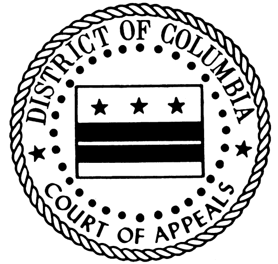
24-CV-0300



Clerk of the Court
Received 12/13/2024 11:32 AM
Resubmitted 12/13/2024 07:26 PM
Resubmitted 12/16/2024 09:14 AM

DISTRICT OF COLUMBIA COURT OF APPEALS

ELIZABETH LITTELL

Appellant,

v.

DISTRICT OF COLUMBIA

Appellee.

APPEAL FROM THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Civil Division No. 2021-CA-004093-B (*Hon. Dayana A. Dayson, Judge)*

REPLY BRIEF OF APPELLANT

Respectfully submitted,

By: /s/ Luke T. Needleman

Benjamin T. Boscolo (DC Bar No.: 412860)*
Luke T. Needleman (DC Bar No.: 90006213)
CHASENBOSCOLO
7852 Walker Drive, Suite 300
Greenbelt, Maryland 20770
(301) 220-0050
Fax (301) 474-1230
bboscolo@chasenboscolo.com
lneedleman@chasenboscolo.com
Counsel for Elizabeth Littell

Table of Contents

I. TABLE OF AUTHORITIES ii

II. ARGUMENT 3

A. The Trial Court Erred In Its Finding That The District Was Not Responsible for the Maintenance of the Hazard that Caused Ms. Littell's Injuries. 3

i. There is No "Special Use" of the Premises................................ 4

ii. "Special Use" By the Adjacent Property Owner Does Not Relieve Municipalities, Like the District, From Liability in Tort. 6

iii. The Issue of "Special Use" By the Adjacent Property Owner is Not Properly Before the Court. 8

iv. 24 D.C.MR. § 1105.9 Does Not Relieve the District of Columbia of its Duty to Maintain Non-Standard Paving Materials.........10

B. There Is Sufficient Evidence to Prove Both Actual and Constructive Notice of the Defective Condition Located on the Public Sidewalk. 10

i. Actual Notice 11

ii. Constructive Notice 12

C. The District's Argument Regarding the De Minimis Nature Of the Defect Is Not Before the Court. 15

III. CONCLUSION 15

IV. CERTIFICATE OF SERVICE 17

I. TABLE OF AUTHORITIES

Cases

Merriam v. Anacostia Nat. Bank, 247 F.2d 596 (D.C. Cir. 1957)………………….5

Quigley's Pharmacy, Inc. v. Beebe, 261 A.2d 242 (D.C. 1970)……………………5

Hecht v. District of Columbia, 139 A.2d 857 (D.C. 1958)…………………………6

District of Columbia v. Texaco, Inc. 324 A.2d 690 (D.C. 1974)……………..6, 7, 8

Henderson v. District of Columbia, 493 A.2d. 982 (D.C. 1985)………………...…8

Emmco Ins. Co. v. White Motor Corp., 429 A.2d 1385 (D.C. 1981)………………8

Washington Metro. Area Transit Auth. v. Davis, 606 A.2d 165 (D.C. 1992)…….12

Lynn v. District of Columbia, 734 A.2d 168 (D.C. 1999)………………...12, 13, 14

District of Columbia v. Woodburry, 136 U.S. 450 (1890)………………………..12

Wilson v. Washington Metro. Area Transit Auth., 912 A.2d 1186 (D.C. 2006)….12

Codes and Regulations

24 D.C.MR. § 1105.9……………………………………………………4, 10

II. ARGUMENT

A. The Trial Court Erred In Its Finding That The District Was Not Responsible for the Maintenance of the Hazard that Caused Ms. Littell's Injuries.

The District of Columbia, as a matter of law, had a duty to maintain the portion of the sidewalk on which Ms. Littell tripped and fell. As a result, the Trial Court erred in its Order.

