UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 998

September Term, 2015

RONNIE TOMLINSON

v.

ST. AGNES HEALTHCARE, INC.
t/a ST. AGNES HOSPITAL

Krauser, C.J.
Nazarian,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: February 23, 2017

After suffering injuries, as a result of tripping over a protruding corner of a sidewalk, appellant, Ronnie Tomlinson, brought a negligence action, in the Circuit Court for Baltimore City, against appellee, St. Agnes Healthcare, Inc., the owner of a hospital adjacent to the sidewalk where Tomlinson fell. In that suit, Tomlinson initially alleged that the sidewalk at issue was located on St. Agnes' property and that St. Agnes had negligently failed to remove ice, mud, and snow from that sidewalk, or to repair it, or to place warning signs as to the danger posed by the protruding corner. When, however, it became obvious that St. Agnes did not own what was, in fact, a public sidewalk, Tomlinson further alleged that, regardless of who actually owned the sidewalk, St. Agnes had negligently allowed mud and water to flow from its property onto the sidewalk, concealing the protrusion at issue and thereby creating a hazard, which led to Tomlinson's fall.

After the circuit court granted the first of two successive summary judgments in favor of St. Agnes, on the grounds that Tomlinson had assumed the risk of his fall and resultant injuries, this Court reversed that judgment, *Tomlinson v. St. Agnes Healthcare, Inc.*, No. 2325, Sept. Term, 2010 (Oct. 16, 2013), and remanded the case to the circuit court for further proceedings. Upon remand, the Baltimore City circuit court, once again, granted summary judgment in favor of St. Agnes, but this time on the grounds that St. Agnes did not own the sidewalk on which Tomlinson had fallen and thus owed no duty to maintain that sidewalk; that, even if St. Agnes did own the sidewalk where Tomlinson's fall had taken place, the alleged defect in that sidewalk was too trivial to warrant liability; and, finally, that Tomlinson's claim, that St. Agnes had created the sidewalk hazard in question, was "pure speculation."

Challenging that ruling, Tomlinson noted this appeal, presenting three issues for our review. Rephrased and reordered to facilitate that review, they are:

I. Whether the circuit court erred in granting summary judgment on the grounds that St. Agnes did not own the sidewalk when, according to Tomlinson, St. Agnes' claim of non-ownership was barred by either waiver or the law of the case doctrine.

II. Whether the circuit court erred in granting summary judgment on the grounds that Tomlinson's claim that St. Agnes had created a sidewalk hazard, which caused Tomlinson to fall, was "pure speculation."

III. Whether the circuit court erred in granting summary judgment on the grounds that the defect in the sidewalk was trivial and therefore was not a basis upon which liability could be imposed when, according to Tomlinson, that claim was barred by either waiver or the law of the case doctrine.

For the reasons that follow, we hold that the circuit court did not err in granting summary judgment in favor of St. Agnes, because St. Agnes did not own the sidewalk at issue and the circuit court was not barred, as Tomlinson claims, by waiver or the law of the case, from granting summary judgment on the basis of that non-ownership, and because the circuit court correctly held that Tomlinson's claim that St. Agnes had created the sidewalk hazard at issue amounted to no more than mere speculation. Consequently, we need not reach the issue of whether the circuit court erred in granting summary judgment on the grounds that St. Agnes' additional claim, that the protruding corner of the sidewalk at issue was too trivial to generate liability, was also barred by waiver or the law of the case doctrine.

Facts

On March 1, 2007, Tomlinson went to St. Agnes Hospital to participate in a sleep study. When the study ended, early the next morning, he decided to walk to a nearby bus

stop and take a bus home. As he left the hospital, he saw what he described as "construction to the right of the emergency room." Then, noting that there was sleet on the ground and that the nearby pavement looked "slippery," he chose to walk down a "grassy slope," covered with hay and rocks, to reach a stretch of sidewalk, leading to the bus stop.

