Circuit Court for Baltimore County
Case No. C-03-CV-20-003199

UNREPORTED

IN THE APPELLATE COURT*

OF MARYLAND

No. 1714

September Term, 2022

LUCY KEYSER

v.

GOUCHER COLLEGE

Arthur,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 16, 2024

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

While she was a student at Goucher College, appellant Lucy Keyser was injured when a tree branch fell and struck her on the head as she was walking to class during a powerful windstorm. Ms. Keyser filed suit against Goucher, alleging that the school negligently failed to warn her of the dangers of the storm and to take steps to protect her by, for example, cancelling classes or closing the campus. The Circuit Court for Baltimore County granted Goucher's motion for summary judgment.

Ms. Keyser appealed. For the reasons stated herein, we affirm.

FACTUAL AND PROCEDURAL HISTORY

We view the pertinent facts in the light most favorable to Ms. Keyser, the party who opposed the summary judgment motion.

In March of 2018, Ms. Keyser was a student-athlete at Goucher, located in Towson, Maryland. She lived on campus.

On March 2, 2018, a winter storm struck the Baltimore metropolitan area. The storm brought high winds to the area.[1]

Ms. Keyser testified that, as she walked across the Goucher campus to her class late that morning, "[i]t was super windy." The wind, she said, was "just loud, like a loud

[1] In her brief, Ms. Keyser cites a number of newspaper articles concerning the severity of the storm. The articles consist of inadmissible hearsay, which a party cannot use to defeat a motion for summary judgment. *See*, *e.g.*, *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737 (1993). Moreover, Ms. Keyser appears not to have presented the articles to the circuit court. Nonetheless, we can take notice of historical weather data, which indicates that at about 12:00 p.m. on March 2, 2018, the wind speed was measured at 54 miles per hour at BWI Thurgood Marshall Airport. Glen Burnie, MD Weather History, *Weather Underground*, https://perma.cc/N9B2-3G65.

wind tunnel." There were "twigs and things all over the ground." She heard "things landing on the ground."

During the storm, a tree branch broke and struck Ms. Keyser's head, causing her to suffer a concussion. The wind was so loud that she could not recall hearing the branch fall.

On August 28, 2020, Ms. Keyser filed a complaint against Goucher in the Circuit Court for Baltimore County. In her complaint, she alleged, among other things, that Goucher breached a duty to her by not warning of the danger of falling trees during a windstorm and by not cancelling classes.

On September 5, 2022, after two years of litigation, Goucher moved for summary judgment.[2] In its motion, Goucher argued that it did not owe Ms. Keyser a duty to warn her of falling trees during a windstorm or to protect her from weather conditions that were open and obvious. Ms. Keyser opposed the motion.

After a hearing, the circuit court granted the motion for summary judgment. In its comments on the record at the end of the hearing, the court explained that Goucher had no duty to advise Ms. Keyser of open and obvious conditions; that Ms. Keyser's own allegations established that the wind created open and obvious dangers; and that, as an

[2] More precisely, Goucher moved to dismiss the complaint or, in the alternative, for summary judgment. Because Goucher's motion included materials outside the four corners of the complaint, such as Ms. Keyser's deposition, the court opted to treat the motion as a motion for summary judgment, as it may do under Maryland Rule 2-322(c).

adult, Ms. Keyser was capable of recognizing those dangers. Ms. Keyser, the court said, "did not need Goucher College to tell her it was very windy and to take precautions."[3]

Ms. Keyser filed this timely appeal.

QUESTION PRESENTED

Ms. Keyser presents two questions, which, in the interest of concision, we have condensed into one: Did the court err in granting Goucher's motion for summary judgment?[4]

STANDARD OF REVIEW

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. Rule 2-501(f). In an appeal from the grant of summary judgment, this Court conducts a de novo review to determine

[3] The court also entered summary judgment against Ms. Keyser on counts alleging that Goucher was liable to her on theories of agency or vicarious liability, negligent employment, and *res ipsa loquitur*. Ms. Keyser does not challenge those rulings on appeal.

