No. 23-CV-0522

In the

District of Columbia Court of Appeals

MARY-KATE CASTANIA,

Appellant,

v.

THE DISTRICT OF COLUMBIA,

Appellee.

Appeal from the Superior Court of the District of Columbia, Civil Division No. 2020 CA 003026B *(Hon. Hiram Puig-Lugo, Judge)*

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RULE 28(a)(2)(A) STATEMENT AS TO PARTIES

Appellants certifies that the following parties and counsel are involved in the proceedings in this matter. Currently, there are no intervenors or *amici curiae*.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under D.C. Code § 16-4427(b) on the basis that Ms. Castania appeals an order issued by the Superior Court that granted a motion for summary judgment which disposed of all of her claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting summary judgment where there were material issues of fact given lay witness and expert witness testimony.
2. Whether the trial court erred in ruling as a matter of law that a sidewalk defect of 0.8 to 1.5 inches was insignificant, even though the defect existed in a highly trafficked commercial area.

STATEMENT OF THE CASE

This appeal arises from a premises liability action brought by Appellant, Mary-Kate Castania, against the District of Columbia that was pending in the Superior Court. On July 25, 2019, Ms. Castania was riding an electric scooter on the sidewalk near 1523-1525 9th Street, NW in Washington, D.C. She encountered a portion of the sidewalk that was raised, causing her to fall and suffer severe injuries. Ms. Castania filed her Complaint on July 08, 2020, (JA 12-16) and upon the completion of discovery, the District of Columbia filed its dispositive motion for summary judgment. By Order dated February 23, 2023, the trial court

granted the District of Columbia's Motion for Summary Judgment, ruling that as a matter of law 1) Ms. Castania failed to proffer sufficient evidence for a reasonable jury to conclude that the District of Columbia had sufficient notice of a dangerous condition; and 2) the defect at issue was "insignificant" as a matter of law. JA 355-362. A timely appeal of the trial court's order was thereafter filed.

STATEMENT OF THE FACTS

Ms. Castania was riding her electric scooter and was severely injured when her scooter struck a defect on a sidewalk in front of 1523-1525 9th Street, NW which the District of Columbia admitted it owned, maintained and inspected. ("the incident") JA 300-310, 317. At the time of the incident, and for at least two years prior, there was a portion of that sidewalk that was raised and constituted a dangerous condition for persons lawfully on the sidewalk, including Ms. Castania. Specifically, a raised portion of the sidewalk in front of 1523-1525 9th Street, NW, in Washington, D.C., had a sudden change in elevation between 0.8 and 1.5 inches in height. JA 327-328, 329-330. This elevation change caused Ms. Castania to be thrown from her scooter and sustain serious and permanent injuries including but not limited to an elbow fracture, wrist fracture and leg fractures which required multiple surgeries. J.A. 98-117.

During motions practice Ms. Castania presented the following to the trial court:

1. Expert report with measurements of the raised sidewalk defect where Ms. Castania fell, identifying the elevation change from 0.8 inches to 1.5 inches. J.A. 329-330.
2. An Affidavit of Claire Wilder who works at, and whose husband owns, Chaplin's Restaurant located on the same block and in close proximity to the incident. JA 297-298. Ms. Wilder was an eyewitness to Ms. Castania's fall and observed the raised sidewalk defect. JA 297-298, 332-333. Ms. Wilder has personal knowledge that the raised sidewalk defect at issue existed for approximately two years prior to the incident. Id.
3. An Affidavit of Kyle Sappington, the owner of Glass House Gallery, D.C., located in the District of Columbia on the same block and next to where the incident occurred. JA 299. Mr. Sappington has personal knowledge that the raised sidewalk defect at issue existed since approximately 2017. JA 299, 332-333.

Notwithstanding the above, the trial court failed to view the evidence before it in the light most favorable to Ms. Castania, and granted summary judgment. The trial court ruled that there "is no genuine issue of material fact that Defendant had no constructive notice of an alleged defect that would need to be repaired." JA 360-361. For the reasons set forth herein, the trial court committed reversible error.

STANDARD OF REVIEW

For the issues before this Court, the standard of review is *de novo* as the question of whether summary judgment was properly granted is one of law and is reviewed *de novo*. *Cormier v. The District of Columbia Water & Sewer Auth.*, 959 A.2d 658, 662 (D.C. 2008). This Court reviews the trial court's granting of summary judgment *de novo*. *Reeves v. Washington Metropolitan Area Transit Authority*, 135 A.3d 80 (D.C. 2016).