When Tomlinson reached the sidewalk leading to the bus stop, it was "wet" with "sleet," as well as icy and muddy, but he, nonetheless, proceeded to walk on the sidewalk towards the bus station. Moments later, he reached a section of the sidewalk where, beneath the mud and slush, two concrete slabs in the sidewalk were joined together unevenly, so that each slab had one corner that was higher and one corner that was lower than the other slab. Purportedly unaware of this differential, because it was obscured by mud and slush, Tomlinson stepped forward and tripped over the elevated corner of one of those concrete slabs and fell. As a result of that fall, Tomlinson suffered a fractured left fibula and broken left ankle.

Procedural History

After his fall, Tomlinson filed a complaint, in the Baltimore City circuit court, claiming that St. Agnes had negligently breached its "duty to exercise ordinary and reasonable care" in maintaining "the hospital grounds." According to Tomlinson, the sidewalk at issue was on the hospital's grounds, and St. Agnes had negligently failed to remove ice, mud, and snow from that sidewalk, or to repair it, or to place cones or signs to warn passersby of the sidewalk's hazardous condition. Then, St. Agnes moved for summary judgment, contending that Tomlinson "knowingly placed himself in a potentially dangerous situation" and thereby assumed the risk of his fall and resultant injuries, and

that, in any event, the alleged defect in the sidewalk was "too trivial" to generate liability. The circuit court granted the motion and entered summary judgment in favor of St. Agnes, based solely on its finding that Tomlinson had assumed the risk of his injuries.

A. The First Appeal

After Tomlinson noted an appeal from the circuit court's grant of summary judgment in favor of St. Agnes, this Court, in an unreported opinion, *Tomlinson v. St. Agnes Healthcare, Inc.*, *supra*, held that the circuit court had erred in granting summary judgment in favor of St. Agnes based upon assumption of risk, as there was no evidence that Tomlinson knew of and understood that there was a danger of tripping over a "hidden defect" in the sidewalk at issue and because there was a genuine dispute of fact as to whether Tomlinson had any reasonable alternative to walking on that sidewalk. *Id.* at 8-14. It therefore reversed and remanded the case to the circuit court for further proceedings.

B. Proceedings Following Remand

After the case was remanded to the circuit court, discovery was reopened. When that discovery concluded, St. Agnes once again moved for summary judgment. Thereafter, counsel for the parties met at the site of the fall and agreed that the height difference between the two sidewalk slabs, where Tomlinson tripped and fell, was one inch at its deepest point.

Tomlinson then filed a response to St. Agnes' motion for summary judgment, whereupon St. Agnes filed a reply, supplementing its motion. In that supplement, St. Agnes pointed out that it did not own the sidewalk on which Tomlinson fell and attached to the supplement a site plan for the hospital and an affidavit from an engineer, asserting that he

had reviewed the site plan and that the sidewalk was owned by Baltimore City. It then asserted that, because it did not own the sidewalk, it had no duty to use reasonable care to maintain the sidewalk for the benefit of pedestrians and therefore did not owe a duty of care to Tomlinson. In reply, Tomlinson filed a supplemental response to St. Agnes' motion for summary judgment, contending that St. Agnes was estopped from claiming that it did not own the sidewalk at issue because of an answer it had made to an interrogatory propounded by Tomlinson. That interrogatory stated:

> State whether the sidewalk on which [Tomlinson] alleges he fell was owned by [St. Agnes].

St. Agnes responded:

> For the purposes of this lawsuit, St. Agnes will stipulate that regardless of whether it owned the sidewalk on which [Tomlinson] claims he fell, St. Agnes had the responsibilities set forth in the Code provisions attached as Exhibit A[1] to maintain that area of the sidewalk.

