IN THE STATE COURT OF GWINNETT COUNTY
STATE OF GEORGIA

JOAN REESE FROST, Plaintiff, v. THE LANDING AT BRIAR PLACE II, LLC, ET AL., Defendant.	CIVIL ACTION FILE NO. 12-1-3456-B7

PLAINTIFF'S BRIEF IN SUPPORT OF HER RESPONSE TO DEFENDANT THE LANDING AT BRIAR PLACE'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff Joan Reese Frost (hereinafter "Plaintiff"), and files this Response to Defendant The Landing at Briar Place II, LLC's Motion for Summary Judgment and showing this Honorable Court as follows:

I. INTRODUCTION AND STATEMENT OF RELEVANT FACTS

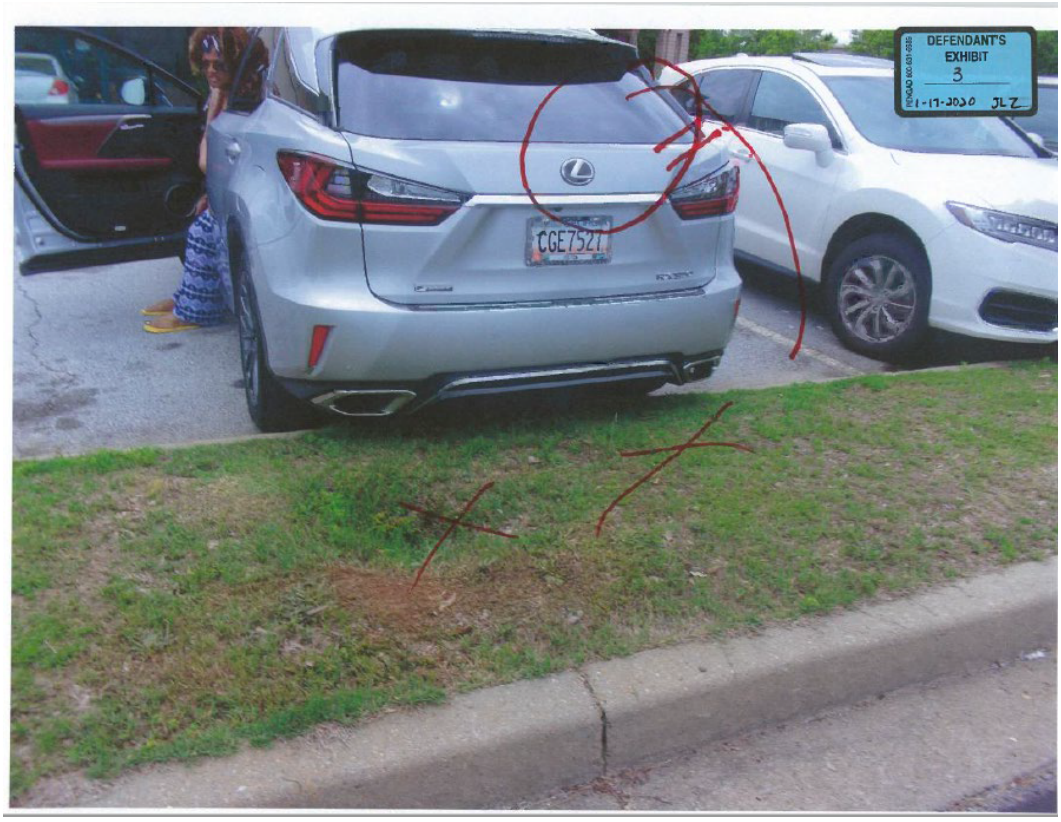
Defendants' entire argument for summary judgment is premised on a mischaracterization of Plaintiff's deposition testimony. Defendants argue that Plaintiff unequivocally identified *one* spot on The Landing where she fell. Defendants argue that Plaintiff identified this solitary spot with an "x" on a photograph of the incident scene. Defendants argue that because there was no visible hole in the area that Plaintiff indicated that they are entitled to summary judgment. This argument fails because it is based on an intentionally inaccurate retelling of Plaintiff's testimony.

What Plaintiff actually testified was that immediately after she fell, she could see which hole she had fallen into because it had a depression from her footprint. (Deposition of Joan Reese Frost, hereinafter "Frost Depo." at 167:17.24). However, when Plaintiff was

shown a photograph of the incident location, she confirmed that she could not identify the hole simply by looking at the picture.

> Q. Okay. At this point, you don't know by looking at the photograph where you actually put your right foot?
>
> A. No.

(Frost Depo. at 168:10-16). Reese goes on to testify that, because she couldn't tell which hole she'd fallen into, she'd **marked two areas where she could have potentially fallen.** (Frost Depo. at 168:13-16) ("That is why I marked those two areas. But you couldn't see, you can't see the hole as clearly on [the right side] because it is a lateral view rather than an aerial view").



As this Court can plainly see from the above photograph, Plaintiff drew **two x's** indicating the **two different spots** where she believes she could have fallen. Despite ***admitting*** that there was an "x" on the hole that ***they admit was there*****,** Defendants argue that Plaintiff didn't indicate that this hole was where she had fallen. This is a total fabrication. Not

only did Plaintiff indicate that this hole could be the one in which she had fallen, she is the person who drew the "x" identifying the hole.

Defendants' entire argument is based on fiction. Not only does the very photograph on which they rely repudiate their argument, the facts in this case establish that Defendants had superior knowledge of these hazardous holes and that their failure to repair them resulted in a breach of their duty of care. Because the record supports the conclusion that Defendants knew of and had the opportunity to repair the holes in The Landing but negligently failed to do so, their motion for summary judgment should be DENIED.