SUMMARY OF ARGUMENT

Appellant submits that the trial court committed two errors in granting the motion for summary judgment. First, the trial court erred by ruling that Ms. Castania failed to present sufficient evidence upon which a reasonable jury could find that the District of Columbia had constructive notice of the raised sidewalk at issue. Ms. Castania presented affidavits of two fact witnesses, as well as expert testimony, to support her claim that the raised sidewalk defect at issue existed for several years before the incident. Second, the trial court erroneously ruled that a sidewalk defect of between 0.8 inches and 1.5 inches was insignificant as a matter of law, even where the defect existed in a highly trafficked commercial area of Washington, D.C. containing a large church, WMATA bus stop, restaurants, and gallery. In reaching its conclusion the trial court relied on one case alone, and that case is factually dissimilar from the case before this Court.

ARGUMENT

I. The Trial Court Erred When It Ruled that Ms. Castania Failed To Present Sufficient Evidence Upon Which a Reasonable Jury Could Find the District of Columbia Negligent.

A. Material Factual Issues Exist on the Issue of Constructive Notice

It has long been settled that the District of Columbia has a duty to maintain its sidewalks in a reasonably safe condition. *The District of Columbia v. Woodbury*, 136 U.S. 450, 463-65 (1890); *Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1322 (D.C. 1994); *Lynn v. The District of Columbia*, 734 A.2d 168, 171-72 (D.C. 1999); *see also* STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 10.10 The District of Columbia's Liability for Unsafe Conditions in Public Space. JA 311.

Viewing the evidence in the light most favorable to Ms. Castania, there remains a triable issue of fact as to whether the District of Columbia had constructive notice of the raised sidewalk defect that caused Ms. Castania's fall. In order to establish a constructive notice claim against the District of Columbia, a plaintiff must show that (1) a dangerous condition existed, and (2) that it existed for such a period of time that the District of Columbia should be aware of it. *Lynn v. The District of Columbia.*, 734 A.2d 168 (D.C. 1999). When considering the particular circumstances of constructive notice, how long a dangerous condition existed for is a critical factor. *See Wilson v. Wash. Metro. Area Transit Auth.*, 912

A.2d 1186, 1190 (D.C. 2006)(citing *Lynn*, 734 A.2d at 170.). If the alleged hazard persisted for an unreasonably prolonged period of time, then constructive notice may be imputed to the defendant. *See Lynn*, 734 at 171. When considering how long is too long, this Court has found that a raised portion of a sidewalk existing for just "more than a month" can be unreasonably prolonged. *Id.* Additionally, "since questions of this kind are necessarily fact-specific, a trial judge must carefully assess, in considering a motion for summary judgment . . . whether material questions of fact exist." *Id.* at 170.

Here, as set forth below, Ms. Castania presented to the trial court the testimony of two fact witnesses who observed the sidewalk defect at issue and had knowledge of how long the sidewalk defect existed prior to the incident. The District of Columbia chose not to depose these witnesses during discovery, and their affidavit testimony was presented to the trial court.

B. The Testimony of Claire Wilder & Kyle Sappington Create Material Issues of Fact.

One witness to the incident was Claire Wilder. Ms. Wilder observed the fall itself, as well as the sidewalk defect. JA 297-298, 332-333. Ms. Wilder's works at, and her husband owns, Chaplin's Restaurant, located in Washington, D.C. *Id.* Chaplin's restaurant is located on the very same block as the sidewalk where the incident occurred. Ms. Wilder was an eyewitness to the fall and had an opportunity

to observe the sidewalk defect. Id. Specifically, Ms. Wilder testified by affidavit that the "raised sidewalk in front of" the location where the incident occurred had been present "for approximately two years prior" to the fall. *Id.*

As the District of Columbia chose not to depose Mr. Wilder, no evidence or argument was presented to the trial court in any way discounting, discrediting, or otherwise contradicting the testimony that the raised sidewalk at issue had been present for at least 2 years prior to Ms. Castania's fall.

Ms. Castania also offered testimony of a second witness who observed the sidewalk defect. Kyle Sappington owns a business located at 1527 9th Street, NW which is on the same block and next to where the incident occurred. JA 299, 332-333. As with Claire Wilder, Mr. Sappington had an opportunity to observe the sidewalk; his observations were dated back to 2017. *Id.* Mr. Sappington testified via affidavit "that the raised sidewalk" existed since 2017. *Id.*

As with Ms. Wilder, the District of Columbia chose not to depose Mr. Sappington. The District of Columbia offered no evidence or argument to the trial court in any way discounting, discrediting, or otherwise contradicting the testimony that the raised sidewalk at issue existed since 2017.