Tomlinson then filed an opposition to St. Agnes' reply, raising what appeared to be a new claim, namely, that St. Agnes had negligently failed to prevent sediment and water runoff, generated by its construction on the hospital grounds, from flowing from its property to the sidewalk; the accumulation of which, he asserted, obscured the one-inch differential in the sidewalk and thereby added a "new element of danger or hazard" to pedestrians using the sidewalk. And, in support of that new contention, he submitted an

[1] St. Agnes attached several provisions of the Baltimore City Code in Exhibit A to its answers to Tomlinson's interrogatories. However, the only provisions that relate to a property owner's responsibility to clear snow, ice, or obstructions from sidewalks are Baltimore City Code Art. 19, §§ 50-46 and 50-47. Those sections were in effect at the time of Tomlinson's fall but have since been repealed.

affidavit, pursuant to Maryland Rule 2-501(d),[2] requesting that, if the circuit court permitted St. Agnes to raise the issue of the sidewalk's ownership, that it postpone the summary judgment hearing and that it order, as discovery had ended, St. Agnes to "produce for deposition" a corporate designee as to this claim. Attached, as exhibits, to the affidavit were photographs, depicting the sidewalk and the adjacent St. Agnes hospital grounds, which purportedly showed a lack of "sediment controls" to prevent runoff from the construction site.

At the hearing that followed, on the motion for summary judgment, the circuit court denied Tomlinson's request to postpone that hearing and declined to consider certain exhibits attached to Tomlinson's affidavit, namely, photographic exhibits 1, 4, and 5, because they were not authenticated by a witness, with personal knowledge of the locations, which those photographs depicted, at the time they were taken. Then, turning to the merits of the motion for summary judgment, the circuit court found that "St. Agnes [did] not own that sidewalk" and, therefore, that it had "no duty" of care. It further found that even "if St. Agnes did own the sidewalk . . . the one-inch differential as discovered through investigation with [c]ounsel together [was] de minimis." Then, as for Tomlinson's claim that sediment and water runoff from St. Agnes' property had created the sidewalk hazard at issue, the motions judge stated that there were no "facts that would lead me to believe that there was an additional hazard created by St. Agnes." Indeed, it amounted to

[2] Maryland Rule 2-501(d) provides that a party opposing a motion for summary judgment may submit an affidavit, stating "that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit," and request that the court deny summary judgment, grant a continuance, or issue such other orders as justice requires.

no more than "pure speculation," in the court's view, as to what effect the construction on St. Agnes' property had on surrounding property, including the sidewalk, because, as the court noted, no testimony or evidence had been provided as to "the net effect" of "rainfall or water flow and what the cause may be as opposed to natural erosion off the side of that hill." Based upon those findings, the court granted summary judgment in favor of St. Agnes, noting that it need not reach the assumption of risk defense in St. Agnes's motion for summary judgment in light of its foregoing rulings.

Standard of Review

Maryland Rule 2-501 provides that summary judgment shall be entered "in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Thus, in evaluating a party's motion for summary judgment, a trial court "must first determine 'whether there is a dispute as to a material fact sufficient to require the issue to be tried.'" *Crystal v. Midatlantic Cardiovascular Associates, P.A.*, 227 Md. App. 213, 223 (2016) (quoting *Frederick Rd., Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 93 (2000)). "A material fact is one that will alter the outcome of the case, depending upon how the fact-finder resolves the dispute." *Blackwell v. CSX Transp., Inc.*, 220 Md. App. 113 (2014). But, "[c]onclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment and an opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Benway v. Maryland Port Admin.*, 191 Md. App. 22, 46 (2010) (quoting *Carter v. Aramark Sports*

and Entm't Scrvs., Inc., 153 Md. App. 210, 225 (2003)). If the trial court concludes that there is no dispute of material fact, and if the nonmoving party has "failed to make a sufficient showing on essential element of its claim, for which it has the burden of proof," then it is appropriate for the trial court to enter summary judgment in favor of the movant. *Id.* (internal citation and quotation marks omitted).