[4] Ms. Keyser formulated her questions as follows:

1. DID THE CIRCUIT COURT ERR IN FINDING THE APPELLEE HAD NO DUTY TO WARN MS. KEYSER OF THE DANGERS OF CATASTROPHICALLY HIGH WINDS, AND THAT THE APPELLEE HAD NO DUTY TO PROTECT MS. KEYSER FROM FORESEEABLY DANGEROUS CONDITIONS?

2. DID THE CIRCUIT COURT IMPROPERLY RESOLVE DISPUTES OF MATERIAL FACT IN FAVOR OF THE APPELLEE?

whether the circuit court's conclusions were legally correct. *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012). The standard is well known:

> When reviewing a grant of summary judgment, we determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. This Court considers the record in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party.

Blackburn Ltd. P'ship v. Paul, 438 Md. 100, 107-08 (2014) (citations and quotation marks omitted).

DISCUSSION

"In order to recover damages in a negligence action, a plaintiff bears the burden of proving: '1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the plaintiff suffered actual injury or loss, and 4) that the loss or injury proximately resulted from the defendant's breach of the duty.'" *See*, *e.g.*, *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. 569, 581 (2020) (quoting *Marrick Homes LLC v. Rutkowski*, 232 Md. App. 689, 698 (2017)) (further citation omitted).

"Generally, whether there is adequate proof of the required elements to succeed in a negligence action is a question of fact to be determined by the fact-finder." *Patton v. U.S. Rugby Football*, 381 Md. 627, 636 (2004). "The existence of a legal duty, however, is a question of law to be decided by the court." *Id.*

"The duty of care owed by an owner or occupier of land to someone entering on the property depends on whether the person 'is an invitee, a licensee, or trespasser.'"

Giant of Maryland LLC v. Webb, 249 Md. App. 545, 562 (2021) (quoting *Rowley v. Mayor and City Council of Baltimore*, 305 Md. 456, 464 (1986)); *accord Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 581 (quoting *Rehn v. Westfield America*, 153 Md. App, 586, 592 (2003)) (further citation omitted).

"An 'invitee' is 'a person invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business.'" *Giant of Maryland LLC v. Webb*, 249 Md. App. at 562 (quoting *Rowley v. Mayor & City Council of Baltimore*, 305 Md. at 465). We assume that Ms. Keyser had the status of an "invitee" as a student in the common areas of the campus generally, and in the dining halls and academic buildings. *See Rhaney v. University of Maryland Eastern Shore*, 388 Md. 585, 602 (2005).[5]

An owner must use reasonable and ordinary care to keep the premises safe for invitees and to protect them from injury caused by an unreasonable risk, which the invitees, by exercising ordinary care for their own safety, will not discover. *Rowley v. Mayor & City Council of Baltimore*, 305 Md. at 465. The owner, however, "is not an insurer of the invitee's safety." *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 389 (1997); *accord Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 582.

Invitees have a duty to exercise due care for their own safety. *See Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 582; *Tennant v. Shoppers Food*

[5] In her dormitory, however, she would have the status of a tenant. *Id.*

Warehouse Md. Corp., 115 Md. App. at 389. "'This includes the duty to look and see what is around the invitee.'" *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 582 (quoting *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. at 389). "A property owner 'has no duty to warn an invitee of an open, obvious, and present danger.'" *Id*. (quoting *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. at 389)) (further citation omitted).

Both in the circuit court and in this Court, Goucher relied primarily on *Patton v. U.S. Rugby Football*, 381 Md. 627 (2004). In that case, the Court held that the organizers of an amateur rugby tournament did not have a duty to protect a competitor and his father (a spectator) from the danger of a lightning strike. *Id.* at 639; *id.* at 642-43. The organizers did not own the property on which the tournament was taking place—it was taking place at a public school. *Id.* at 631. Consequently, the existence of a duty turned, in that case, not on whether a danger was open and obvious, but on whether the organizers had a "special relationship" with the competitor and his father. *See id.* at 639.