The District's arguments raised in the Brief of Appellee to the contrary are not well-founded in law or fact for four reasons.

First, the adjacent property owner's alleged installation of granite pavers does not constitute "special use." There must be a finding of "special use" of a public space by an adjacent property owner in order for the District's duty to maintain the public space in question to become secondary to an adjacent property. there must be a finding that the adjacent property owner made "special use" of the sidewalk. Due to the lack of "special use," the District's responsibility to maintain the sidewalk upon which Ms. Littell fell is not the responsibility of any other entities.

Second, the caselaw offered by the District does not stand for the proposition that municipalities, like the District, are not liable in tort for defective conditions

on the public walkways even in scenarios where the adjacent property owner makes "special use" of the public walkway.

Third, the District did not assert, nor did the Trial Court find, that the adjacent property owner made any "special use" of the sidewalk at issue. This issue is raised by the District on the first time on appeal. The issue was not addressed by the Trial Court and did not serve as a basis for its ruling. As there is no finding from the Trial Court that the adjacent property owner made "special use" of the sidewalk, there can be no finding that the District's duty to maintain the sidewalk is secondary to the adjacent property owner under this theory.

Finally, 24 D.C.MR. § 1105.9, on its face, is insufficient to relieve the District of its duty to maintain public walkways in the District of Columbia.

i. There is No "Special Use" of the Premises.

The District's contention that the adjacent property owner made "special use" of the premises is meritless. The Court should reject the District's argument that their responsibility to maintain the public sidewalk where Ms. Littell fell became responsibility of the adjacent property owner.

Where public way is used by private parties for their own private and special use, as distinguished from use to which they are entitled as members of the public, and that use creates a dangerous condition which causes injury to a pedestrian. Both those creating the dangerous condition and those for whose special benefit

the use has produced that dangerous condition *may* be liable in certain circumstances. *Merriam v. Anacostia Nat. Bank*, 247 F.2d 596 (D.C. Cir. 1957). When an abutting property owner has made no substantial special use of specific defective public space, and such space is otherwise used by the general public in a way unrelated to adjoining owner's special interest, no duty arises requiring owner to protect those using that space from defects not caused by him. *Quigley's Pharmacy, Inc. v. Beebe*, 261 A.2d 242 (D.C. 1970). One is shown to have substantially used public space for a direct and special purpose in aid of his use of private property. *Id.* at 244.

Here, the adjacent property owner "made no substantial special use" of the public sidewalk at issue, and the portion of the sidewalk at issue is otherwise used by the general public in a way unrelated to the adjoining owner's special interest on a frequent basis. Here, Ms. Littell was walking down 7th Street to get to another business establishment. Ms. Littell was not entering or exiting the adjacent property. In fact, her use of the public sidewalk where the defective condition existed was entirely unrelated to the adjacent property owner's interest.

In *Quigley*'s *Pharmacy, Inc.*, there was testimony that upward of 5,000 persons used the sidewalk as a public pathway daily. The sidewalk located in front of the adjacent property owner at 810 7th Street is utilized by pedestrians traveling

by foot to get to and from locations located in the District of Columbia for reasons unrelated to the adjacent property owner.

In *Hecht v. District of Columbia*, the evidence revealed that the adjacent property's sidewalk led only to the adjacent property's building and was used only by people who enter the building. 139 A.2d 857 (D.C. 1958). Additionally, the Court noted that the sidewalk is "an appurtenance of the building only, and it is not used in any way by the general public." *Id.* at 863. This case is simply the opposite. Here, the public sidewalk is a thoroughfare and is for the general use of the public to travel by foot to places other than the adjacent property's building and is not used solely by pedestrians to enter the adjacent property. The pavers in front of the adjacent property are a part of a public sidewalk utilized by the general public for reasons other than entering the adjacent property owner's building.

As a matter of law, there is no special use by the adjacent property owner.

ii. "Special Use" By the Adjacent Property Owner Does Not Relieve Municipalities, Like the District, From Liability in Tort.

