaintiff volunteered during direct examination that he does not know what caused him to fall. Trial Tr., Day I, at 152:1-10 (A271) ("… as I was briskly walking over there, I tripped on something. **I don't know what I tripped on**. …") (emphasis added).

Plaintiff introduced two photographs showing the dumpster and hose. See Pl. Exs. 1 and 2 (A534-A535). The pictures do not show any signs where Plaintiff tripped or fell. Id. Exhibit 1 shows the whole side of the dumpster with a cinder block and several pieces of wood. See Pl. Ex. 1 (A534). Plaintiff confirmed that only two or three cinder blocks would fit between the hose and the side of the dumpster. Trial Tr., Day II, at 68:21-69:1 (A363-A364). A standard cinder block is 16 inches by 8 inches. See id., at 68:18-20 (A363). Plaintiff is 6'2" or 74 inches tall. Id., at 51:9-13 (A346). When he fell, he landed flat on his stomach, causing his entire front to become soaked from a puddle of water on the ground. Id., at 49:22-50:5 (A344-A345). He agreed that when it landed, his body would have covered 6'2" of space from whatever caused him to trip. Id., at 51:14-17 (A346). He did not strike the dumpster when he fell. Id., at 69:8-9 (A364).

Plaintiff was seen by Dr. Joel Fechter on April 11, 2018. Transcript of Dr. Fechter ["Fechter Dep."], at 12:10-12 (A282). Plaintiff described the history of his injury to Dr. Fechter during that encounter. Id., at 12:13-13:3 (A282-A283). Dr. Fechter testified that Plaintiff told him that the injury was caused by a fall on concrete. Id., at 13:7-10 (A283) ("He told me that on 11-19-15, while he was at work, he tripped and fell forward onto concrete injuring his left knee."). When asked to confirm that Plaintiff stated that he fell on concrete, Dr. Fechter testified "[t]hat is exactly what he told me." Id., at 39:18-21 (A109). The two photographs of the scene do not show any concrete surface in the area of the tie wire. See Pl. Exs. 1 and 2 (A534-A535). Indeed, Plaintiff explicitly testified that the ground near the dumpster was gravel. Trial Tr., Day II, at 32:16-18 (A327).

IV. **Gilbane's Investigation.**

After the accident, Plaintiff went to the J.E. Richards trailer and told two other J.E. Richards employees that he had fallen. Id., at 57:5-14 (A352). He did not tell them that he fell over a tie wire, because he "didn't know what he fell over." Id., at 57:21-23 (A352). Nick Sames, J.E. Richards' foreman, told Plaintiff that he fell over the tie wire. Id., at 59:5 (A354). Mr. Sames confirmed that he was the source of Plaintiff's claim to have fallen over the tie wire:

"Q. Okay. Did Mr. Witkowski know what he fell on?

A. No.

Q. Do you know how it came about that it was reported that he fell over a tie wire?

A. That I told him that he fell over the [tie] wire."

Q. All right. Did you tell him this at this point where you're discussing this, this evening when we're talking about it?

A. Yes."

Sames Dep., at 32:3-13 (A47). Mr. Sames did not see the fall. Id., at 30:4-7 (A45). Plaintiff understood that Mr. Sames left the area before the incident and did not see the fall. Trial Tr., Day II, at 59:6-9 (A354). Plaintiff admits that Mr. Sames made the statement linking the fall to a tie wire "without any information". Id., at 59:20-22 (A354).

Plaintiff did not speak to anyone from Gilbane after the accident, id., at 65:19-22 (A360), and he did not testify as to what Mr. Sames communicated to Gilbane. Mr. Sames testified that he "notified Gilbane verbally that we had an incident." Sames Dep., at 37:22-38:1 (A52-A53). Mr. Sames did not provide more specific details about what information he communicated to Gilbane. Mr. Romrell testified that he "ran into Nick Sames and he told me that a guy had fallen and hurt his knee." Trial Tr., Day II, at 115:7-8 (A410). Mr. Hinderliter testified that J.E. Richards' employees told Mr. Romrell "that a gentleman fell and hit his knee." Trial Tr., Day I, at 118:5 (A237).

Mr. Sames notified Mr. Romrell of the incident shortly after Mr. Romrell discovered that security had locked the site and left. Trial Tr., Day II, at 115:4-7 (A410). Mr. Romrell retrieved an incident report form from the Gilbane trailer for J.E. Richards to fill out. Id., at 116:5-16 (A411). Mr. Sames had Plaintiff fill out the form. Id., at 59:23-25 (A354). In the report, Plaintiff claimed to have "tripped on an invisible tie wire." Id., at 62:25-63:5 (A357-A358). Plaintiff confirmed that the allegations in his Complaint that he tripped on a tie wire were based entirely on a statement made by someone who did not see him fall. Id., at 69:14-18 (A264).

Mr. Romrell was not able to access or personally investigate the job site the day of Plaintiff's accident. Id., at 109:10-15 (A404). When an incident occurs, Gilbane relies on information that a subcontractor provides. Id., at 109:16-19 (A404). Gilbane does not routinely question whether its subcontractors are telling it the truth. Id., at 110:8-11 (A405). Gilbane believed what Plaintiff reported at the time. Id., at 110:3-7 (A405). At the time of Plaintiff's report, Gilbane had neither a general practice nor a specific reason to press him for additional details or question the veracity of what he reported. Id., at 110:3-11 (A405).

Mr. Romrell called Robert Hinderliter to report the accident later that evening. Id., at 115:9-23 (A410). Mr. Hinderliter was the Mid-Atlantic Safety Director for Gilbane on the date of the accident. Trial Tr., Day I, at 95:3-21 (A214). His job duties included investigating job site incidents and he investigated

Mr. Witkowski's accident on behalf of Gilbane. Id., at 109:11-15 (A229). Mr. Hinderliter went to the scene of the accident personally. Trial Tr., Day I, at 120:3-9 (A239). Mr. Hinderliter and Mr. Romrell walked the site together to look at the area where the accident happened. Trial Tr., Day II, at 122:6-12 (A417). That inspection took place the morning after the accident. Trial Tr., Day II, at 121:5-6 (A416); see also Trial Tr., Day I, at 120:10-13 (A239). However, the tie wire had already been removed before he arrived. Id., at 120:3-16 (A239). Mr. Hinderliter did not see Plaintiff fall, did not see video of Plaintiff falling, and did not speak to anyone who claimed to have seen Plaintiff fall. Id., at 115:9-15 (A234). Mr. Romrell has similarly not spoken with anyone who claims to have seen the incident. Trial Tr., Day II, at 117:9-15 (A412).

Mr. Hinderliter spoke with J.E. Richards' safety director while at the site that day. Trial Tr., Day I, at 110:10-11 (A229) and 119:5-14 (A238). There is no evidence or testimony that anyone else from J.E. Richards provided information to Gilbane during Mr. Hinderliter's investigation. The safety director had not seen the accident personally. Id., at 119:17-19 (A238). Instead, that person received his information from speaking with Plaintiff and Nick Sames. Id., at 119:20-120:2 (A238-A239). There is no evidence or testimony that Gilbane received any information about the cause of the incident from any source other than Plaintiff and Mr. Sames.