In reviewing a trial court's grant of summary judgment, we apply a *de novo* standard of review. Under that standard, we conduct an independent review of the record to determine if the trial court's grant of summary judgment was appropriate, considering all facts and reasonable inferences based upon those facts in the light most favorable to the nonmoving party. *Poole v. Coakley & Williams Constr., Inc.*, 423 Md. 91, 108 (2011). Our review, however, is limited "solely to the grounds upon which the circuit court granted summary judgment." *Crystal*, 227 Md. App. at 223.

I.

In this second appeal, Tomlinson contends that the circuit court erred in granting summary judgment in favor of St. Agnes, as that ruling was based upon the court's conclusion that St. Agnes did not own the sidewalk at issue, and thus owed no duty of care to maintain the sidewalk for the benefit of Tomlinson or any other pedestrian using that pathway. Although Tomlinson does not dispute that St. Agnes was not the owner of the sidewalk, he nonetheless maintains that the circuit court erred in granting summary judgment for two reasons: First, the circuit court should not have considered St. Agnes' claim that it did not own the sidewalk, pursuant to the law of the case doctrine, because St. Agnes could have raised that claim in the first appeal, but failed to do so; or, alternatively,

the court should have construed an answer which St. Agnes gave to an interrogatory, propounded by St. Agnes, as "an express waiver" of St. Agnes' "right to dispute [the] issue of ownership of the sidewalk."

A. Law of the Case

Tomlinson asserts that, because St. Agnes failed to claim that it did not own the sidewalk during the first appeal, under the law of the case doctrine, the circuit court erred in granting summary judgment in favor of St. Agnes based upon that fact.

As we noted in *Haskins v. State*, under the law of the case doctrine, "once an appellate court rules upon a question," then "litigants and lower courts become bound by the ruling." 171 Md. App. 182, 190 (2006) (internal citation and quotation marks omitted). That doctrine applies to issues that were either raised and decided on appeal or "that could have been raised and argued" on appeal based on "the then state of the record." *Id.* (internal citation and quotation marks omitted). However, the issue of who owned the sidewalk was not before this Court in the first appeal, as it was neither raised by the parties nor relied upon by the circuit court in rendering its decision. In fact, the issue of ownership was not raised until after the case was remanded to the circuit court following the first appeal. It was, after that remand, that St. Agnes first asserted that it did not own the sidewalk at issue and submitted, in support of that claim, a site plan for the hospital and an affidavit from an engineer, stating that he had reviewed the site plan of the hospital and that the sidewalk at issue was owned by Baltimore City. Therefore, we hold that the circuit court did not err by declining to apply the law of the case doctrine to preclude consideration of St. Agnes' claim that it did not own the sidewalk, nor was the sidewalk on its property.

B. Waiver

During discovery in this case, Tomlinson filed an interrogatory, requesting that St. Agnes state whether it owned the sidewalk. In its answer to that interrogatory, St. Agnes stated that it "will stipulate that regardless of whether it owned the sidewalk on which [Tomlinson] claims he fell" it had responsibilities under provisions of the Baltimore City Code "to maintain that area of the sidewalk." Tomlinson contends that this "stipulation" was "an express waiver" by St. Agnes of "a known right to dispute [the] issue of ownership of the sidewalk in this case," and, consequently, that the circuit court erred in relying upon St. Agnes's assertion that it did not own the sidewalk in granting summary judgment.

Waiver is "the intentional relinquishment of a known right, or conduct that warrants such an inference." *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2010). By stating that it had responsibilities to maintain the sidewalk "regardless of whether it owned the sidewalk," St. Agnes hardly claimed that it owned the sidewalk. Hence, St. Agnes' answer to the interrogatory did not waive, relinquish, or concede anything relating to the ownership of the sidewalk. Because there was no waiver, we hold that the circuit court did not err in considering St. Agnes' contention that it did not own the sidewalk and then relying upon that uncontested statement of fact in granting summary judgment.

II.

Tomlinson next contends that the circuit court erred in granting summary judgment because, from his perspective, there was sufficient evidence of a genuine dispute of material fact as to whether St. Agnes negligently failed to prevent sediment and water runoff, from its property, from flowing downhill onto the section of sidewalk on which he

fell. That sediment and water runoff, he maintains, obscured the one-inch differential between sidewalk slabs and thereby created the hazard, which caused his fall.

