Circuit Court for Baltimore City
Case No. 24-C-22-000768

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1627

September Term, 2023

SERENA FLOOD

v.

FSK LAND CORPORATION, ET AL.

Friedman,
Beachley,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 21, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. RULE 1-104(a)(2)(B).

In this slip-and-fall case, Serena Flood appeals the grant of summary judgment in favor of FSK Land Corporation and other defendants. We find no error and affirm.

BACKGROUND

In her complaint, Flood alleged that she slipped and fell on black ice[1] on a sidewalk outside of the Triad Technology Center, located on the Johns Hopkins Bayview Medical Center Campus, where she worked. At the close of discovery, the defendants—FSK Land Corporation, The Johns Hopkins Health System Corporation, The Johns Hopkins Bayview Medical Center, Inc., and The Johns Hopkins University t/a Johns Hopkins Medicine (referred to here, collectively, as "FSK") moved for summary judgment, on the grounds that Flood could not establish that it had actual or constructive notice of the black ice that caused her fall.[2] In support of its motion, FSK attached Flood's deposition transcript in

[1] Black ice has an almost mystical quality in Maryland tort law. Plaintiffs typically cannot recover for slip-and-fall accidents on ordinary ice because our appellate courts have universally found, as a matter of law, that plaintiffs assumed the risk because of the visibility of the ordinary ice and the clear dangers that come from walking on it. *See, e.g.*, *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 640-41, 653 (2009) (holding that the plaintiff assumed the risk when he walked on visible ice in part because "the danger of slipping on ice has been identified as one of the risks that anyone of adult age would appreciate"); *ADM P'ship v. Martin*, 348 Md. 84, 103 (1997) ("[W]here the facts are not in dispute and the plaintiff intentionally and voluntarily exposed [them]self to a known danger, we [will] sustain [] the granting of a summary judgment." (quoting *Burke v. Williams*, 244 Md. 154, 158 (1966))); *Schroyer v. McNeal*, 323 Md. 275, 288 (1991) ("[Plaintiff] voluntarily chose to park [on ice and snow] and to walk across it and the sidewalk, thus indicating her willingness to accept the risk and relieving the [defendants] of responsibility for her safety."). By contrast, the distinguishing characteristic of black ice is that it is invisible, and thus, a slip-and-fall on black ice can often survive motions for summary judgment on this basis. *See, e.g.*, *Thomas v. Panco Mgmt. of Maryland, LLC*., 423 Md. 387, 401-03 (2011) (holding that whether a tenant knew the risk of slipping on black ice was a question for the jury).

[2] FSK also moved for summary judgment on the alternative grounds that the danger from the ice was "open and obvious" and that, as a result, Flood had assumed the risk or

which she was asked if she had ever seen ice in the area at which she had fallen, and she answered, "No." FSK also attached an affidavit from the Director of Facilities at the Johns Hopkins Bayview Medical Center campus in which he stated that his office had never received any reports of black ice on the sidewalk prior to Flood's fall. In opposition to FSK's motion for summary judgment, however, Flood supplied an affidavit in which she attested that prior to the accident, she had "observed several instances during the year in which visible ice had accumulated on the sidewalk that would require me to walk on the grass or detour to avoid the ice." The circuit court found that the above-quoted portion of Flood's affidavit "materially contradict[ed]" her deposition testimony and, as a result, struck this portion of the affidavit pursuant to Maryland Rule 2-501(e). The circuit court then found that, in the remaining summary judgment record, there was no genuine dispute of material fact about whether FSK had constructive knowledge of the ice and that it was entitled to judgment as a matter of law. This timely appeal followed.

ANALYSIS

When a party moves for summary judgment, the court "shall enter judgment 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." MD. R. 2–501(f).

The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013). In an appeal from the grant of

was contributorily negligent, thus precluding recovery. The circuit court did not reach these alternative grounds and neither do we.

summary judgment, this Court reviews whether the circuit court's conclusions were legally correct, without deference to the circuit court's decision, and construes facts and reasonable inferences in the light most favorable to the non-moving party. *Maryland Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 694 (2015). "Before turning to the questions of law, we must first decide whether the [c]ircuit [c]ourt properly determined that no genuine dispute of material fact exists." *O'Connor v. Baltimore Cnty.*, 382 Md. 102, 110-11 (2004); *see also In re Carpenter*, 264 Md. App. 138, 169 (2024). In determining the existence of a factual dispute, "we need to determine the record that may properly be considered." *Imbraguglio v. Great Atl. & Pac. Tea Co., Inc.*, 358 Md. 194, 201 (2000).