Gilbane was required to prepare and submit an incident report to the GSA. Id., at 110:12-17 (A229). Mr. Hinderliter prepared and signed the report on behalf of Gilbane. Id., at 111:8-13 (A230). The incident report stated that Plaintiff tripped over a tie wire. Id., at 112:8-12 (A231) and Pl. Exhibit 10 (A538).[1] However, he was clear that this conclusion was "[b]ased on the information that [he] was told[.]" Id., at 112:11-12 (A231). The only information about what happened available to Mr. Hinderliter when he conducted the report came from J.E. Richards. Id., at 121:8-24 (A240). The Gilbane employees with whom Mr. Hinderliter spoke received their information from J.E. Richards. Id., at 121:18-122:8 (A240-A241). Because no one witnessed the accident, Mr. Hinderliter was forced to rely on statements by J.E. Richards' employees: "I mean, I can only base my observations and my finding on what I'm told of the accident. **I basically wasn't there during, so I have to go by what's the information that I'm told**." Id., at 123:25-124:3 (A242-A243) (emphasis added). The incident report was based

[1] The transcript reflects that parties referred to this Exhibit as Plaintiff's Exhibit 8. The document pre-marked as Exhibit 8 is a form submitted to Gilbane's worker's compensation insurance carrier. That document was not shown to Mr. Hinderliter or admitted into evidence through any other witness. The GSA Report Form shown to Mr. Hinderliter and admitted into evidence was pre-marked as Plaintiff's Exhibit 10. Exhibit 10 includes several details described by Mr. Hinderliter's testimony that are not present in the pre-marked Exhibit 8, including the document title, Mr. Hinderliter's signature, and the dates of November 19 and 20. These details confirm that Exhibit 10, not Exhibit 8, was admitted into evidence. For ease of reference, this Memorandum will refer to the document pre-marked as Exhibit 10 as the "GSA Report."

solely on information from J.E. Richards. Id., at 122:12-14 (A241). Mr. Hinderliter relied on that information in preparing his report. Id., at 122:3-5 (A241).

The record discloses only two bits of information that were provided to Mr. Hinderliter before he submitted the GSA report. First, Mr. Sames told Mr. Romrell that a worker had fallen and hurt his knee. See id., at 118:4-6 (A237); Trial Tr., Day II, at 115:7-8 (A410); and Sames Dep., at 37:22-38:1 (A52-A53). Second, Plaintiff filled out an incident report stating that he had "tripped on an invisible tie wire." Trial Tr., Day II, at 62:25-63:5 (A357-A358). Both statements relate that the incident happened, but do not provide additional details. Neither statement relates the specific location of the fall, the direction that Plaintiff was traveling, or the fact that he fell in a puddle.

Plaintiff's counsel did not question Mr. Hinderliter about the evidentiary basis for the incident report. Counsel did, however, ask Mr. Hinderliter if the report noted other tripping hazards. See Trial Tr., Day I, at 112:16-24 (A231). Mr. Hinderliter conceded that the report did not state that gravel or the dumpster were tripping hazards. Id., at 112:16-21 (A231). The report also does not speculate that Plaintiff could have tripped on his own feet. Id., at 112:22-24 (A231). The report simply stated that Plaintiff tripped over the tie wire. Id., at 112:25-113:2 (A231-A232). Counsel did not ask, nor did Mr. Hinderliter testify, as to whether the investigation evaluated or ruled out potential alternative causes of the accident.

Mr. Romrell signed the incident report form in which Plaintiff provided his written statement. Trial Tr., Day II, at 104:25-105:7 (A399-A400). All information in that report was provided by J.E. Richards. Id., at 106:5-107:10 (A401-A402). The incident report does not include any information that Mr. Romrell provided based on his own independent investigation. Id., at 107:11-14 (A402). Mr. Romrell's signature on the form indicated that he had been informed of the incident. Id., at 107:25-108:2 (A402-A403). The signature did not indicate that Mr. Romrell had done any personal investigation of the incident. Id., at 108:3-5 (A403).

Plaintiff's counsel asked Mr. Romrell if he had the chance to take measurements at the scene. Id., at 122:13-14 (A417). Mr. Romrell believed that he took measurements at the site, but was not sure that he did and could not recall any distances measured. Id., at 124:1-15 (A419). Plaintiff did not elicit any testimony from Mr. Hinderliter or Mr. Romrell regarding what evidence might have shown where Plaintiff tripped and fell, much less that such evidence was present during their inspection.

## V. **Motions for Judgment as a Matter of Law.**

Gilbane moved for judgment as a matter of law at the close of Plaintiff's evidence. Trial Tr., Day II, at 79:20-25 (A374). Gilbane argued that Plaintiff had failed to adduce sufficient evidence that his accident was caused by Gilbane's

negligence. Id., at 79:10-80:10 (A374-375). The trial court stated that the "motion would have been granted a long time ago" if the case were a bench trial. Id., at 84:9-11 (A379). However, the court found that the standard in a jury trial is different and that the incident report that Mr. Hinderliter submitted to the GSA was an admission against interest sufficient to overcome the motion in a jury trial. Id., at 84:13-85:5 (A379-A380).

Gilbane renewed its Motion after the jury returned a verdict in Plaintiff's favor. See Renewed Mot. for J. as a Matter of Law. Gilbane again argued that Plaintiff had failed to introduce competent evidence to show that Gilbane's negligence caused the accident. Mem. Points and Authorities in Supp. Renewed Mot. J. as a Matter of Law, at 5-9. The Trial Court denied the Renewed Motion in the Final Order.

The Trial Court found this case to be "similar" to Rich v. D.C., 410 A.2d 528 (D.C. 1979). See Final Order, at 6 (A542). Rich, according to the Trial Court, held that testimony that the plaintiff "tripped in the approximate location of a tripping hazard, in a manner consistent with tripping over that hazard, was sufficient evidence for a jury to consider." Id. The Trial Court found that the following evidence supported Plaintiff's claim: "an admission from the Defendant that a tie wire caused Plaintiff's fall, a recognition that Gilbane connected the tie wire to a sump pump on the date the Plaintiff fell, and uncontested hearsay

testimony that Plaintiff tripped over a tie wire." Id. The Trial Court reasoned that Rich "suggests" that this evidence was sufficient to meet Plaintiff's burden of proof. Id. This appeal follows.