After reviewing its earlier decisions on the subject (*id.* at 639-42),[6] the Court concluded that a "special relationship" comes about only when the injured persons

[6] *See*, *e.g.*, *Remsburg v. Montgomery*, 376 Md. 568 (2003) (holding that the leader of a hunting party had no special relationship with another member of party and thus no special duty to protect him from being accidentally shot by another member of the party); *Todd v. MTA*, 373 Md. 149, 165 (2003) (holding that the employee of a common carrier had a duty to aid or protect a passenger who was being attacked by another passenger); *Muthukumarana v. Montgomery County*, 370 Md. 447, 492 (2002) (holding, in two consolidated cases, that 911 operators did not have a special duty to members of the public); *Southland Corp. v. Griffith*, 332 Md. 704, 720 (1993) (holding that the employee

depend upon and cede control to another (*id.* at 642) or entrust themselves to the control and protection of another. *Id.* at 643. In *Patton*, however, the plaintiffs did not entrust themselves to the control of the organizers. *Id.* at 644. To the contrary, the plaintiffs "were free to leave the voluntary, amateur tournament at any time and their ability to do so was not restricted in any meaningful way by the tournament organizers." *Id*. In particular, the plaintiffs were "capable of leaving the playing field on their own volition if they [felt] their lives or health [were] in jeopardy." *Id*. Furthermore, "[t]he changing weather conditions" in that case "presumably were observable to all competent adults." *Id*. Hence, the Court held that the player and his father had no special relationship with the tournament's organizers and, thus, that the organizers owed no duty of care to them. *Id*.

Unlike this case, *Patton* does not concern the duty of an owner or occupier to an invitee. The *Patton* Court may have looked for a special relationship between the organizers and the plaintiffs precisely because the organizers had no common-law duty, such as the duty owed by an owner or occupier to an invitee. Thus, *Patton* does not dictate the outcome of this case.

Nonetheless, *Patton* sheds light on the scope of an owner or occupier's duty to protect an invitee against dangerous weather conditions that are "observable to all competent adults." *Id*. In support of its conclusion, the *Patton* Court cited, with approval, a number of cases in which courts in other jurisdictions have held that an owner

of a convenience store had a duty to call the police at the request of a customer who was being assaulted).

or occupier has no duty to warn invitees of dangerous weather conditions that are readily observable by competent adults. *Id.* at 644-45 n.6.[7]

For example, in *Hames v. State*, 808 S.W.2d 41, 45 (Tenn. 1991), the court held that the State of Tennessee did not breach its duty of care to a golfer who was struck by lightning on a State-owned course. The court reasoned that "the risks and dangers associated with playing golf in a lightning storm are rather obvious to most adults." *Id.* The court added that "a reasonably prudent adult can recognize the approach of a severe thunderstorm and know that it is time to pack up the clubs and leave before the storm begins to wreak havoc." *Id.*

Similarly, in *Seelbinder v. County of Volusia*, 821 So.2d 1095, 1097 (Fla. Dist. Ct. App. 2002), the court held that the county, "in its capacity as 'landowner' or the equivalent, did not have a duty to warn invitees, including beachgoers" at a county-owned beach, "that there was a risk of being struck by lightning." In expressing that conclusion, the court said that it was "joining the almost universally agreed view." *Id.*

In *Grace v. City of Oklahoma City*, 953 P.2d 69, 71 (Okla. Civ. App. 1997), the court held that a city did not have a duty to warn a golfer on a city-owned course of the dangers of lightning. "Lightning," the court wrote, "is a universally known danger

[7] Ordinarily, an owner or occupier has an obligation to warn of defective conditions in the property, such as a slippery walkway at an amusement park (*Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 583-84) or food that has been spilled on the floor of a supermarket. *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. at 385-87. The weather is not a condition of the property. Nonetheless, the cases cited by *Patton* tacitly treat dangerous weather conditions like defective conditions in the property.

created by the elements." *Id.* Consequently, the city had "no duty to warn its invitees of the patent danger of lightning or to reconstruct or alter its premises to protect against lightning." *Id.*