In cases, such as Flood's, involving premises liability, the plaintiff must show that a dangerous condition existed, that the property owner had actual or constructive knowledge of the danger, and that knowledge was gained with sufficient time to remove or warn of the danger. *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 263-64 (2003).

In this appeal, Flood claims that the record reflects the existence of a factual dispute regarding whether FSK was on constructive notice of the existence of black ice at the location at which she fell. The only evidence in the summary judgment record to which Flood points as creating a genuine dispute of material fact is her affidavit attesting that she had "observed several instances during the year in which visible ice had accumulated on the sidewalk that would require me to walk on the grass or detour to avoid the ice." [3] This

[3] We express no opinion about whether Flood's affidavit—had it survived—would be sufficient to generate a genuine dispute of material fact about whether FSK had constructive notice of the condition or if it would be sufficient to allow her claim to survive summary judgment. On the one hand, it is not clear that Flood's knowledge that the area

argument misses the critical point that the circuit court had earlier struck that portion of Flood's affidavit because it "materially contradict[ed]" her deposition testimony and that Flood has not appealed from that decision.[4] Without this affidavit there is simply nothing in the summary judgment record which generates a genuine dispute of fact about FSK's

froze several times a year could be imputed to FSK. On the other, if Flood had frequently seen visible ice in the same area, it might indicate that Flood had assumed the risk. *See supra* note 1.

[4] Flood's opening brief to this Court did not argue that the circuit court erred in finding that her affidavit "materially contradict[ed]" her deposition testimony nor in striking the relevant portions of the affidavit pursuant to Rule 2-501(e). Rather, she claimed that the court did not find a material contradiction and did not strike her affidavit. In her reply brief, Flood realized that the court did strike her affidavit due to a material contradiction and raised that argument for the first time (and even then, without significant legal or factual argument in its support). As such, we hold that the argument is waived. *See* MD. R. 8-131(a); 8-504(a)(6); *Jones v. State*, 379 Md. 704, 713 (2004) (discussing this Court's discretion to consider arguments made for the first time in reply briefs); *Fearnow v. Chesapeake & Potomac Tel. Co. of Maryland*, 342 Md. 363, 384 (1996) (same). Moreover, even if we were to exercise our discretion to consider Flood's argument, it would not change the outcome.

When a trial court finds that an affidavit or other statement under oath "materially contradicts" a prior sworn statement, it must strike the materially contradictory portion unless there has been a change in circumstances explaining the contradiction. MD. R. 2-501(e)(2). Our courts apply a high standard for finding a material contradiction. *Marcantonio v. Moen*, 406 Md. 395, 410 (2008) (describing a "material contradiction" as "a factual assertion that is significantly opposite to the affiant's previous sworn statement"); *Thomas v. Shear*, 247 Md. App. 430, 462-63 (2020) (holding that a material contradiction existed and was properly struck when an expert's deposition testimony was directly refuted by the same expert's affidavit because they "cannot both be true"). Here, however, even that high standard is clearly surmounted. In Flood's deposition testimony she was asked if she had ever before seen ice in the location at which she fell. She answered "No." In her affidavit, however, Flood attested that prior to the accident, she "observed several instances during the year in which visible ice had accumulated on the sidewalk that would require me to walk on the grass or detour to avoid the ice." Both of these statements cannot be true. As a result, were we to exercise our discretion to reach the question, we would hold that the circuit court did not err in striking the relevant portion of Flood's affidavit.

constructive knowledge of the danger of black ice at the location at which Flood fell.[5] As a result, FSK was entitled to judgment as a matter of law. Because the circuit court did not err, we affirm.

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

[5] The burden of coming forward with admissible evidence demonstrating a factual dispute was on the nonmoving party. *E.g.*, *Macias v. Summit Mgmt., Inc.*, 243 Md. App. 294, 315 (2019). As discussed above, Flood failed to carry that burden. As a result, any evidence produced by the moving party, FSK, in support of summary judgment is immaterial to our analysis. Nevertheless, it gives us comfort that FSK submitted an affidavit from its facilities manager to which was attached an exhibit. That exhibit provided temperatures recorded by the National Oceanic and Atmospheric Administration at a weather station about 4 miles from the Johns Hopkins Bayview campus showing that in the days surrounding the accident, temperatures were consistently above freezing and that there was no measurable precipitation the day before and day of the accident. NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, RECORD OF CLIMATOLOGICAL OBSERVATIONS: MARYLAND SCIENCE CENTER (2019), https://perma.cc/D4H9-ENJE. {E.236} We take judicial notice of those facts. MD RULE 5-201(b)(2) (allowing the court to take judicial notice of adjudicative facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").