## SUMMARY OF THE ARGUMENT

Plaintiff bore the burden to prove that his injuries were caused by Gilbane's negligence. This required him to introduce evidence that he physically encountered or contacted the tie wire. His evidence failed on that point. To the contrary, the clear, uncontradicted evidence at trial shows that no one knows what caused Plaintiff to fall. Plaintiff does not know what caused him to fall and no one else observed either the accident or some other evidence indicating that he actually tripped over the tie wire. Gilbane's accident report cannot prove causation, because that report was based solely on Plaintiff's statement that he tripped over the tie wire and Plaintiff misrepresented his own knowledge in that statement. The entire record leads to the clear, unescapable conclusion that no one knows whether Plaintiff actually contacted the tie wire. The Final Order must be reversed and final judgment should be entered in Gilbane's favor, because Plaintiff bore the burden of proof on causation and he could not introduce evidence showing that he actually tripped over the tie wire.

## ARGUMENT

"'The elements of a cause of action for negligence are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach.'" Wash. Metro. Area Transit Auth. v. Ferguson, 977 A.2d 375, 377 (D.C. 2009) (quoting Mixon v. Washington Metro. Area Transit Auth., 959 A.2d 55, 58 (D.C. 2008)). "A plaintiff must prove both negligence and causation." Twyman v. Johnson, 655 A.2d 850, 852 (D.C. 1995) (citation omitted); see also Wilson v. Wash. Metro. Area Transit Auth., 912 A.2d 1186, 1189 (D.C. 2006) ("The plaintiff in a negligence case has the burden of proving a causal relationship between the deviation in the standard of care and her injury.") (citations omitted). Simply proving that the defendant was negligent is insufficient to make out a *prima facie* claim. The plaintiff must go further and demonstrate that the negligence caused the injury.

"'To establish proximate cause, the plaintiff must present evidence from which a reasonable juror could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries and that the injuries were foreseeable.'" District of Columbia v. Zukerberg, 880 A.2d 276, 281 (D.C. 2005) (quoting District of Columbia v. Wilson, 721 A.2d 591, 600 (D.C. 1998)). Although proximate cause is typically a

jury question, "'where plaintiff's evidence invites the jury to speculate as to negligence or causation a directed verdict is properly granted.'" McFarland v. George Wash. Univ., 935 A.2d 337, 359 (D.C. 2007) (citations omitted). "'[A] jury should never be permitted to guess as to a material element of the case such as damages, negligence, or causation.'" Id.

This Court has consistently required plaintiffs to present evidence that they physically encountered the alleged hazard to meet their burden of proof on causation. See Twyman, 655 A.2d, at 852-54; Wilson, 912 A.2d, at 1189-90. The Trial Court in this case erred by reducing Plaintiff's burden of proof on that element, removing this requirement for proof of physical contact with the hazard. Plaintiff's evidence does not meet the true standard of proof for causation. The evidence identified in the Final Order does not meet Plaintiff's burden to prove that he contacted the tie wire. To the contrary, the record is clear that no one actually knows what caused Plaintiff to trip and fall. The Final Order should be reversed, and final judgment entered in Gilbane's favor, because Plaintiff failed to satisfy his burden of proof on causation.

## I. **The Trial Court Erroneously Reduced Plaintiff's Burden of Proof.**

The first question for this Court, before addressing whether Plaintiff's evidence met his burden of proof, is what Plaintiff had to prove. More specifically, the question is whether Plaintiff's burden of proof on causation required him to

introduce evidence that he physically encountered the tie wire. This Court has consistently required that proof and the Trial Court erroneously removed the element of physical contact from Plaintiff's *prima facie* case.

A. **Plaintiff had to prove that he physically encountered the hazard.**

This Court found that evidence that the plaintiff fell near a hazard is not sufficient to meet the plaintiff's burden of proof of causation in Twyman v. Johnson. See 655 A.2d, at 852-53. In Twyman, the plaintiff fell on steps behind her residence. Id., at 851. She presented expert testimony showing that the steps were unsafe and violated the building code, because they "lacked dimensional uniformity of the risers and treads, were not slip resistant, and were not protected by a handrail, only a 'guardrail.'" Id. Plaintiff, however, could not link her accident to any of those defects. She testified that she was on the second or third step when she fell, but had no explanation what actually caused the accident. Id., at 851-52.

This evidence failed to establish causation, because the jury could not link the accident to the defendant's negligence without resorting to speculation: "Since Twyman was the only witness to the accident and she admitted that she did not know what had caused her fall, the jury could not reasonably have decided that she fell, for example, because she stepped on a slippery or uneven stair tread - and not simply because she missed a step or lost her balance while not holding the guardrail (she was carrying a bag of trash at the time)." Id., at 853. Her proof that a

hazard existed and she fell near the defect was not enough to reach the jury without some further evidence that she actually came into contact with that hazard. Id.

This Court affirmed the rule from Twyman in Wilson v. Wash. Metro. Area Transit Auth., 912 A.2d 1186 (D.C. 2006). In Wilson, the plaintiff slipped and fell as she attempted to exit a bus. Id., at 1187. After her fall, she observed a substance she believed to be orange soda on her hand. Id., at 1187-88. Even though she never observed the substance on the bus steps, the plaintiff argued that the jury could find in her favor, because she slipped in the same general area that she encountered a potentially hazardous substance. Id., at 1189. This Court rejected the argument out of hand. The fact that orange soda may have been in the same general area did not allow the jury to infer that the soda caused the plaintiff to slip. Id., at 1190 ("the jury was left to speculate as to causation and draw impermissible inferences where there was no evidence that orange soda is what she slipped on or that it was even on the steps."). The evidence had to go further and show that the plaintiff actually contacted the hazard. Id.

Similarly, in Rich v. D.C., this Court found that the Plaintiff introduced sufficient evidence to allow the jury to infer that she physically encountered the alleged hazard. 410 A.2d 528, 533 (D.C. 1979). In Rich, the hazard at issue was one of two holes where bricks were missing in the sidewalk. Id. at 530. Plaintiff testified: "All of a sudden one leg went into a depression and the other foot hit

something metal, and it was very fast ... .” Id. Although the defendant argued that the term “depression” was vague and not sufficient to support an inference that Plaintiff stepped into one of the two holes shown in photographs introduced into evidence, the Court noted: “Additionally, although appellant did describe the cause of her fall as a depression, she also called it a ‘hole.’” Id. at 533, n.3. In finding the evidence sufficient to support an inference that Plaintiff fell into one of the two holes, the Court commented:

> Appellant’s statement that one leg went into a depression and her other foot hit something “metal” is consistent with the photographs in that if one foot went into one of the holes depicted, a metal manhole cover (which was shown as being adjacent to the holes) likely would be the next object struck by the opposite foot. The foregoing inferences as to the cause of appellant's fall are both reasonable and supported by the evidence.

Id. Just as in Twyman and Wilson, the Rich Court required the plaintiff to prove that she physically encountered the hazard. The difference between Rich and the other two cases is whether the plaintiff met the standard, not what the standard required in the first place.