The general rule in Maryland is that a property owner "is under no duty to pedestrians to maintain the public sidewalk abutting his land free from the natural accumulation of snow and ice[,]" and, therefore, the abutting owner is generally "not 'liable in clearing the public sidewalk of snow and ice.'" *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 273 (2003) (quoting *New Highland Recreation, Inc. v. Fries*, 246 Md. 597, 601 (1967)). This rule applies even where a statute or ordinance requires that the property owner keep the pavement abutting his property free of snow and ice, because the duty of the property owner "is owed to the authorities and not to the private individual who happens to slip." *Leonard v. Lee*, 191 Md. 426, 430-31 (1948). *See also Dorsch v. S. S. Kresge Co.*, 245 Md. 697, 698 (1967) (citing *Weisner v. Mayor and City Council of Rockville*, 245 Md. 225 (1967)).

Tomlinson, however, relies upon an exception to the general rule. That exception provides that an owner of property may be liable if "through his negligence," he adds "a new element of danger or hazard, other than one caused by natural forces," to the use of a sidewalk by a pedestrian. *Deering*, 377 Md. at 273 (quoting *New Highland Recreation*, 246 Md. at 601); *see also Matyas v. Suburban Trust Co.*, 257 Md. 339, 343 (1970) (stating that a property owner has "a negative duty not to create a new hazard" on a sidewalk abutting his property). Tomlinson maintains that that there was evidence from which a reasonable jury could infer that construction on St. Agnes' property "affected" grass and other vegetation on the slope abutting the sidewalk, thereby causing mud, ice, and water runoff

from the slope to be "deposited on the sidewalk where [he] fell." He claims that this evidence raised a dispute of material fact as to whether St. Agnes created a dangerous condition on the sidewalk by negligently failing to install or maintain sediment controls on its property, which he suggests would have prevented the runoff.

But the only evidence upon which Tomlinson relies, in support of this claim, is his own deposition testimony that he observed construction near the emergency room, as well as hay and rocks on the "grassy slope" that he walked down to reach the sidewalk, and several photographs, depicting construction near the emergency room, as well as the slope which he walked down to reach the sidewalk, and the uneven stretch of sidewalk where he fell, which bore visible stains and discolorations.[3]

[3] Although not set forth as a separate issue in the "Questions Presented" section of his brief, Tomlinson also asserts that the circuit court erred in not admitting into evidence three additional photographs, which also depict construction near the emergency room, the slope that Tomlinson walked down to reach the sidewalk, and the sidewalk at issue. Those photographs were attached, as photographic exhibits 1, 4, and 5, to an affidavit, which his counsel submitted to the circuit court before the summary judgment hearing. He insists that these three additional photographs were properly authenticated in an affidavit signed by his counsel and alleges that they were also identified and authenticated by him at his deposition. But, as this issue was not properly presented, we may decline to consider it. *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 (1999), *aff'd*, 366 Md. 597 (2001) (holding that an appellant can "waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief"). In any event, the circuit court did not err in declining to admit the additional photographs into evidence. A party seeking to introduce photographs may authenticate them "either through the photographer or through someone with personal knowledge who can verify that the photograph accurately portrays its subject." *Id.* at 28 n.4. As Tomlinson's counsel did not take the photographs or have personal knowledge of the contents, he could not properly authenticate them. Moreover, the circuit court heard argument from counsel for the parties as to whether the additional photographs were, in fact, the same as those authenticated by Tomlinson during his deposition, and determined that they were not.

