Circuit Court for Baltimore City
Case No. 24-C-22-001841

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1923

September Term, 2023

STEVEN FRANK

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

Wells, C.J.,
Tang,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: November 22, 2024

*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 Rule 1-104(a)(2)(B).

Steven Frank, the appellant, sued the Mayor and City Council of Baltimore (the "City"), the appellee, for negligence after sustaining injuries when he tripped on a displaced sidewalk slab and fell.[1] The City moved for summary judgment, which the Circuit Court for Baltimore City granted. The appellant appeals from this order and presents the following issue, which we have slightly rephrased:

> Did the circuit court err in granting summary judgment in favor of the City on the ground that the City lacked constructive notice of the displaced sidewalk slab?

For reasons we will explain, we shall vacate the judgment and remand this case for further proceedings without affirmance or reversal.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2021, the appellant was walking along a public sidewalk near 856 East Lombard Street in Baltimore City when he tripped on a displaced sidewalk slab and fell. As a result, he sustained injuries to his head and spine.

The appellant filed a complaint for negligence, alleging that the City breached its duty of care in failing to maintain and repair the sidewalk, among other things.

The parties deposed the appellant and the City's corporate designee during discovery. The appellant testified that he was walking to a job interview when he tripped and fell, noting that he did not see the unevenness in the sidewalk slabs. When asked why

[1] The appellant also sued Albemarle Square Townhouse Condominium Association III, Inc., Tidewater Property Management, Inc., and Flag House Courts Resident Association, Inc. Later, he voluntarily dismissed them from the lawsuit.

he failed to notice the condition, the appellant responded, "Because it wasn't visible to see." He also stated that he was unaware of how long the condition had existed.

The City's corporate designee testified that sidewalk inspections in Baltimore City are "complaint-driven." This means the City will inspect a sidewalk when a complaint is made through its 311 system. Before the appellant's accident, the City had not received any complaints about the sidewalk in front of 856 East Lombard Street. After the accident, the corporate designee inspected the area and noticed that the root of a nearby tree raised the sidewalk slab in question. When asked if he considered the condition a "trip hazard," the corporate designee responded, "Yes, it's raised."

A.

Motion for Summary Judgment

The City filed a motion for summary judgment, arguing that no evidence showed it had actual or constructive notice of the displaced sidewalk slab. The appellant opposed the City's motion. Recognizing that the City had no actual notice, the appellant argued there was a dispute of material fact over whether the City had constructive notice of the condition.

To support his argument, the appellant included an affidavit from his expert, Sylvia Deye, along with her report and curriculum vitae. The report included an aerial view of the block of East Lombard Street and two photographs of the sidewalk slab taken after the accident.

Ms. Deye described the area in her report, noting that the concrete sidewalk panels measured around five square feet and were separated by expansion joints. She pointed out that the cobblestones bordering a tree bed along the sidewalk heaved, and there was a crack in the sidewalk at the corner of the tree bed. The sidewalk panel adjacent to the tree trunk had also heaved, creating an "abrupt vertical edge" approximately 2 inches high.

Ms. Deye opined that the "abrupt vertical edge of the heaved sidewalk" was "dangerous" and caused the appellant to trip and fall. She described the condition as "a low and inconspicuous tripping hazard for pedestrians." She also opined that the condition had existed for many years before the accident and that those responsible for maintenance should have identified and repaired the sidewalk before the accident.

Ms. Deye's opinion about how long the condition had been present was based on Google imagery. In her report, she stated, "Since 2018 the crack, heaved sidewalk and displaced cobble stone was visible," and included a footnote referencing "https://www.google.com/maps." But the report did not include any Google images of the condition Ms. Deye claimed had been visible since 2018, nor were these images included as an exhibit in the appellant's opposition to the City's motion for summary judgment. Despite this, the appellant argued that the heaved sidewalk slab existed for over two years before the accident, imputing constructive notice to the City. He also asserted that the City had a duty to inspect and maintain its sidewalks and warn pedestrians of potential hazards. Therefore, he argued that summary judgment should be denied.

The City filed a reply, arguing that the approximately two-inch deviation of the sidewalk slab, which had developed over time, was a trivial defect as a matter of law. Therefore, it maintained that the City could not be charged with constructive notice. Nor did the City have a duty to inspect and warn of such defects.

B.