The clear, consistent rule from these three cases is that the plaintiff must introduce evidence that he or she physically encountered the purported hazard. In Twyman, the hazard was not the stairs as a whole, but rather the fact that portions of the stairs were slippery or uneven. See 655 A.2d, at 853. Even though the plaintiff proved that a hazard existed, she did not show that she slipped “on a

slippery or uneven stair tread". Id. Her evidence that she fell near the hazard did not meet her burden of proof on causation without some evidence that she actually contacted the slippery or uneven condition. In Wilson, the plaintiff may have shown that there was an orange substance in the general area where she fell, but her evidence failed to show that she actually stepped on that substance when she fell. 912 A.2d, at 1190. On the other hand, in Rich, Plaintiff produced evidence that she actually encountered the hazard she claimed caused her to fall, even though she did not see that hazard on the night of her fall. 410 A.2d at 533. Taken together, these three cases require plaintiffs to prove more than the existence of a hazard near the location of a fall. To meet the burden of proof on causation, a plaintiff must present evidence that he or she physically encountered or contacted the alleged hazard.

In this case, Plaintiff presented evidence that the tie wire was a tripping hazard at the time of the fall. Although that evidence met his burden of proof as to Gilbane's negligence, it was not sufficient to meet his burden on causation. Under Twyman, Wilson and Rich, Plaintiff had to go beyond simply showing that the defect existed. He had to introduce evidence that he physically encountered or contacted the tie wire. If his evidence fell short on that point, he failed to meet his burden of proof as to causation and his claim would have to be dismissed for the same reason that the claims were dismissed in Twyman and Wilson.

B. **The Trial Court removed the physical contact requirement.**

The Trial Court did not require Plaintiff to prove that he physically contacted the tie wire. Instead, the Final Order found that Plaintiff's evidence that he "tripped in the approximate location of a tripping hazard, in a manner consistent with tripping over that hazard, was sufficient evidence for a jury to consider." See Final Order, at 6 (A542). The Trial Court incorrectly interpreted the ruling in Rich to support its position. See id. (discussing Rich, 410 A.2d 528). The Trial Court reasoned that Rich "suggests" that Plaintiff met his burden of proof by showing that he fell near the hazard in a manner consistent with tripping on the hazard. Id. Rather than requiring proof of physical contact with the hazard, which was totally absent from the evidence in this case, the Trial Court allowed Plaintiff's case to reach the jury based on evidence that he fell near the hazard in a way consistent with encountering the hazard. In doing so, it erroneously reduced Plaintiff's burden of proving causation. The Final Order should be reversed, because the Trial Court applied the wrong standard when determining whether Plaintiff met his burden of proof on causation.

As an initial matter, the phrase "in a manner consistent with tripping over that hazard[]" is broader than the standard of proof that this Court has required. As noted above, this Court has consistently required evidence that the plaintiff physically encountered the hazard. While the phrase "consistent with" would

*include* cases where the plaintiff provides evidence of physical contact with the hazard, the "consistent with" standard would not necessarily *require* evidence of a physical encounter. To the contrary, the phrase "consistent with" would seemingly include all falls with similar mechanisms rather than evidence of a physical encounter with the claimed hazard. The problem with this standard is that, at a certain level, all trip-and-fall accidents have broad consistencies. Any incident where a person stumbles and falls forward could be called a trip-and-fall, whether the stumble is caused by an object, an animal, the ground, another person, or even the person's own feet. Under the "consistent with" standard, a plaintiff would merely need to show that he or she tripped near a trip hazard to make out a *prima facie* claim for negligence. A person who tripped over their own feet a foot away from a sidewalk defect could file suit against the entity responsible for the sidewalk. Such a fall would be in the area of the sidewalk defect and "consistent with" tripping over the defect, even though the plaintiff did not actually trip on the defect. Such a suit is wholly inconsistent with this Court's case law, but would be permissible under the Trial Court's "consistent with" standard.

The "consistent with" standard is contrary to law and logic. Indeed, the only case on which the Trial Court relied for this standard, does not support the Trial Court's rule. In Rich, the plaintiff showed that she tripped over a defect in a sidewalk, not that she fell near a defect in a manner consistent with falling over the

hazard. 410 A.2d, at 530. Although she did not see what caused her to fall, she testified that, "one leg went into a depression and the other foot hit something metal[.]" Id. She described the cause of her fall as a "'hole'" elsewhere in her testimony, id., at 533 n. 3, and introduced photographic evidence showing "two holes in the brick sidewalk which were near a manhole cover." Id., at 530. She also provided witness testimony establishing that the same or similar defect had been consistently present for several weeks prior to the accident through the date that she photographed the holes. Id. . This evidence, which showed that one foot encountered a hole and the other immediately struck something metal, met the plaintiff's burden to prove that "one of the holes in the brick sidewalk was the cause of her fall." Id., at 533.

Rich did not hold that evidence that the plaintiff tripped near a trip hazard was sufficient to meet the burden of proof on causation. To the contrary, the plaintiff in Rich proved that she tripped in a hole. See District of Columbia v. Zukerberg, 880 A.2d 276, 282 (D.C. 2005) (describing Rich as "finding case was properly submitted to the jury where photographs of two holes in the sidewalk coupled with plaintiff's description of her fall was enough to permit an inference that one of the holes was the cause of her fall."). That distinction between tripping near a trip hazard and tripping over a specific type of hazard is critical. The issue in Rich was whether the plaintiff had to specifically identify which of two similar

hazards in close proximity to each other caused her fall. The trial court in Rich granted a judgment notwithstanding the verdict "because appellant had not established conclusively that one of the holes on the corner was the hole into which she stepped." Rich, 410 A.2d, at 533. This Court found that level of proof was not necessary. The plaintiff only needed to show that the fall was caused by a defect for which the defendant would be liable. Id. By showing that her injuries were caused by a hole and the defendant would be liable for injuries caused by either of the two holes at issue, the plaintiff sufficiently established that her injuries were caused by the defendant's negligence. Rich did not hold that the plaintiff only needed to show that she tripped near the two holes, without any evidence that she actually stepped in one of the two hazards. The plaintiff's evidence was sufficient to link her injuries to the specific hazards at issue, even if she could not identify which of the two hazards actually caused the fall.

This Court has explicitly confirmed that Rich requires more evidence than simply tripping near a trip hazard. The plaintiff in Twyman, like Plaintiff here, argued that her evidence satisfied the standard from Rich. Twyman, 655 A.2d, at 853. The Court of Appeals described the evidence from Rich showing that the plaintiff's feet encountered a hole and something metal, noting that this testimony allowed the plaintiff "to link her accident causally to a defect in the pavement." Id. (discussing Rich, 410 A.2d, at 533). If falling near the hazard in a manner

consistent with falling on the hazard were sufficient to provide the necessary causal link, the plaintiff in Twyman would have made out a *prima facie* claim. After all, falling after putting her foot wrong going down stairs would be "consistent with" either missing an uneven step or slipping on a slippery spot. The Twyman court necessarily rejected a standard requiring only proximity and consistency, finding that causation required evidence of a direct link between the negligence and the injury: "Twyman gave no testimony tying her fall to a defective condition of the stairs other than her bare statement that she set her foot down on the second or third step and fell." Id. Twyman, Wilson, and even Rich are clear that the causal link requires evidence that the plaintiff physically encountered a hazard caused by the defendant's negligence. If that direct link is missing, the plaintiff cannot rely on location and consistency.