While causation, in a negligence case, is ordinarily a question for a jury, a plaintiff, opposing a motion for summary judgment, must produce evidence from which a reasonable jury could find that the defendant's negligence had caused the plaintiff's injury. *See Wankel v. A & B Contractors, Inc.*, 127 Md. App. 128, 165-66 (1999). Although Tomlinson testified that he saw construction near the emergency room upon leaving the hospital, as well as hay and rocks on the slope which he walked down to reach the sidewalk where he fell, he offered nothing more to show that that ongoing construction had caused sediment and water runoff to be deposited onto that sidewalk in a quantity sufficient to cover and obscure the one-inch differential in the sidewalk. Indeed, no testimony or evidence was presented showing that the condition of the sidewalk had worsened during construction, or that the construction channeled water and sediment onto the sidewalk, as opposed to other potential sources, such as runoff from other nearby properties, or defects in the design or maintenance of the sidewalk itself.

Tomlinson has also failed to present any evidence that St. Agnes created the sidewalk hazard by not installing sediment controls on its property. Tomlinson asserts that an inference could be drawn that there were no sediment controls because no such controls are visible in the photographs, in the record, depicting St. Agnes' property where it abuts the sidewalk. Although Tomlinson identified those photographs at his deposition, he only referred to them to describe how he walked from the emergency room down to the sidewalk and where he fell. He never stated when the photographs were taken, or that they were an accurate depiction of St. Agnes' property at the time of his fall. Therefore, the photographs were not evidence of what was or was not present on St. Agnes' property at the time that

Tomlinson fell, and a jury could not reasonably infer, from the photographs, that St. Agnes' property lacked sediment controls around its construction site at that time. Moreover, even if a jury could infer that St. Agnes lacked sediment controls on its property, Tomlinson did not produce any testimony or other evidence as to how a lack of proper sediment controls led mud and water to create the hazard at issue.

Thus, the circuit court did not err in holding that it was no more than "pure speculation" as to what effect the construction on St. Agnes' property had on the surrounding property, because no testimony or other evidence was provided by Tomlinson as to "the net effect" of "rainfall or water flow and what the cause may be as opposed to natural erosion off the side of that hill." And, as stated above, "[c]onclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment and an opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." *Benway v. Maryland Port Admin.*, 191 Md. App. 22, 46 (2010) (quoting *Carter v. Aramark Sports and Entm't Scrvs., Inc.*, 153 Md. App. 210, 225 (2003)).

Finally, Tomlinson's reliance upon *Battisto v. Perkins*, 210 Md. 542 (1956), for the proposition that the evidence and reasonable inferences therefrom raise a genuine dispute of fact as to whether St. Agnes created a hazard on the sidewalk, is also misplaced. In *Battisto*, the defendants owned land situated above the plaintiffs' property, and the plaintiffs alleged that, due to construction on the defendants' land, "the natural flow of

water was accelerated and large quantities of mud and debris were repeatedly precipitated upon the plaintiffs' properties, causing great damage." *Id.* at 545.

In that case, the trial court issued a directed verdict in favor of the defendants. *Id.* Thereafter, the Court of Appeals determined that there was significant testimony supporting the plaintiffs' claim, specifically, testimony as to a lack of barriers and drains around the construction site for several months, as well as "testimony from a number of witnesses that they traced the source of the mud and it came from the appellees' property." *Id.* at 547-48. Consequently, it reversed the directed verdict rendered in favor of the defendants. *Id.* at 548. In contrast, no evidence was presented showing that the mud, ice, and slush on the sidewalk and had come from St. Agnes' property.

For the foregoing reasons, we hold that the circuit court did not err in granting summary judgment in favor of St. Agnes.[4]

JUDGMENT OF THE CIRCUIT COURT OF BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Tomlinson also contends that that St. Agnes had constructive notice of the danger or hazard. See *Deering*, 377 Md. at 273 (holding that if a plaintiff were to establish that an owner of property abutting a sidewalk had created a hazard on a sidewalk, the plaintiff would still have to establish that the owner had actual or constructive notice of the danger or hazard). But, as we determine that Tomlinson did not adduce evidence showing a genuine dispute of material fact as to whether St. Agnes had created a hazard on the sidewalk at issue, we do not reach the issue of constructive notice.