The District's reliance on *District of Columbia v. Texaco* is insufficient to show that the District is not liable in tort for injuries caused by defective conditions on the public sidewalk at issue. The *Texaco* matter arises out of pedestrian falling and sustaining injuries because of a defective sidewalk which crossed the driveway entrance of a Texaco gasoline station. *District of Columbia v. Texaco, Inc.* 324

A.2d 690, 691 (D.C. 1974). The pedestrian only brought suit against the District of Columbia and the District of Columbia was found liable. *Id.* The *Texaco* matter specifically concerned an action between the District and the abutting property owner, in which the District sought indemnification for the judgment paid by the District. This court was presented with the sole issue of whether an adjacent property owner's use of a public sidewalk constituted a "special use." If it was, then the District had the right to seek indemnity when the District is found liable in tort and judgment is entered against the District. In addressing the issue, this Court held that the abutting gasoline station made "special use" of the public sidewalk where the gas station used the sidewalk as a driveway entrance to the gasoline station and, as a result, causes an unsafe or dangerous condition on the sidewalk. *Id.* This court remanded the case to the trial court for a determination of whether the deteriorating condition of the sidewalk was caused primarily by its use as a driveway entrance to a gasoline station. *Id.* If there was a finding that the defective condition was caused primarily by the "special use," then the District could seek indemnification. *Id.*

To be sure, this Court did not hold that the District cannot be found liable for defective conditions on public walkways, even in instances where there is evidence of "special use" by abutting property owners. This Court merely addressed the issue of whether the District is permitted to seek indemnification from the adjacent

property owner after the District is found liable. More importantly, this Court found that the District's right to seek indemnification from the abutting property owner required a finding that the defective condition was caused primarily by the 'special use' as a prerequisite to the District's right to seek indemnification. *Id.* Here, there is no evidence that the defective condition was caused by an alleged special use. As a result, the issue of whether the District is permitted to seek indemnification is not properly before the Court.

Texaco does not bar a pedestrian's right to seek judgment against the District for defective conditions in public sidewalks.

iii. The Issue of "Special Use" By the Adjacent Property Owner is Not Properly Before the Court.

Absent a miscarriage of justice which is manifest, the Court of Appeals not need, and usually will not, consider arguments made for a first time on appeal in a civil matter. *Henderson v. District of Columbia*, 493 A.2d. 982 (D.C. 1985). This Court has long adhered to the policy that a party generally will not be allowed to raise an issue on appeal that was not presented to the trial court. *Emmco Ins. Co. v. White Motor Corp.*, 429 A.2d 1385 (D.C. 1981).

In moving for summary judgment on the basis that the District was not responsible for the premises upon which Ms. Littell fell, the District relied solely on municipal regulations. On appeal, however, the District asserts for the first time

that it is entitled to summary judgment on the common law theory that the adjacent property owner made "special use" of the premises. The Trial Court did not rely on this theory in reaching its order and, as a result, this Court's is unable to review a trial court finding with respect to this theory.

This contention was not presented in the District's motion for summary and therefore is not a proper subject of review.

Assuming, without conceding, the issue of "special use" of the public sidewalk by the adjacent property is properly before the Court, there is still no merit to these contentions. In its brief, the District first contends that the adjacent property owner made "special use" of the sidewalk at issue and thus the District's duty to maintain the sidewalk became secondary to the adjacent property owner's. This argument fails for several reasons. First, the fact that an adjacent property may be partially liable to a pedestrian injured by a defect in a sidewalk does not as a matter of law release the District from liability. Second, the case law does not stand for the proposition that the municipality is not liable. It simply holds that the adjacent property may also be liable. There are many instances where multiple parties can be held jointly and severally liable for injuries caused by a single defective condition (property owner, lessee, and property management company) (general contractor and subcontractors).

iv. 24 D.C.MR. § 1105.9 Does Not Relieve the District of Columbia of its Duty to Maintain Non-Standard Paving Materials.