Finally, in *McAuliffe v. Town of New Windsor*, 577 N.Y.S.2d 942, 944 (App. Div. 1991), the court held that the town had no duty to warn an adolescent at a town-owned lake about the dangers of lightning. The danger was "admittedly apparent" to the young man, and "there is no duty to warn against a condition that is readily observable by the reasonable use of one's senses[.]" *Id.*[8]

Returning to this case, we reiterate that "[a] property owner 'has no duty to warn an invitee of an open, obvious, and present danger.'" *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 582 (quoting *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. at 389). In view of the authorities cited with approval in

[8] In addition to the four cases discussed above, the *Patton* Court cited *Caldwell v. Let the Good Times Roll Festival*, 717 So.2d 1263 (La. Ct. App. 1998). *Caldwell* does not turn on whether an owner or occupier has a duty to warn invitees of dangerous weather conditions that are readily observable by competent adults, but it does contain colorful language that suggests a person should be aware of the dangers of changing weather conditions:

> Most animals, especially we who are in the higher order, do not have to be told or warned about the vagaries of the weather, that wind and clouds may produce a rainstorm; that a rainstorm and wind and rain may suddenly escalate to become more severe and dangerous to lives and property. A thundershower may suddenly become a thunderstorm with destructive wind and lightning. A thunderstorm in progress may escalate to produce either or both tornadoes and hail, or even a rare and unexpected micro burst . . . all of which are extremely destructive to persons and property.

Id. at 1271.

Patton, we conclude that the powerful windstorm in this case created open, obvious, and present dangers. "Tree limbs may break and street signs may become loose during strong wind gusts." *High Wind Safety Rules*, National Weather Service (NOAA), https://perma.cc/ZZ3R-FXP8. "High winds can cause downed trees and power lines, flying debris and building collapses, which may lead to power outages, transportation disruptions, damage to buildings and vehicles, and injury or death." *Id.* These dangers are not only open, obvious, and present, but their cause—the wind—is "observable to all competent adults." *Patton v. U.S. Rugby Football*, 381 Md. at 644.

Indeed, Ms. Keyser herself observed the force of the wind: she likened the noise to a "wind tunnel," saw debris on the ground, and heard "things landing on the ground." On these undisputed facts, therefore, we hold that Goucher had no duty to protect Ms. Keyser against the open, obvious, and present danger that a tree branch might break and strike her.[9]

In arguing that the court erred in granting summary judgment because a jury could reasonably have found that the dangers she confronted were not open and obvious, Ms. Keyser cites *Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 585. *Six Flags* is a bit different from this case.

[9] The result might be different if Goucher knew or should have known that the tree was unhealthy and that one of its limbs might break in a windstorm, but failed to take reasonable steps to remedy the problem. In this case, however, the record contains no evidence that the tree was unhealthy, much less that Goucher knew or should have known that it was unhealthy.

In *Six Flags* a jury awarded damages to a ten-year-old child, who fell while crossing a wet, wooden pedestrian bridge near a water ride at an amusement park. *Id.* at 575-76. The amusement park, Six Flags, moved for judgment on the ground that the wet (and presumably slippery) condition of the bridge was open and obvious. *Id.* at 578. The circuit court denied the motion, and this Court affirmed. *Id.* at 583; *id.* at 585-86. We reasoned:

> To be sure, witnesses for both parties testified that the wet condition of the bridge was visible. It does not necessarily follow, however, that the slippery condition of the bridge was obvious. It is reasonably conceivable that a visitor to the amusement park may have perceived the water on the wooden walkway without appreciating the danger created by the wet surface. The jury may have believed that a visitor could have concluded that the bridge was unlikely to be slippery despite the wet condition. Indeed, [the plaintiff's expert] testified that there was non-skid material installed on the nearby exit bridge from the [water] ride but no non-skid material installed on the bridge where [the child] fell and was injured.

Id. at 583.