The Trial Court's interpretation of Rich stretches its rule far beyond what that case, or any of this Court's other cases discussing causation, actually held. Plaintiff could not prove causation simply by showing that he tripped near a trip hazard or that his fall was otherwise "consistent with" tripping over the tie wire. To meet his burden of proof on causation, Plaintiff had to present some evidence that he actually contacted the tie wire. The Final Order should be reversed, because the Trial Court reduced Plaintiff's burden of proof and allowed him to reach the jury on causation without evidence that he physically encountered the hazard at issue.

## II. **Plaintiff Failed to Meet His Burden of Proof.**

The next issue, after determining what Plaintiff bore the burden to prove, is whether his evidence met that burden. Under Twyman and Wilson, Plaintiff was required to prove that he physically encountered the tie wire. Rich would allow Plaintiff to meet this burden by introducing evidence that he physically encountered something consistent with the tie wire, but it would not remove the requirement that he prove that he physically encountered the hazard. If he failed to present that evidence, the jury could not find that the tie wire caused his injuries without engaging in impermissible speculation, and Gilbane is entitled to judgment as a matter of law. See Twyman, 655 A.2d, at 852-54. The Final Order should be reversed, because Plaintiff failed to prove that he physically encountered the tie wire. No witness testimony or physical evidence indicates that Plaintiff contacted the wire, and neither Gilbane's incident reports nor the remainder of the evidence discussed in the Final Order fixes this flaw in Plaintiff's case.

### A. **No witness testimony or physical evidence indicates that Plaintiff contacted the tie wire.**

#### 1. Every witness denied knowledge of what caused Plaintiff's fall.

Plaintiff was the only witness to his fall. The first thing Plaintiff did after picking himself up was to confirm that no one saw him fall. Trial Tr., Day II, at 50:16-19 (A345). Indeed, he was the only person in the area when he fell. Id., at 48:23-25 (A343). His testimony was clear and consistent that no one else saw the

incident. Id., at 55:24-56:1 (A350-A351); at 56:7-12 (A351); see also Trial Tr., Day I, at 153:2-6 (A272) ("Nobody saw me fall.").

Not only was Plaintiff the only person in the area at the time of the fall, the record is also clear that no one outside of the immediate area would have been able to see the fall. The incident happened at a secure location behind 10-12' wooden barriers. See Sames Dep., at 15:15-17 (A30); Trial Tr., Day II, at 14:18-20 (A309), 88:16-22 (A383), and 97:12-14 (A392) (describing strict security around project, including high wooden barriers). Plaintiff was the only person who could have witnessed the accident, because he was only person in the area of the fall and no one outside of the area would have been able to see what happened.

To the extent that any doubt remained, every witness with knowledge of the project who testified at trial denied seeing Plaintiff fall. The only trial witnesses with knowledge of the project other than Plaintiff were Nick Sames, Kendall Romrell, and Robert Hinterlider. Plaintiff understood that Mr. Sames left the area before the incident and did not see the fall. Trial Tr., Day II, at 59:6-9 (A354). Mr. Sames confirmed that he did not see the fall. Sames Dep., at 30:4-7 (A45). Mr. Romrell had gone to the office to get caution tape to flag the wire and was on his way back to the office after finding the work area closed when he found out that Plaintiff fell. Trial Tr., Day II, at 113:4-17 and 115:4-7 (A408 and A410). Mr. Romrell called Mr. Hinterlider by phone to inform him of the incident. Id., at

115:9-23 (A410). Mr. Hinderliter did not see Plaintiff fall, did not see video of Plaintiff falling, and did not speak to anyone who claimed to have seen Plaintiff fall. Trial Tr., Day I, at 115:9-15 (A234). Put simply, no one other than Plaintiff witnessed the fall.

The lack of other witnesses is critical, because Plaintiff does not know what caused him to fall. Trial Tr., Day I, at 152:1-10 (A271) ("… as I was briskly walking over there, I tripped on something. **I don't know what I tripped on**.") (emphasis added). He did not look to see what caused him to fall immediately after the accident or when he passed through the area again on his return from the Port-a-Potties. Trial Tr., Day II, at 51:18-21 and 55:5-9 (A346 and A350). Indeed, he never saw the tie wire at all on the day of the accident. Id., at 55:10-23 (A350). When asked if he felt a tie wire on his shin as he fell, Plaintiff responded that the accident "happened so suddenly that [he] didn't have time to even get [his] hands in front of [him]." Id., at 57:24-58:4 (A352-A353). This testimony is clear that Plaintiff, the only eyewitness to the fall, does not know what caused him to fall.

No one has personal knowledge of what caused Plaintiff to fall. Only one person witnessed to the accident and that person neither saw nor felt the hazard. No one has personal knowledge to say that Plaintiff did or did not trip on the tie wire, because no one saw or felt Plaintiff contact that hazard. There was absolutely no evidence that Plaintiff physically encountered anything that caused him to fall. He

never testified about what he felt when falling or feeling anything that caused him to fall. This is indistinguishable from Twyman, where the plaintiff "was frank in testifying that she did not know what had caused her to fall." Twyman, 655 A.2d, at 851. Just as the plaintiff in Twyman acknowledged a lack of knowledge about the cause of her fall, Plaintiff's testimony does not provide the direct causal link between the tie wire and his fall. Indeed, no witness can provide the direct link this Court deemed necessary in Twyman. Plaintiff cannot prove causation unless some other evidence proves what caused him to fall.

2. No physical evidence supports Plaintiff's claim.

This absence of personal knowledge might not be conclusive if there were some other evidence indicating what happened. The record is clear, however, that no physical evidence linked Plaintiff's fall to the tie wire. The accident happened just before security closed the job site for the night, so Gilbane could not inspect the scene until the next morning. Trial Tr., Day II, at 109:10-15 (A404). The weather forecast called for rain overnight between the incident and the next morning. Id., at 111:18-22 (A405). Gilbane inspected the scene the next morning, but neither Mr. Hinderliter nor Mr. Romrell testified that they observed any physical signs of the accident. Neither identified scuff marks, indentations, or other physical signs indicating where Plaintiff fell or the cause of the incident. Indeed, it is not clear what they could have observed at the time of the inspection, because

the tie wire had already been removed before Mr. Hinderliter arrived. Trial Tr., Day I, at 120:3-16 (A239). No testimony identified physical evidence showing the location where Plaintiff fell, much less directly linking Plaintiff's fall to the tie wire.