The District's reliance on 24 D.C.MR. § 1105.9 fails. The District concedes 24 D.C.MR. § 1105.9 does not include a provision that authorizes enforcement by civil actions by private individuals. The District makes a passing argument that "no such express cause of action is required . . . [because] an injured pedestrian can simply bring a common-law negligence claim against the property owner." This argument is illogical. On one hand, the District claims 24 D.C.MR. § 1105.9 is legally sufficient to shift all responsibility to maintain nonstandard pavers on public sidewalks to private property owners, yet concedes the regulation, standing alone, cannot serve as a basis for liability in tort against the private property owners. If 24 D.C.MR. § 1105.9 was intended to shift all liability for injuries arising from defective conditions of nonstandard paving materials from the District to private property owners, the regulation would provide a particular enforcement mechanism or specify a particular remedy indicating this intent. Here, 24 D.C.MR. § 1105.9 is devoid of this language.

B. There Is Sufficient Evidence to Prove Both Actual and Constructive Notice of the Defective Condition Located on the Public Sidewalk.

The District seeks affirmance of the Trial Court's order on alternative basis that Ms. Littell did not offer evidence of notice. The Trial Court did not address the issue of notice in granting the District's Motion for Summary Judgment. Ms.

Littell would suffer substantial procedural unfairness by an affirmance on this ground.

Regardless, the Trial Court record contained sufficient evidence to prove notice under both actual and constructive notice doctrines. At the minimum, this issue is proper for determination by the jury.

i. Actual Notice

District of Columbia had actual notice of the defective condition that caused Ms. Littell's injuries. At the minimum, the record establishes a genuine issue fact regarding whether the District had actual notice of the defective condition that was sufficient for the Trial Court to deny the District's motion for summary judgment, and submit the issue to the jury.

The District's actual notice arises out of two pieces of evidence. First, Ms. Smith's 311 service request to the District identified the subject sidewalk as needing repair, stating that it was "in horrible disrepair." Ms. Smith's request stated that "some of the bricks are much higher than others. [. . .] The sidewalk issue is dangerous. Please advise who is responsible for the upkeep, and repair, and kindly make them aware that it [is] dangerous."

Second, the record contained a sworn affidavit from Ms. Smith stating that she witnessed the conditions of the sidewalks located at 810 7th street, NW, Washington, D.C.; the sidewalk located at 810 7th Street, NW, Washington, DC is

made of pavers; the pavers pop up when you step on them; she has tripped on the pavers located at 810 7th Street, NW, Washington, DC; and that her complaint to the city of Washington DC in 2017 requesting a sidewalk repair via the DC311 portal was in referenced to the pavers located at 810 7th Street.

This evidence is sufficient to prove actual notice of the defective condition and at the minimum, created an issue of fact that is only proper for the fact-finder.

ii. Constructive Notice

It is well-established that constructive notice can be shown by evidence that a street has remained in an unsafe condition for a sufficient period of time that the District had reason to know of the defect had it exercised reasonable care. *Washington Metro. Area Transit Auth. v. Davis*, 606 A.2d 165, 175 (D.C. 1992). It is true that in assessing whether notice was sufficient, "[e]very such case must be determined by its peculiar circumstances." *Lynn v. District of Columbia*, 734 A.2d 168, 172 (D.C. 1999) (quoting *District of Columbia v. Woodburry*, 136 U.S. 450, 463 (1890)). "Although each case has its own peculiar circumstances, the duration of the alleged hazard is an important factor in establishing constructive notice." *Wilson v. Washington Metro. Area Transit Auth.*, 912 A.2d 1186, 1190 (D.C. 2006).