C. The Sidewalk Defect Was Measured by Expert Witness as Between 0.8 and 1.5 Inches.

Dr. William Vigilante, one of Appellant's liability experts, measured the portion of the sidewalk where the incident occurred and reported a change in elevation of between 0.8 and 1.5 inches. JA 329-330. The District of Columbia did not contest or otherwise argue the invalidity of these measurements, thus conceding their accuracy. JA 327-328. This is well in excess of the 0.25 inches that the District of Columbia considers acceptable by its own internal policies and procedures. This is also well in excess of the 0.5 inch standard that the District of Columbia admits as the threshold at which a sidewalk needs to be repaired. In its responses to Mr. Castania's request for admission of facts, the District of Columbia concedes that it would repair sidewalk defects of 0.5 inches or greater. JA 300-303.

D. The Trial Court Confused Actual and Constructive Notice.

It bears mentioning that the trial court wrongly confused the doctrines of constructive and actual notice. The trial court in granting the motion for summary judgment reasoned that "[i]ndeed, neither witness testified having reported the condition of the sidewalk to the District in an effort to secure repairs." JA 360. This analysis by the trial court is confusing, and appears to conflate actual notice with constructive notice. It is unknown whether this confusion by the trial court ultimately impacted its ruling, but at no point in the record did Ms. Castainia suggest that her negligence claim rested in actual notice. Although it had an

opportunity to correct it analysis in its order denying Mr. Castania's Rule 59(e) Motion to Alter or Amend Judgment, the trial court chose not to do so and seemingly continued to conflate the doctrines of actual and constructive notice. JA 382-386.

II. The Trial Court Erred in Ruling that the Sidewalk Defect Was Insignificant as a Matter of Law

The trial court wrongly ruled that that the sidewalk defect was "insignificant" as a matter of law, and therefore granted the summary judgment motion. In reaching its conclusion, the trial court relied on one, single case: *Briscoe v. The District of Columbia*, 62 A.3d 1275 (D.C. 2013). As discussed herein, the defect at issue is not "insignificant," and the facts of Briscoe materially differ from the facts before this Court.

A. Briscoe Is Distinguishable

In *Briscoe*, the plaintiff was attempting to cross a curb which was located directly in front of her home. She fell and suffered injuries. The trial court there determined that the photograph of the curbstone confirmed that the defect was "very small" and was no more than "an indentation along the upper edge of the curb." *Briscoe*, 62 A.3d at 1277, 1279. In reaching its conclusion that summary judgment was appropriate, the *Briscoe* court relied upon precedent involving a one-half inch gap between a median strip and a curb, and another involving a brick protruding one-quarter of an inch above the sidewalk. *Briscoe*, citing *Williams v.*

The District of Columbia, 646 A.2d 962, 962-963 (D.C. 1992)(finding summary judgment appropriate when the plaintiff "lacked **any evidence** that the condition of the street or the median strip was defective). *Briscoe*, 62 A.3d at 1278 (emphasis added). This Court in *Briscoe* ultimately concluded that a *de minimis* defect should remove the matter from the jury as a matter of law.

The facts of the instant case are distinguishable from *Briscoe*. First and foremost, the defect in *Briscoe* was on a curb. This Court did not face in *Briscoe*, nor did it decide, that raised sidewalk panels of 0.8 inches to 1.5 inches are insignificant. This Court rendered its decision based on what is arguable a very narrow set of facts, particularly that in Briscoe the defect was a small indentation along a curb adjacent to a parking lane of a roadway directly outside of the plaintiff's home. In the matter before the Court now, the raised sidewalk defect that caused Ms. Castania's fall was 1.5 inches at its peak, and was squarely in the middle of the highly trafficked sidewalk. JA 307-310, 337.

B. The Fall Occurred in a Heavily Trafficked Area Within the District of Columbia.

It is important to note that it is long been settled that the nature of the hazard's surrounding area is a fact upon which a plaintiff can rely to defiant a summary judgment motion. *See Lynn v. The District of Columbia*, 734 A.2d 168 (D.C. 1999). Specifically, the nature of the hazard's surrounding area and the amount of traffic it receives are important factors when considering whether the

particular circumstances of a case may establish constructive notice. *Id.* at 171. Therefore, routine pedestrian traffic and the presence of significant commercial activity near the location of the hazardous sidewalk strongly favors a finding of constructive notice. *See id.* (noting the proximity to a shopping mall near the dangerous condition as a factor in finding that a genuine issue of material fact was raised regarding constructive notice); *Smith v. District of Columbia*, 189 F.2d at 671, 676 (D.C. Cir. 1951) (observing that the plaintiff slipped on ice in a "much-traveled corner in downtown Washington" while determining that the plaintiff raised a genuine issue of fact regarding constructive notice).