Far from linking the fall to the tie wire, the physical evidence tends to show that Plaintiff likely did not trip on the tie wire. The construction area had uneven ground, which was strewn with gravel, broken concrete, and other construction debris. Trial Tr., Day II, at 52:9-13 (A347); Sames Dep., at 36:6-37:6 (A51-A52); Pl. Ex. 1. Plaintiff conceded that he was not paying attention as he crossed this terrain. Trial Tr., Day II, at 52:6-13 (A347). This lack of attention is at least equally consistent with Plaintiff's falling on debris as it is the tie wire.

Furthermore, Plaintiff's description of his fall is inconsistent with the photographs of the area near the tie wire. The photographs show the ground to consist of uneven gravel with a dumpster and a light-colored item on the ground behind the tie wire in the area where Plaintiff would have fallen if he tripped on the wire. See Pl. Exs. 1 and 2 (A534-A535). Plaintiff's testimony places the tie wire less than 48 inches from the side of the dumpster. Trial Tr., Day II, at 68:18-69:1 (A363) (conceding that a cinder block is 16 inches long and only two or three blocks would fit between the sump pump hose and the side of the dumpster). Plaintiff is 6'2" or 74 inches tall. Id., at 51:9-13 (A346). When he landed, his body

would have covered 6'2" of space from whatever caused him to trip. Id., at 51:14-17 (A346). He did not strike the dumpster when he fell. Id., at 69:8-9 (A364). Instead, he landed flat on his stomach, causing his entire front to become soaked from a puddle of water on the ground. Id., at 49:22-50:5 (A344-A345). There was no standing water visible in the area of the tie wire, including in the area between the tie wire and the dumpster. See Pl. Ex. 1 (A534). He also told his treating physician that he fell onto concrete. Fechter Dep., at 13:7-10 and 39:18-21 (A83 and A109). The area behind the tie wire was gravel, not concrete. See Pl. Exs. 1 and 2 (A534 and A535); Trial Tr., Day II, at 32:16-18 (A327). This testimony indicates that Plaintiff must have tripped and fallen further from the dumpster, behind where the person taking the photographs stood. There may have been concrete, standing water, and space to fall elsewhere in the construction area, but those features were not present where Plaintiff would have fallen if he tripped over the tie wire.

Finally, Plaintiff's testimony is inconsistent with the layout of the area more generally. Plaintiff walked past gang boxes shortly before he tripped.[2] Trial Tr., Day II, at 52:14-18 (A347). The gang boxes were at least 30 feet from the dumpster. See Sames Dep., at 25:15-22 (A40). Plaintiff was not confident where,

[2] Gang boxes are large metal storage boxes that J.E. Richards' personnel used to store their tools on the job site. Sames Dep., at 20:4-12 (A35).

within that 30-foot span, he tripped and fell. See Trial Tr., Day II, at 52:14-53:4 (A347-A348). He estimated that he was approximately three-quarters of the way from the gang boxes to the dumpster, id., at 52:14-18 (A347), but he could not say how many steps he took or how long his strides were. Id., at 52:19-25 (A347). When pressed, he acknowledged that he did not know why he estimated that he went three-quarters of the way from the gang boxes to the dumpster. Id., at 53:1-4 (A348). Plaintiff's inability to say where he was is itself troubling, but his estimate is worse. His own estimate, if believed, places his accident several feet further from the dumpster than the tie wire. This additional space would explain how Plaintiff did not contact the dumpster as he fell and landed on concrete and standing water not visible in the photographs. Such a scenario would explain the apparent inconsistencies between Plaintiff's testimony and the physical evidence, but that explanation would also mean that Plaintiff tripped and fell several feet before he reached the tie wire.

No physical evidence indicates that Plaintiff contacted the tie wire. To the contrary, the limited physical evidence tends to disprove Plaintiff's theory that he fell over the tie wire. This Court need not conclude that Plaintiff fell somewhere away from the tie wire, however. Plaintiff bore the burden of proof on causation, and neither witness testimony nor physical evidence can provide the necessary causal link. Any link between the tie wire and Plaintiff's fall would necessarily rest

on the same sort of speculation that this Court ruled impermissible in Twyman, 655 A.2d, at 852-54 and Wilson, 912 A.2d, at 1190-91. Gilbane is entitled to judgment as a matter of law for the same reasons that the claims in Twyman and Wilson were dismissed.

B. **Gilbane's incident report does not change this result.**

Lacking eyewitness testimony or physical evidence, Plaintiff relied primarily on the incident report that Mr. Hinderliter prepared and submitted to the GSA.[3] The report indicated that Plaintiff tripped over a tie wire. Trial Tr., Day I, at 112:8-12 (A231) and Pl. Ex. 10 (GSA Report) (A536).[4] The Trial Court denied Gilbane's Motion for a Directed Verdict during trial on the grounds that the report was a party admission sufficient to present a jury question on causation. Trial Tr., Day II, at 84:13-85:5 (A379-A380). The Final Order went further, finding that Mr. Hinderliter's report and testimony were, "[f]or all practical purposes" an admission of Gilbane's liability. Final Order, at 5 (A541). This ruling was reversible error for several reasons.

[3] Another incident report was filled out by Plaintiff and signed by Mr. Romrell. This report includes Plaintiff's written statement that he tripped on an invisible wire. The Final Order does not rely on this report and, regardless, this report cannot satisfy Plaintiff's burden of proof for the same reasons that the GSA report fails. Plaintiff did not actually know what he reported in the statement, so his baseless claim, based on speculation from his foreman, that he tripped on the wire is not sufficient evidence of causation.

[4] The parties mistakenly referred to this document as Exhibit 8. See supra, note 1.

1. The incident report must be viewed in context.

The GSA Report was admissible as a party admission under Rule 801. See Fed. R. Evid. 801. As a party admission, the GSA Report became admissible based on who prepared the document, not the trustworthiness of its contents: "Party admissions differ from most out-of-court statements in that their admissibility does not require the demonstration of 'guarantees of trustworthiness' but is based rather upon the identity of the speaker." Harris v. United States, 834 A.2d 106, 116 (D.C. 2003) (citation omitted). Party admissions need not be based on personal knowledge or other foundation typically required for evidence to be admissible. In re M.D., 758 A.2d 27, 32 (D.C. 2000) (citation omitted). "So long as the statement is fairly attributable to the party, 'it makes no difference whether the adopting party had any personal knowledge of the truth of the matters mentioned in the statement.'" Harris, 834 A.2d 106, 116 (quoting 5 WEINSTEIN'S FEDERAL EVIDENCE § 801.31 [3][b] (2003)).