Hearing

The circuit court held a hearing on the City's motion for summary judgment, during which the parties reiterated the arguments outlined in their papers. It was undisputed that the City did not have actual notice of the defect. Thus, the City focused on the issue of constructive notice. Relying on *Keen v. Mayor of Havre de Grace*, 93 Md. 34 (1901), the City outlined what the appellant needed to establish to prove it had constructive notice. Quoting *Keen*, the City claimed the appellant had to show that the condition of the displaced sidewalk slab was:

> known and notorious to those traveling the street, and there ha[d] been full opportunity for the municipality through its agents charged with that duty, to learn of its existence and repair it . . . . If the defect be of such a character as not to be readily observable, express notice to the municipality must be shown.

Id. at 39 (internal quotation marks and citation omitted). The City argued that the appellant did not "meet the elements" of constructive notice. This was because no evidence showed that the condition of the sidewalk slab was known and notorious to anyone traveling the streets. The City referenced Ms. Deye's report in which she opined that the condition was "low and inconspicuous." Thus, the City argued, the condition "could not be reliably

detected, which is the very opposite of known and notorious to those traveling the streets." The City also asserted that there was no evidence of how long the condition existed before the accident.

The appellant argued that the Google imagery cited in Ms. Deye's report was evidence that the condition had been present since at least 2018. Thus, he argued that whether the City would have discovered and repaired the defect, given its existence for two or more years, was a question for the jury to decide. The City responded by stating that there were "many issues" with the Google imagery. The City explained that it was not authenticated and that the appellant did not include an affidavit stating that it accurately depicted the condition of the sidewalk slab in 2018.

The City reiterated the "straightforward elements" of constructive notice. It argued that the appellant did not satisfy the "very first element, which is that the condition was known and notorious to those traveling the streets." Again, it cited Ms. Deye's report and argued that the condition was not "known and notorious to those traveling the streets. There are no other witnesses who have stated of [sic] record that this condition was known and notorious to those traveling the streets." The City, therefore, maintained that it was entitled to judgment as a matter of law because there was no genuine dispute of material fact that the condition was not "known and notorious to those traveling the streets."

In addition, the City continued to assert that the two-inch deviation in the sidewalk slab was trivial because it was slight, minor, and inconsequential. The appellant, on the other hand, argued that the issue of triviality should be decided by a jury. This was because

the appellant's expert opined that the condition was dangerous, and the City's corporate designee acknowledged that it posed a trip hazard. The City responded by stating that even if the condition was dangerous, the appellant failed to establish constructive notice for the abovementioned reasons.

C.

Court's Ruling

At the conclusion of the hearing, the circuit court granted the City's motion for summary judgment. It explained:

> The facts in this case is that there was a raised sidewalk most likely due to -- because of a tree root or something like that. There is a two-inch difference between the sidewalk and the abutting sidewalk in this case. Question is . . . whether the City has actual notice of which . . . there's no evidence that they did, or constructive notice. Now*, constructive notice would consist of either -- will consist of basically it being open and notorious or whether it's otherwise obvious to -- would be obvious to the City*.
>
> The law indicates that the City doesn't have any obligation to regularly inspect anything -- any item in this -- any issues regarding the city streets because as a practical matter, the city streets in Baltimore are extensive and maybe the resources should be used for something else.
>
> So the question is, is whether over two-and-a-half years whether they did or did not inspect it is not material to this case. *The question then becomes is whether it was open and notorious. In this matter, this is the two-inch crack on a city sidewalk. The [c]ourt does not consider that within the meaning of the law to be open and notorious, therefore, the [c]ourt will find that notice requirement in this matter* is not -- *has not been proved* by the pleadings in this case. The [c]ourt will grant the motion for summary judgment as to [the] City of Baltimore.

(emphasis added).

The court entered an order granting the City's motion for summary judgment, and the appellant noted a timely appeal.

II.
OVERVIEW OF RELEVANT LAW

To establish a *prima facie* case of negligence, a plaintiff must prove: "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." *Marrick Homes LLC v. Rutkowski*, 232 Md. App. 689, 698 (2017).