Here, summary judgment was not appropriate because (1) the raised sidewalk defect that is at issue was present for at least two years before Ms. Castania's fall, and (2) the raised sidewalk defect was present in a location that receives a high volume of pedestrian traffic. *Lynn*, 734 A.2d at 171. The fall at issue occurred on 9th Street NW between P Street NW and Q Street NW. This is a well-traveled area of the city. In fact, the District of Columbia, through its Rule 30(b)(6) designee Andrew Kaufman, testified that the location is a "major road," a "federal aid road," "a road eligible for federal aid," a road that "the federal government has deemed it an important, major, bigger road," that the federal government would even help in the cost of maintaining the road and sidewalk," and that the sidewalk is part of the "major road." JA 320-321.

What's more, as pointed out to the trial court, the dangerous condition was on the same block as several commercial establishments that garner heavy pedestrian, bicycle, and scooter traffic such as a daycare center, two restaurants and an art studio/gallery. JA 293. A large Baptist church resides on the opposite side of the street on the same block as the incident, as does the Gregory Life Family Center non-profit, and an additional restaurant. JA 293. (see google maps photo)[1] The dangerous condition on the sidewalk existed along the route of two WMATA public bus routes — the G8 bus which has two stops within 1.5 blocks of the sidewalk and the G2 whose westbound bus stop is on the corner south of the defect with an eastbound stop across the street. The defect was in the middle of the sidewalk, not an obscure area that a person would not be expected to travel. JA 336-337. It is also worth mentioning that witness Claire Wilder had seen individuals trip and fall over the raised sidewalk at issue prior to Ms. Castania's fall. JA 297-298.

C. The District of Columbia Concedes that Any Change in Elevation Greater than .25 Inches Needs Repair.

The trial court, in ruling that the defect before it of between 0.8 and 1.5 inches was "insignificant" as a matter of law, seemingly ignored not only the law in the

[1] https://www.google.com/maps/@38.9103194,-77.0239909,3a,75y,156.58h,88.13t/data=!3m7!1e1!3m5!1s3oiUvkNIZYdbNARG9E8x4Q!2e0!5s20190701T000000!7i16384!8i8192?entry=ttu

District of Columbia, but also the District of Columbia's own admissions. Indeed, a change in elevation as small as 0.125 inches has been sufficient to constitute a dangerous condition, although it is generally accepted that a change in elevation up to 0.25 inches is acceptable and anything beyond that is a dangerous condition. Compare *District of Columbia v. Cooper*, 445 A.2d 652, 656 (D.C. 1982) with *Washington Gas Light Company v. Jones*, 332 A.2d at 360 (D.C. 1975). *See also Klein v. The District of Columbia*, 133 U.S. App. D.C. 129, 409 F.2d 164 (D.C. 1969)(reversing directed verdict for the District where there was evidence of a ¾ inch protrusion on a sidewalk).

Of significance here is that the District of Columbia concedes that any change in elevation greater than 0.25 inches presents a defect that needs to be repaired. During discovery, the corporate designee for the District of Columbia, Andrew Kaufman, testified as follows:

Q (Counsel for Ms. Castania): So up to and including July 25, 2019, when there was a height difference in a sidewalk, did the District use the ADA's one-forth of an inch in determining whether a sidewalk needed to be repaired?

A (Mr. Kaufman): In general?

Q (Counsel for Ms. Castania): Yes.

A (Mr. Kaufman): Yes.

JA 318.

The defect in the instant case ranged from 0.8 inches to 1.5 inches in size, well above one-fourth of an inch. JA 327-330. Further, both of Plaintiff's liability experts, Mr. Walter Green and Dr. Vigilante, agree that the standard of care in the District of Columbia is that any change in elevation on a sidewalk of more than 0.25 inches needs to be repaired. JA 196-226, 234, 338-339, 329-331. The Defendant's experts do not rebut this standard of care.

Accordingly, viewing the evidence in the light most favorable to Ms. Castania, judgment as a matter of law in the instant case was inappropriate as the change in elevation of the sidewalk panels where she fell was 0.8 inches to 1.5 inches, higher than 0.25 inches or even 0.75 of an inch, and certainly was not a *de minimis* defect. Furthermore, in *Briscoe*, the District of Columbia argued that the location of the allegedly defective curbstone was not in a "busy or conspicuous location." *Briscoe* at 1279. Here, the location of the fall occurred directly in the middle of a sidewalk in a highly trafficked area of the city.

CONCLUSION

In light of the foregoing, the Appellant respectfully requests that this Court reverse the grant of summary judgment be reversed and remand the case for a jury trial.

Dated: November 2, 2023 Respectfully submitted,

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I certify that a copy of this brief was served upon counsel for the District of Columbia through the Court's electronic 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.

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