The fact that the GSA Report was admissible does not, however, make the document an admission of liability. To the contrary, the Report's admissibility depends on Gilbane's ability to explain the document and rebut the conclusions that Plaintiff sought to draw from it. Party admissions receive preferential treatment precisely because the party making the purported admission has the

opportunity to explain or rebut the statement. Chaabi v. United States, 544 A.2d 1247, 1248 (D.C. 1988) (citation omitted). ("'The basis for allowing an admission into evidence is the ability of the party to rebut the testimony, thereby avoiding the danger prevented by the hearsay rule, that is, the inability to cross-examine an out-of-court assertion.'"). "The opportunity to refute is not just the generalized opportunity to contradict the fact asserted in the admission … but to explain the specific circumstances and nature of the admission itself, including a flat denial that such an admission was ever made." Id., at 1249.

This ability to explain and rebut a party admission impacts the effect that such an admission may have on the litigation. A party statement might, in the abstract, meet the burden of proof without the need for other evidence. In re M.D., 758 A.2d, at 32. However, this Court has cautioned that, although the evidence is admissible, "that does not mean the admission would be conclusive of the issue or irrebuttable." Ukwuani v. District of Columbia, 241 A.3d 529, 548 n.42 (D.C. 2020) (citation omitted). Indeed, the admission alone might not even preclude the Court from entering judgment in the admitting party's favor as a matter of law. See id., 241 A.3d, at 548 (citation omitted). Put simply, the effect of a party admission necessarily depends on evidence surrounding the admission.

Gilbane was entitled to present evidence explaining and rebutting the incident report. Furthermore, Gilbane was entitled to have that evidence considered

when the Trial Court ruled on its Motion and Renewed Motion for Judgment as a Matter of Law. Indeed, "[a]ll of the evidence in the record must be considered, moreover, not merely the evidence favorable to the non-moving party." Furline v. Morrison, 953 A.2d 344, 351 (D.C. 2008) (citation omitted). The Trial Court could not disregard or ignore "positive testimony which is not inherently improbable, inconsistent, contradicted, or discredited". Hamilton v. Hojeij Branded Food, Inc., 41 A.3d 464, 473 (D.C. 2012) (citation omitted). The Trial Court could not simply determine that Gilbane admitted liability in the incident report. Rather, the Trial Court was required to consider Gilbane's evidence explaining the report in making that ruling.

The Trial Court found that the incident report amounted to an admission of liability. Final Order, at 5 (A541). This conclusion would be possible only if Gilbane failed to offer any evidence explaining or rebutting the report. That did not occur. To the contrary, Gilbane offered positive testimony from the persons responsible for the investigation and report explaining what occurred and what evidence went into the ultimate report. The Trial Court could not simply disregard that testimony when it ruled on Gilbane's Motions, but that is precisely what the Final Order does. The Final Order deems the incident report to be an admission of liability without any discussion of Gilbane's explanation and rebuttal evidence. This effectively deprived Gilbane of its ability to explain the purported admission,

which is reversible error. See Chaabi, 544 A.2d, at 1248. The Final Order should be reversed for this reason alone.

2. In context, no reasonable person could view the incident report as evidence that Plaintiff physically contacted the tie wire.

Although the incident report is not an admission of liability, Plaintiff might argue that the report meets his burden of proof as to causation. Given that Plaintiff must prove that he physically encountered the tie wire, the question becomes whether the report proves that Plaintiff contacted the wire. Considering the entirety of the evidence, not simply the report itself, no reasonable person could view the incident report as evidence that Plaintiff actually contacted the tie wire.

The evidence surrounding the report is clear and uncontradicted. Plaintiff did not know what caused him to trip. Trial Tr., Day I, at 152:1-10 (A271); Trial Tr., Day II, at 55:10-23 (A350), and 57:24-58:4 (A352-A353); Sames Dep., at 32:3-5 (A47). Nick Sames, who Plaintiff acknowledges was not present and had no basis to say what happened, told Plaintiff that he tripped over the tie wire. Trial Tr., Day II, at 59:6-22 (A354). There is no evidence or testimony that this explanation was anything other than pure guesswork on Mr. Sames' part. Plaintiff took Mr. Sames' speculation and ran with it, writing out a statement claiming that he tripped over "an invisible tie wire." Id., at 104:25-105:7 (A399-A400); Sames Dep., at 32:6-13 (A47). Neither he nor Mr. Sames had a factual basis for that assertion.

Nevertheless, that speculation was the explanation that he provided to Gilbane as if it were fact.

Gilbane investigated the incident, including inquiring whether anyone else saw the incident and visually inspecting the scene. Trial Tr. Day I, Id., at 122:6-12 (A241); 115:9-15 (A234). No other witness came forward and there is no indication that any physical signs of the accident remained when Gilbane was able to view the work site. Trial Tr. Day II, at 117:9-15 (A412). The photograph of the tie wire and dumpster does not reveal any imprints from knees or forearms in the ground beyond the tie wire. See Pl. Exhibit 2 (A535). At that point, the only information about the incident known to Gilbane was Plaintiff's report that he tripped over the tie wire. Trial Tr., Day I, at 110:10-11 and 119:5-120:2 (A229 and A238-A239). Gilbane had no reason to distrust that report at the time. Nothing about Plaintiff's story was inherently suspicious and, even if Gilbane had questions, there were no physical signs that it could use to contest the version Plaintiff provided. The GSA required Gilbane to submit an incident report, so it provided what it was told at the time. The record is clear that the only information supporting the incident report's statement that Plaintiff tripped on the tie wire was Plaintiff's description of the incident.

With this context, no reasonable person could interpret the incident report as evidence that Plaintiff did, in fact, trip over the tie wire. Gilbane neither had nor

relied on any information beyond Plaintiff's statement at the time it submitted the report. And the evidence showed that Plaintiff's statement was based on pure speculation. As such, the incident report cannot provide any basis to conclude that the tie wire cause the accident other than Plaintiff's statement itself. Plaintiff's statement cannot support the conclusion that he tripped over the tie wire, because Plaintiff freely admits that he does not know what caused the fall. Instead of personal knowledge, Plaintiff's statement was based on what he was told by Nick Sames. Mr. Sames did not see what happened. Mr. Sames told Plaintiff that Plaintiff tripped over the tie wire, but Plaintiff acknowledges that Mr. Sames lacked any factual basis for that claim. Whether Mr. Sames' statement to Plaintiff was innocent speculation or intentional fabrication, it certainly provides no factual basis to conclude that Plaintiff actually encountered the tie wire.

The only way to view the incident report as evidence that Plaintiff actually contacted the tie wire is to either ignore Gilbane's evidence explaining what went into the report or to speculate that Gilbane actually relied on some evidence past Plaintiff's statement. Neither option is permissible. The Trial Court was required to consider the entire record, including Gilbane's testimony that the incident report was based solely on Plaintiff's statement. It could not ignore or disregard Gilbane's uncontradicted testimony on that point, nor could it speculate what other basis Gilbane might have had for the report. To the contrary, although Plaintiff was

entitled to the benefit of every reasonable inference from the evidence, that inference could not cross the line into speculation: "'[t]he opponent of the motion [for judgment as a matter of law] must be given the benefit of every reasonable inference from the evidence, but not inferences based on guess or speculation.'" Giordano v. Sherwood, 968 A.2d 494, 502 (D.C. 2009) (quoting Furline, 953 A.2d, at 351). The record does not indicate that Gilbane had any evidence past Plaintiff's statement, much less that it relied on such evidence to prepare the incident report. Any conclusion that Gilbane relied on evidence independent from Plaintiff's statement is unsupported and impermissible.

