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)*

REPLY BRIEF FOR APPELLANT

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I. The District of Columbia Raises Matters Not Before this Court

As a preliminary matter, for reasons unknown, the District of Columbia addresses two issues that Ms. Castania has not brought before this Court. First, the District of Columbia references *actual* notice throughout its brief, when what is before this Court is the claim of *constructive* notice. Second, it brings before this Court the exclusion of one piece of documentary evidence, namely a photograph, which Ms. Castania has not raised on her appeal.

A. Ms. Castania's Claims Are Grounded on Constructive Notice, Not Actual Notice

Ms. Castania made clear, both at the trial level and on appeal, that her claims are grounded in the theory of constructive notice, not actual notice. Constructive notice is the lens through which the issues of summary judgment, issues of material fact, the sidewalk defect, and witness testimony, among others, should be viewed. The District of Columbia continues the trial court's error in blurring the lines — if not conflating — these very different doctrines. The court in reaching its conclusion to grant 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. Such a reporting that the trial court mentions speaks to whether the District of Columbia had actual notice, when the claims before the trial court were those of constructive notice.

The District of Columbia continues this confusion by focusing a good bit of its brief on actual notice, commenting throughout that "the record was insufficient to establish that the District had actual or constructive notice," that it "undisputedly did not have actual notice of any purported dangerous condition," that the District was "not aware of any complaints, warnings, or other notices concerning the sidewalk," that Ms. Castania "did not challenge the District's lack of actual notice," that a pedestrian "must prove that the District had actual or constructive notice of a dangerous defect," the District of Columbia "never received a complaint about the sidewalk," and the claim of actual notice is "forfeited." (Appellee brief at 3, 9 and 10).

To be fair, the District of Columbia concedes that Ms. Castania never contended that she was claiming actual notice, yet it continues to focus its attention on the claim of actual notice as if to somehow shore up its arguments regarding constructive notice, to lessen the impact of the trial court's conflation of the two doctrines, or simply to otherwise create some new precedent that blends the two principles. Either way, the attention placed by the District of Columbia on the doctrine of actual notice is misplaced. Ms. Castania's claim is grounded in the theory of constructive notice — a recognized and appropriate basis for negligence within the District of Columbia.

B. The Trial Court's Handling of the Google Image Is not at Issue

The gravamen of Ms. Castania's claim is clear: that the trial court wrongly disposed of her case via summary judgment because, when looked at in light most favorable to Plaintiff, issues of material fact exist given the testimony of Claire Wilder and Kyle Sappington, given the size of the sidewalk defect, given the expert testimony, given that the incident occurred in a trafficked area, and given the 30(b)(6) testimony. The purpose of an appeal is not for an appellant to raise each and every decision made by a trial court, but instead to limit an appeal only to those issues it believes constitute reversible error. That is the very foundation upon which our adversarial system of justice rests, and exactly the path taken by Ms. Castania.

As with the issue of actual notice, the District of Columbia focuses its attention on matters not raised by Ms. Castania. Specifically, the District of Columbia references the exclusion of a Google street image. That image is not before this Court on appeal, yet — as with its attention given to constructive notice — the District of Columbia seemingly focuses its attention to somehow detract from the actual issues before the Court.

II. The District of Columbia's Blanket Claims that Ms. Castania Had an Obligation To Prove Up Root Growth Is not Supported by the Law

The District of Columbia seems to place upon Ms. Castania an obligation to prove up the rate of root growth that caused the sidewalk defect, and to identify some singular point in time that the hazard occurred. It argues that Ms. Castania "sheds no light on how quickly the alleged tree root growth occurred" or at what specific point in time it caused an impact on the sidewalk. (Appellee brief at 12). In making these blanket arguments the District of Columbia cites no authority whatsoever to support the proposition that Ms. Castania was required to prove up the rate of root growth and identify a specific point in time that a hazard existed. In fact, the District of Columbia does not even cite authority outside of the District of Columbia that could be persuasive on this point. The District of Columbia's insistence that absent "such detail," Ms. Castania cannot prevail is not supported by any law cited by the District of Columbia, or otherwise.

III. The District of Columbia Ignores the Importance of Traffic Where the incident Occurred

The District of Columbia argues that Ms. Castania "unreasonably elevates" the significance of 9th Street being deemed a "major road." (Appellee brief at 15). Untrue. In taking such a position the District of Columbia would seemingly have

this Court ignore its own precedent regarding incidents that occur in heavily trafficked areas. As Ms. Castania points out in her Brief for Appellant, and as stands uncontradicted by the District of Columbia, the nature of the hazard's surrounding areas is a fact upon which a plaintiff can rely to defeat a summary judgment motion. *See Lynn v. The District of Columbia*, 734 A.2d 168 (D.C. 1999). The amount of traffic an area receives is an important factor in a constructive notice claim. *Id.* At 171.