Concerning a municipality's duty, we have explained that "[g]enerally, a municipal corporation owes a duty to persons lawfully using its public streets and sidewalks to make them reasonably safe for passage." *Smith v. City of Balt.*, 156 Md. App. 377, 383 (2004). "This duty is not absolute and the municipality is not an insurer of safe passage." *Id.* "If, however, a person is injured because a municipality failed to maintain its streets, and the municipality had actual or constructive notice of the dangerous condition that caused the injury, the municipality may be held liable in negligence." *Id.*

Actual notice is "knowledge on the part of the corporation, acquired either by personal observation or by communication from third persons, of that condition of things which is alleged to constitute the defect." *Colbert v. Mayor of Balt.*, 235 Md. App. 581, 588 (2018) (citation omitted). Here, the appellant acknowledges that the City lacked actual notice. The issue thus centers on constructive notice. "Constructive notice is notice that the law imputes based on the circumstances of the case." *Id.*

A.

Doctrine of Triviality

"Not every defect in a sidewalk is actionable." *Martin v. Mayor of Rockville*, 258 Md. 177, 183 (1970) (citation omitted). The doctrine of triviality recognizes that "it is impossible to maintain a sidewalk in a perfect condition, and minor defects are bound to exist." 19 Eugene McQuillin, *The Law of Municipal Corporations* § 54:120, Westlaw (database updated July 2024); *accord Cordish v. Bloom*, 138 Md. 81, 84–85 (1921) ("No city, town or village could maintain a perfectly level or even surface in all of its sidewalks without burdening the property owners with unreasonable and unnecessary taxation."). "Pavements will in time become irregular and uneven from roots of trees, heavy rains and snows or other causes." *Cordish*, 138 Md. at 85.

Our courts have applied the doctrine of triviality to defects that were "slight, minor or inconsequential." *Martin*, 258 Md. at 183 (citation omitted). If the defect is too trivial to be dangerous, then the defect is not actionable. *See id.* at 181 ("[S]lightly irregular defects do not subject municipalities to liability for negligence."). What is considered a dangerous condition or merely a trivial defect "cannot be reduced to a mathematical formula." *President of Princess Anne v. Kelly*, 200 Md. 268, 273 (1952). Based "on the facts in each case, the court should determine whether there is sufficient evidence of the gravity of the alleged defect to permit a jury to consider the question of negligence." *Leonard v. Lee*, 191 Md. 426, 435 (1948); *accord Keen*, 93 Md. at 40 (explaining that if there is evidence that would allow the jury to reasonably find there was a dangerous condition in the sidewalk,

which the municipality knew or should have known about, and that this condition was the proximate cause of the accident, then the municipality's request for judgment should not be granted).

The questions of triviality and constructive notice are closely related. *Martin*, 258 Md. at 180. "[I]f the defect is so trivial then it should follow that the City should not be charged with constructive notice." *Id.* In other words, "the municipality is not chargeable with constructive notice if the defect is so minor as to make its discovery unlikely." *Id.* at 182 (construing *Leonard*, *supra*); *accord Keen*, 93 Md. at 39 ("If the defect be of such a character as not to be readily observable, express notice to the municipality must be shown.").

B.

Constructive Notice

In the absence of a trivial defect, constructive notice can be established in different ways. In *Keen v. Mayor of Havre de Grace*, the Maryland Supreme Court provided the oft-repeated language for showing constructive notice of a "bad condition" of the streets:

> After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligen[ce]. If the defect be of such a character as not to be readily observable, express notice to the municipality must be shown. But if it be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable.

93 Md. at 39 (internal quotation marks and citations omitted); *see id.* at 40 (holding that evidence that the hole had pre-existed the plaintiff's injury for enough time to have made it a matter of common knowledge to the townspeople was sufficient to support a reasonable finding of constructive notice).

In *Smith v. City of Baltimore*, this Court surveyed cases in accord with these principles. 156 Md. App. at 384–85; *see, e.g.*, *Weisner v. Mayor of Rockville*, 245 Md. 225, 232–33 (1967) (holding that evidence that a thin sheet of ice had formed on the sidewalk due to melting and refreezing water from recently plowed snowbanks did not allow a finding of constructive notice against the municipality); *Kelly*, 200 Md. at 271, 273 (holding that evidence that a defect in the sidewalk was well known to neighbors and town authorities was sufficient to support a finding of constructive notice); *Mayor of Balt. v. Poe*, 161 Md. 334, 336–37 (1931) (holding that evidence that a defect in a street had existed all summer was sufficient to support a finding of constructive notice); *Mayor of Annapolis v. Stallings*, 125 Md. 343, 344–45, 348–49 (1915) (holding that evidence that witnesses had observed defect in a city sidewalk for several months was sufficient to prove constructive notice); *Comm'rs of Delmar v. Venables*, 125 Md. 471, 473, 476–77 (1915) (holding that evidence that a stump six or seven inches above road level had been present for approximately two years was sufficient to support a finding of constructive notice against the municipality).