Thus, although "the evidence overwhelmingly established that the bridge was openly and obviously wet," we disagreed "that the dangerous condition caused by the wetness was so clearly open and obvious as to permit no reasonable factfinder to conclude otherwise." *Id.* at 583-84.

Ms. Keyser has no argument comparable to that of the plaintiff in *Gonzalez-Perdomo*. She agrees that the powerful winds were open and obvious—it was loud as a wind tunnel, there was debris all around her, and she heard "things landing on the ground." But she offers no basis to conclude that it was not equally open and obvious to any reasonable person that those powerful winds posed a danger to people and property.

Echoing *Six Flags*, she argues only that "[i]t is 'reasonably conceivable'" that she herself was subjectively unaware of the dangers of a windstorm that she herself describes, elsewhere, as "severe," "relentless," "extreme," and even "catastrophic."

Ms. Keyser's argument is untenable. Invitees have a duty to exercise due care for their own safety. *See Six Flags America, L.P. v. Gonzalez-Perdomo*, 248 Md. App. at 582. "'[I]n the usual case, there is no obligation to protect the invitee[s] against dangers . . . which are so obvious and apparent that [they] may reasonably be expected to discover them[.]'" *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. at 393 (quoting W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts*, § 61, at 427 (5th ed. 1984)). Thus, the question of whether a condition is open and obvious does not depend on whether an invitee claims to have been subjectively aware of it. Ms. Keyser cannot defeat summary judgment by claiming that she herself was somehow unaware of conditions that would have been obvious and apparent to a reasonable person.[10]

If *Patton* applied, Ms. Keyser would fare no better. Like the rugby player and the spectator in *Patton*, Ms. Keyser did not entrust herself to the control and protection of another. Just as the player and the spectator were free to leave the rugby pitch, Ms.

[10] Ms. Keyser represented to the circuit court that her expert would testify that the threat of a falling limb would not have been open and obvious to Ms. Keyser because "this awareness of the foreseeable dangers would have been outside her knowledge and experience." The limits of Ms. Keyser's "knowledge and experience" would seem to be an improbable subject for expert testimony. Even if it were an appropriate subject for expert testimony, Ms. Keyser did not present her expert's alleged opinion to the court in the form of admissible evidence sufficient to defeat a motion for summary judgment. *See*, *e.g.*, *Beatty v. Trailmaster Prods., Inc*., 330 Md. at 737.

Keyser was free not to attend class.[11] She was an adult who was capable of deciding for herself whether to venture out in a powerful windstorm. She was also capable of returning to her dorm if she felt that her life or health was in jeopardy. *Patton v. U.S. Rugby Football*, 381 Md. at 644. Furthermore, the weather conditions "were observable to all competent adults." *Id.* In these circumstances, therefore, the college had no special relationship with Ms. Keyser and, thus, no obligation to warn her of or protect her from the dangers posed by the wind.

CONCLUSION

Ms. Keyser was presumably an invitee of Goucher at the time of the incident. Although Goucher had a duty to Ms. Keyser to protect her from known or reasonably foreseeable dangerous conditions, the weather conditions on March 2, 2018, were open and obvious to Ms. Keyser. Goucher did not have a duty to warn its students of a condition open and observable to a competent adult, like Ms. Keyser. Therefore, the circuit court did not err in granting Goucher's motion for summary judgment.

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

[11] Ms. Keyser asserts that, as a student-athlete, she "would have been subject to" unspecified "consequences" had she "not attended [a] required class without an excuse." Ms. Keyser, however, cites no evidence in the record to support that assertion. Instead, she seems to rely on what she "would have testified" at trial. A party cannot create a genuine dispute of a material fact by relying on unsworn proffers. *See*, *e.g.*, *Beatty v. Trailmaster Prods., Inc*., 330 Md. at 737. In any event, the summary judgment record reflects that several months before her injury Ms. Keyser had already "been missing some classes due to a lack of energy and motivation." Moreover, a month after the injury, she was "worried about not getting A's or B's in two of her classes due to poor attendance that has been occurring since the beginning of the semester."