Here, the raised sidewalk defect at issue was present for at least two years before Ms. Castania's fall. The defect existed in a location that receives a high volume of traffic — a contention supported by the fact witnesses, and by the testimony of the District of Columbia's own 30(b)(6) witness who testified that the location is a "major road." Further, Ms. Castania's fall occurred in the same area as a daycare center, restaurants, a large Baptist church, an art studio/gallery, a family driven nonprofit office (the Gregory Life Family Center), and even directly along two WMATA bus routes.

IV. The Defect Was not De Minimis as a Matter of Law

The District of Columbia argues that this Court can independently affirm the trial court's dismissal on the basis that the raised sidewalk presented a de minimis defect. Ms. Castania agrees, where the facts of a case would support such a finding of a de minimis defect. However, such is not the case here. The District of

Columbia contends that the defect at issue is comparable to the defects in *Briscoe v. District of Columbia*, 62 A.2d 1278 (D.C. 2013), and *Proctor v. District of Columbia*, 273 A.2d 656 (D.C. 1971). This comparison is inaccurate, and equating the defects in these cases with Ms. Castania's fall is woefully misplaced.

In *Briscoe*, the plaintiff attempted to cross a curb located in a residential area directly in front of her home. The trial court there determined that a photograph of the curbstone confirmed that the defect was "very small," indeed "no more than an indentation along the upper edge of the curb." *Briscoe,* 273 A.2d at 1277, 1279. At no point did the Court in *Briscoe* decide that raised sidewalk panels of 0.8 to 1.5 inches are insignificant. A small indentation along a curb is a very different hazard than a 0.8 to 1.5 inch raised sidewalk.

In *Proctor*, the plaintiff fell on a brick which was elevated ¼ inch about the brick sidewalk. As the District of Columbia correctly points out, the Court in *Proctor* found that this was "minor" and that a finding of negligence could not be supported. *Proctor,* 273 A.2d at 659. Ms. Castania appreciates that the District of Columbia fails to reconcile the differences between the hazard here, namely 0.8 to 1.5 inches, with the hazard in *Proctor*, as such a reconciliation cannot be reasonably made.

Finally, any change in elevation greater than 0.25 inches presents a defect that needs to be repaired. When asked specifically whether a sidewalk elevation

change of more than this amount needed to be repaired, the District of Columbia's position is clear:

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 one-fourth 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.

Ms. Castania's experts also both agree that the standard of care in the District of Columbia requires a sidewalk defect of more than 0.25 inches needs to be repaired. JA 196-226, 234, 329-331, 338-339. This is not rebutted by the District of Columbia.

V. The District of Columbia Glosses Over the Witness Testimony

The District of Columbia spends virtually no attention in its brief addressing Ms. Castania's witness statements, and the reason for such little attention should not fall flat on the Court: the District of Columbia either through intention or neglect never conducted discovery regarding these witnesses. The District of Columbia never deposed these independent witnesses, nor otherwise conducted discovery in this regard. The District of Columbia now blankety asserts that the

affidavits are "bare," yet sat on its laurels with conducting additional discovery of the witnesses if it so desired. (Appelle brief at 3) (the witnesses were identified in Plaintiff's responses to discovery). The affidavits themselves provide relevant and critical information regarding the incident which speak directly to the issues before the Court.

Claire Wilder observed the fall firsthand, and the sidewalk defect. At the time she was an employee of Chaplin's Restaurant. JA 297-298, 332-333. Chaplin's Restaurant is located in Washington, D.C., on the very same block as the sidewalk where the incident occurred. *Id.* That the site of the fall shares the same proximity as her work speaks to her familiarity of the area. She witnessed the fall and was able to observe the sidewalk defect. She stated clearly, directly, and unequivocally 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.* Her testimony is not "bare," and if the District of Columbia wanted more information to somehow attempt to discredit Ms. Wilder's testimony, it could have deposed her or otherwise propounded discovery.

Kyle Sappington also offered testimony about the sidewalk defect. Like Ms. Wilder, he also has intimate knowledge of the area as his business is located on the same block where the incident occurred, namely, 1527 9th Street, NW. JA 299, 332-333. As with Ms. Wilder, Mr. Sappington also had an opportunity to observe

the sidewalk, and his observations were dated back to 2017. *Id.* Mr. Sappington also stated clearly, directly, and unequivocally "that the raised sidewalk" existed since 2017. *Id.* Again, either through intention or neglect, the District of Columbia chose not to conduct any discovery with regard to Mr. Sappington. His testimony is not "bare" and speaks directly to the issues at hand.

IV. Conclusion

Looking at the evidence in the light most favorable to Plaintiff a reasonable jury could conclude that the District of Columbia had constructive notice of the defective condition of the sidewalk at issue and that the defect was not de minimus. In light of the foregoing, Ms. Castania respectfully requests that this Court reverse the granting of summary judgment and remand the case for a jury trial.

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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February 23, 2024

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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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