Based on *Keen* and other cases, this Court distilled the standard for proving constructive notice as follows:

> Because a municipality has a duty to keep its roads in proper condition, it must perform repairs upon being notified of a "bad condition of the street." Whether the municipality performs routine inspections or relies on citizens' reports to discover "bad conditions," it cannot avoid notice by turning a blind eye; therefore, when the evidence shows that a "bad condition" is such that, *by virtue of its nature or the length of time it has existed, the municipality would have learned of it by the exercise of due care, the municipality may be found to have constructive knowledge of its existence.*

Smith, 156 Md. App. at 386 (emphases added and citation omitted).

In *Smith*, the plaintiffs alleged that the City had breached its duty to use reasonable care in maintaining the pedestrian crossing signal, which resulted in their father's fatal injury after he was struck by a vehicle while trying to cross the street. *Id.* at 380–81. The plaintiffs conceded that the City did not have actual knowledge of the misaligned crossing signal, and there was no evidence of how long the signal had been out of alignment. *Id.* at 385. However, they maintained that because the City was aware that crossing signals sometimes become misaligned, it had to conduct routine inspections to identify these defects. *Id.* Without such inspections, they argued the City should be deemed to have constructive notice of the defects. *Id.* After a hearing, the circuit court granted summary judgment in the City's favor, and this Court affirmed. *Id.* at 386.

Preliminarily, we explained that there was no duty imposed on municipalities to conduct regular inspections of their roadways. *Id.* at 385. Applying the above standard, we concluded that the misaligned crossing signal was not a defect of such a nature that "one reasonably could infer from its mere existence that citizens would have immediately reported it to the City authorities." *Id.* at 386. In addition, we explained, "there was no direct or circumstantial evidence showing that the defect had existed for a sufficient length

of time that it would have been reported to City authorities, and therefore would have been known to the City, had the City been abiding by its practice of responding to citizen reports of adverse roadway conditions." *Id.* "Had there been evidence of that sort, the issue of constructive notice properly would have been for the fact-finder, precluding summary judgment." *Id.* In *Smith*, "[t]here simply was no such evidence." *Id.*

III.

DISCUSSION

A.

Parties' Contentions

The appellant argues that the circuit court erred in granting summary judgment because it misinterpreted the law regarding constructive notice. He claims the court incorrectly concluded that demonstrating an "open and notorious" defect was necessary to prove constructive notice. Citing *Smith*, the appellant contends that the court should have considered how long the condition existed. He argues, as he did below, that based on the Google imagery, the condition of the sidewalk slab existed as early as 2018, more than two years before the accident. Therefore, there was a genuine dispute of material fact as to whether the City had constructive notice to preclude summary judgment.

The City argues the court correctly determined that the condition was not known and notorious. The appellant's expert opined that the condition was "low and inconspicuous" and may not have been detected by pedestrians. The City asserts that because the evidence showed the defect was not readily observable, the appellant was

required to prove that the City had actual notice of the defect, which he failed to establish. Relying on *Zilichikhis v. Montgomery County*, 223 Md. App. 158 (2015), the City maintains that the expert's opinion about how long the condition existed was not based on admissible evidence and thus could not be used to oppose summary judgment. *See id.* at 183–85 (explaining that unauthenticated photographs of the condition and expert opinion relying on them were not admissible to oppose summary judgment).

B.

Remand

"If the moving party offers more than one basis for granting summary judgment, and the trial court rules on only one basis, we ordinarily are confined to review the ruling on the basis on which the court granted summary judgment." *Coroneos v. Montgomery Cnty.*, 161 Md. App. 411, 422–23 (2005). The problem is that we cannot determine from the court's oral ruling which basis it relied on to decide the City's motion for summary judgment.

At first glance, the circuit court appeared to decide the motion based on a lack of constructive notice rather than on the doctrine of triviality. It stated that to prove constructive notice, the appellant must demonstrate that the defect was either "open and notorious" or "obvious to the City." But then it stated, "[T]his is the two-inch crack on a city sidewalk. The [c]ourt does not consider that within the meaning of the law to be open and notorious . . . ." This conclusion suggests that the court may have determined the condition was trivial as a matter of law.