In *Lynn v. District of Columbia*, the Court of Appeals reversed the Superior Court's granting of the District of Columbia's Motion for Summary Judgment on

the issue of constructive notice and held that the appellant presented a genuine issue of material fact regarding the issue of constructive notice. 734 A.2d at 172. In *Lynn*, the appellant, a pedestrian, fractured her knee when she fell on an uneven ground surface located on the sidewalk in the District of Columbia. *Id.* at 169. The appellant offered evidence that the condition of the sidewalk had existed for "[m]ore than a month" and "probably" for a year. *Id.* at 170. The record also contained an affidavit from Appellant's daughter in which she described the pavement across the street from the condition at issue as cracked and deteriorated, and that she herself had fallen on the pavement across the street on a prior occasion. The Court of Appeals held that the depositions and affidavits from others support appellant's *prima facie* claim that the District of Columbia had constructive notice. *Id.* at 171.

Additionally, the appellant presented evidence that the intersection where she fell was heavily trafficked by pedestrians and proximate to shopping areas. The Court of Appeals further weighed the nature of the area which involved pedestrian traffic, the alleged dangerous condition of the sidewalk, and the time during which the dangerous condition allegedly had existed, and held that there was a question of fact for the jury with respect to constructive notice. *Id.* at 171-172.

Here, the facts are almost identical to those of *Lynn*. There is evidence that the defective condition remained for a more than one (1) year before the date of the

fall, which is sufficient period of time that the District authorities ought to have known of it, had the District exercised reasonable care.

Additionally, the record contains an affidavit from Ms. Smith stating that she had witnessed the conditions of the sidewalks located at 810 7th street, NW, Washington, D.C.; the sidewalk located at 810 7th Street, NW, Washington, DC is made of pavers; the pavers pop up when you step on them; she has previously tripped on the pavers located at 810 7th Street, NW, Washington, DC; she has witnesses a female fall on the pavers in front of 819 7th Street, NW, Washington, DC before 2018; and that she made a complaint to the District of Columbia in 2017 requesting a sidewalk repair via the DC311 portal. Other pertinent circumstances, including the premises being a place of high pedestrian traffic and its proximity to shopping areas, bolster the issue's fitness for resolution by the trier of fact. And in *Lynn* this Court deemed such facts sufficient to present the issue of constructive notice to the jury. The record clearly establishes a genuine issue of fact regarding constructive notice making the issue proper for determination by the trier of fact. As a result, this is not a valid ground for affirmance.

C. The District's Argument Regarding the De Minimis Nature Of the Defect Is Not Before the Court.

The District raises the argument that the defective condition on its public sidewalk is de minimis as a matter of law for the first time on appeal. Accepting this argument would unquestionably result in a miscarriage of justice. The District did not raise, and the Trial Court did not consider, the issue of whether the defect was de minimis. As a result, these arguments should be disregarded and affirmance on this ground would be improper.

III. CONCLUSION

The Trial Court erred in several ways and the Final Order must be reversed for the reasons set forth in Elizabeth Littell's Brief of Appellant. The Brief of Appellee fails to provide a legally sufficient basis for this Court to affirm the Final Order. This Court should reverse the Order of the Superior Court of the District of Columbia dated March 1, 2024, granting the District of Columbia's Motion for

Summary Judgment on Count I and Count IV of Ms. Littell's Complaint and entering judgment in favor of the District of Columbia.

Respectfully submitted,

CHASENBOSCOLO

By:

Benjamin T. Boscolo (DC Bar No.: 412860)
Luke T. Needleman (DC Bar No. 90006213)
7852 Walker Drive, Suite 300
Greenbelt, Maryland 20770
(301) 220-0050
Fax (301) 474-1230
bboscolo@chasenboscolo.com
lneedleman@chasenboscolo.com
Counsel for Elizabeth Littell

IV. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 2024, a copy of the foregoing Reply Brief was served via the Court's filing system on the following:

Caroline Van Zile, Esq.
James C. McKay, Jr., Esq.
Solicitor General of the District of Columbia
caroline.vanzile@dc.gov
james.mckay@dc.gov

Benjamin T. Boscolo