Viewed in context, the incident report demonstrates that Gilbane believed that Plaintiff was truthful when he reported having tripped over the tie wire. When it submitted the report, Gilbane had no independent basis to confirm or deny Plaintiff's statement. Gilbane included the information from Plaintiff, because it believed what it had been told. Gilbane's belief in Plaintiff's veracity "has the same probative value as the vision of a psychic: it reflects nothing more than the individual's foundationless faith in what he believes to be true." Williams v. United States, 130 A.3d 343, 355 (D.C. 2016). Gilbane's misplaced trust in Plaintiff's report does not provide any basis to conclude that the incident report proves facts that neither Plaintiff nor Gilbane have information to support.

### C. **The remaining evidence identified in the Final Order does not show that Plaintiff contacted the tie wire.**

The Trial Court found that the following evidence supported Plaintiff's claim: "an admission from the Defendant that a tie wire caused Plaintiff's fall, a recognition that Gilbane connected the tie wire to a sump pump on the date the Plaintiff fell, and uncontested hearsay testimony that Plaintiff tripped over a tie wire." Final Order, at 6 (A542). No such evidence indicates that Plaintiff physically contacted the tie wire.

1. Mr. Hinderliter did not rule out other causes of the incident.

The "admission" according to the Trial Court consists of Mr. Hinderliter's conclusion that Plaintiff tripped over the wire and an assertion that he "noted Plaintiff could not have tripped over gravel or another potential hazard at the construction site." Final Order, at 5 (A541). As noted above, the conclusion rests entirely on Plaintiff's statement and provides no support for the claim that Plaintiff actually contacted the tie wire. As for the second point, the purported exclusion of other tripping hazard, Mr. Hinderliter did not testify to any such conclusions. Mr. Hinderliter agreed that the report did not identify other tripping hazards, see Trial Tr., Day I, at 112:16-113:2 (A231-A232), but he was neither asked nor testified whether the investigation ruled out potential alternative causes of the accident. Mr. Hinderliter never testified that he considered alternative causes, much less ruled them in or out. Plaintiff argued on brief that Mr. Hinderliter ruled out other

tripping hazards, but that argument is wholly unsupported by the record. The claim that Mr. Hinderliter excluded other causes crosses the line from permissible inference to impermissible speculation, so Plaintiff cannot rely on that purported evidence to prove causation. See Giordano, 968 A.2d, at 502.

2. The fact that the tie wire was present is not evidence that plaintiff tripped on the wire.

The second piece of evidence, after Gilbane's purported admission, is "a recognition that Gilbane connected the tie wire to a sump pump on the date the Plaintiff fell[.]" Final Order, at 6 (A542). This evidence is not relevant to the issue at hand. Taken in the light most favorable to the Plaintiff, Plaintiff presented sufficient evidence for the jury to conclude that Mr. Romrell had connected the tie wire to a sump pump hose prior to Plaintiff's fall.[5] Plaintiff's problem is not a failure to prove that a hazard existed when he fell. The problem for Plaintiff is that he failed to prove that he contacted the hazard. As the Twyman court recognized, proof that a hazard was present is not proof that the hazard caused the accident. See 655 A.2d, at 852. The second item thus cannot allow Plaintiff to meet his burden of proof on causation.

[5] The evidence on this point is not entirely clear or without conflict. To the extent relevant, Gilbane does not concede that the tire wire was, in fact, present at the time of Plaintiff's fall. However, Gilbane does not argue on this appeal that Plaintiff failed to present sufficient evidence to reach the jury on the question whether the hazard had been created prior to the accident.

3. Any hearsay testimony suffers from the same defect as the incident report.

Third, and finally, the Trial Court found that "uncontested hearsay testimony that Plaintiff tripped over a tie wire" allowed Plaintiff to reach the jury. Final Order, at 6 (A542). The Final Order states that, "plaintiff testified he tripped over the tie wire in the same approximate area of the construction site where Mr. Romrell testified to placing the wire." Id., at 5 (A541). Plaintiff did not testify that he tripped over the tie wire at any location. His testimony explicitly disclaimed knowledge of what caused his fall: "… as I was briskly walking over there, I tripped on something. **I don't know what I tripped on**." Trial Tr., Day I, at 152:1-10 (A271) (emphasis added). He neither saw nor felt the tie wire. Id., at 55:10-23 and 57:24-58:4 (A350 and A352-A353). Plaintiff did not clearly identify where he tripped, so it is not clear that he could place the location of his fall at the same place as the tie wire. At most, his testimony indicates that he fell somewhere in the general area of the tie wire, but falling in the general area of a hazard is not sufficient evidence to prove causation. Twyman, 655 A.2d at 852-53; Wilson, 912 A.2d, at 1189-90. Plaintiff did not testify that he physically encountered the tie wire, so his testimony that he tripped in the general area of the tie wire cannot meet his burden of proof on causation.

## III. **Gilbane Is Entitled to Judgment as a Matter of Law.**

Although this Court must view the evidence in the light most favorable to Plaintiff, "a directed verdict is proper when the jury has 'no evidentiary foundation on which to predicate intelligent deliberation and reach a reliable verdict.'" Twyman, 655 A.2d, at 852 (citation omitted). In Twyman, "the trial judge correctly discharged his duty to remove the issue" of causation from the jury, because a verdict in the plaintiff's favor "would have rested on surmise." Id., at 853-54. Similarly, the question of causation was properly removed from the jury where it "was left to speculate as to causation and draw impermissible inferences" as to whether the orange substance caused the plaintiff's fall. Wilson, 912 A.2d, at 1190.

This case is indistinguishable from Twyman and Wilson. Plaintiff demonstrated that a hazard existed, but failed to prove the necessary causal link between his accident and that hazard. The jury in this case could find in Plaintiff's favor only through impermissible speculation and surmise. Because Plaintiff failed to prove a necessary element of his case, Gilbane is entitled to judgment as a matter of law. For the same reasons judgment was entered for the defendants in Twyman and Wilson, this Court should enter an order reversing the Final Order and directing that final judgment be entered in Gilbane's favor.

## CONCLUSION

Plaintiff bore the burden to prove that his accident was caused by the hazard at issue. More specifically, he bore the burden of proving that he physically encountered the hazard. He failed to present any evidence to prove that point, so his claim fails as a matter of law. The Final Order should be reversed and final judgment entered in Gilbane's favor.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2023, the following individuals were served by e-mail notification from the Court's filing system:

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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.

| | |
|---|---|
| /s/ Robert E. Worst | 22-cv-975 |
| Signature | Case Number(s) |
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