In addition, the court's articulation of the law regarding constructive notice is inconsistent with the decisional law above. Its use of the term "open and notorious" seems to reference the language in *Keen*. If the court understood the law to mean that the appellant was required to prove the condition of the sidewalk slab was "known and notorious" (i.e., common knowledge), this interpretation is incorrect. This apparent misunderstanding may have partly arisen from how the City construed the language in *Keen* during the motions hearing. The City framed the "first element" of proving constructive notice as requiring evidence that the defect was "known and notorious to those traveling the streets," a requirement that the appellant did not meet. However, the quoted phrase in *Keen* cannot be read in isolation. When read in context, the Maryland Supreme Court was describing the amount of time that must pass to impute constructive notice:

> *After* a street has been out of repair, so that *the defect has become known and notorious to those traveling the street, and there has been full opportunity* for the municipality through its agents charged with that duty, *to learn of its existence and repair it*, the law imputes to it notice and charges it with negligen[ce].

Keen, 93 Md. at 39 (emphasis added) (internal quotation marks and citation omitted).

As explained in *Smith*, constructive notice is established "when the evidence shows that a 'bad condition' is such that, by virtue of its nature *or* the length of time it has existed, the municipality would have learned of it by the exercise of due care." 156 Md. App. at 386 (emphasis added). Indeed, one way to prove constructive notice is by showing the defect was "known and notorious to those traveling the street" and that there has been a full opportunity for the municipality to learn of its existence and repair it. *See, e.g.*, *Keen*,

93 Md. at 39; *Kelly*, 200 Md. at 271, 273–74; *Stallings*, 125 Md. at 346–49. But neither *Keen* nor *Smith* suggests that proving constructive notice requires a showing that the defect was "known and notorious."

When examining the court's oral ruling, we are led to question whether the court concluded that the defect in the sidewalk slab was so trivial that the City should not be charged with constructive notice. *See Martin*, 258 Md. at 180 ("[I]f the defect is so trivial then it should follow that the City should not be charged with constructive notice."). If this was indeed the court's conclusion, it did not explain how the condition of the sidewalk slab was trivial as a matter of law, given Ms. Deye's opinion that it was dangerous and the City's apparent acknowledgment (through the testimony of its corporate designee) that it was a trip hazard. *See Leonard*, 191 Md. at 435 (explaining that the court should determine whether there is "sufficient evidence of the gravity of the alleged defect to permit a jury to consider the question of negligence" based on the facts of the case); *Keen*, 93 Md. at 40 (explaining that if there is evidence that would allow the jury to reasonably find there was a dangerous condition in the sidewalk, which the municipality knew or should have known about, and that this condition was the proximate cause of the accident, then the municipality's request for judgment should not be granted).

Alternatively, did the court conclude, or assume *arguendo*, that the condition was not trivial and determine that the City lacked constructive notice of the bad condition as a matter of law? If this was the case, the court did not appear to consider whether a genuine dispute of material fact existed regarding whether the City would have learned of the

condition by exercising due care "by virtue of its nature *or* the length of time it has existed." *Smith*, 156 Md. App. at 386 (emphasis added) (analyzing whether a defect was of such a nature that "one reasonably could infer from its mere existence that citizens would have immediately reported it to the City authorities" and whether there was "direct or circumstantial evidence showing that the defect had existed for a sufficient length of time that it would have been reported to City authorities, and therefore would have been known to the City").

Because we cannot determine the basis of the circuit court's decision to grant summary judgment, we vacate the judgment and remand the case for the court to reconsider its ruling in light of this opinion.[2] *See* Md. Rule 8-604(d)(1) ("If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court."). We recognize that the court may arrive at the same conclusion or a different one on remand. Regardless of the outcome, the court should clarify the basis for its decision and articulate its reasoning.

[2] In the exercise of its discretion, the court may permit the parties to supplement their papers. *See* Md. Rule 2-342 ("With leave of court and upon such terms as the court may impose, any motion or other paper may be amended."); Md. Rule 2-501(d) ("If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.").

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED WITHOUT AFFIRMANCE OR REVERSAL. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EVENLY BETWEEN THE PARTIES.