II. ARGUMENT AND CITATION TO AUTHORITY

Premises liability cases hinge on the proprietor's superior knowledge that a hazard existed on their land. On a motion for summary judgment, a proprietor-defendant must show that "there is **no evidence** that it had superior knowledge, or the undisputed evidence demonstrates that the plaintiff's knowledge of the hazard was equal to or greater than that of the defendant." Norman v. Jones Lang LaSalle Ams., Inc., 277 Ga. App. 621, 624 (2006) (emphasis added). In other words, "[the plaintiff] must present some evidence demonstrating that (1) the defendants had actual or constructive knowledge of the hazard and (2) she lacked knowledge of the hazard despite her exercise of ordinary care and that her lack of knowledge was due to conditions within the defendants' control." Id. "A plaintiff's evidentiary burden of proof concerning the second prong of this test is not, however, shouldered until the defendant first establishes negligence on the part of the plaintiff." Berni v. Cousins Props. Inc., 316 Ga. App. 502, 505 (2012) (internal citation and punctuation omitted).

The record in this case is replete with evidence that Defendant The Landing At Briar Place Mall knew that a hazard existed on their land, knew how the hazard was created, knew when the hazard was created, and that the hazard was conspicuous so that a reasonable inspection would have allowed for its discovery and repair.

A. Defendants had constructive knowledge of the holes in which Plaintiff fell.

"[F]or an invitee to recover for a proprietor's alleged negligence in failing to keep the premises safe, there must be proof that the proprietor had superior knowledge of the hazard which was the proximate cause of the invitee's injury." Armenise v. Adventist Health Sys./Sunbelt, 219 Ga. App. 591, 592 (1995). A plaintiff satisfies the superior knowledge rule by showing that the defendants had either actual or constructive knowledge of the hazard. Id.

The record in this case supports the conclusion that the Landing at Briar Place had, *at least*, constructive knowledge of the holes on its property.

> Generally, constructive knowledge may be shown by two methods. The first method involves proof that an employee of the proprietor was in the immediate area of the hazard and had the means and opportunity to easily see and remove the hazard. […] The second method is premised on the proprietor's duty to inspect the premises to discover possible dangerous conditions of which he does not know and to take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement and use of the premises.

Id. (internal citations on punctuation omitted).

1. *The hole[s] in which Plaintiff fell were conspicuous, and Defendants had every opportunity to see and remove the hazard easily.*

It is undisputed that The Landing had a row of holly trees cut down in June of 2014 and had the stumps ground and removed in August of that year. See Defendant's Brief at 8. Defendants ***admit*** that the removal of the trees created holes in The Landing. See Defendant's Brief at 8 ("The red 'x' on the left side of the photo appears to be marking a hole caused by tree removal"). Defendants ***also admit*** that one of the holes resulting from the tree removal was next to Plaintiff's car and could be easily identified on a photograph of the area. See Defendant's Brief at 8 ("In the photograph it appears that a tree was removed near the area Plaintiff's car was parked at the time of the incident").

All of Defendants above admissions support the conclusion that the hazard on The Landing was clear and conspicuous, that Defendants knew the origins of the hazard, and that

Defendants had every opportunity to rectify the hazard in the three years before Plaintiff was injured. In *Armenise v. Adventist Health System/Sunbelt* (219 Ga. App. 591), the Court of Appeals addressed a case in which an invitee fell into a hole while traversing a grassy area between two parking lots. The court held that the plaintiff could not show that the defendants met the first method of constructive knowledge because there was "no evidence in the record that an employee of [the defendants] could have easily seen and removed the hidden defect[...]." Armenise, 219 Ga. App. at 593. In *Armenise*, the holes were so concealed by grass that the only way they could be detected was by the landscape supervisor "stepping around and pressing down with his feet in the area where [the plaintiff] fell until his foot actually pushed down the grass covering the depression." Id.

The facts in *Armenise* stand entirely inapposite to the facts of the instant case. As is noted above – and supported by Defendants' brief – Defendants knew that the holes existed and what created them. The photograph embedded, *supra*, also supports the conclusion that these holes were plainly visible. Frank Miller testified that he drove around the property several times per week, stopping to walk around for closer looks. (Miller Depo. at 45:20-24). Because Frank Miller regularly surveyed the property, he had every opportunity to see and easily rectify this hazard. Further, because Frank Miller was the person who ordered that the trees be cut, that their trunks be removed, and that the resulting holes be filled, he was on notice that The Landing contained holes and should have therefore been more attentive when inspecting the area. The evidence in this case – particularly the picture that Defendant embeds in their brief – illustrates that, had Frank Miller been paying even nominal attention on his inspections of the property, he could have easily detected these holes and had them repaired.

2. *Defendants failed in their duty to reasonably inspect the premises.*

To prove that a defendant breached his duty to inspect the premises, "the evidence must show that the hazardous condition existed on the premises for a sufficient period of time such that a proprietor exercising ordinary care to inspect the premises should have discovered and removed the hazard." Armenise, 219 Ga. App. at 60. In other words, "constructive knowledge can be shown by evidence that a proprietor's failure to discover the hazard resulted from its failure to exercise reasonable care in inspecting the premises." Berni v. Cousins Props. Inc., 316 Ga. App. at 505 (internal citations and punctuation omitted).

a. The hazard existed on the landing for a sufficient period of time.

To determine whether or not the hazard on the premises was detectable through a reasonable inspection, courts routinely consider whether the proprietor knew what caused the hazard and how long the hazard existed. In *Armenise*, the court noted that "[t]here was no evidence as to how the depression was formed or how long it had been there," and the landscaping supervisor testified that he didn't know the cause of the depression or how long it had been there. Armenise, 219 Ga. App. at 59. In *Witt v. Ben Carter Props., LLC* (692 S.E.2d 749), the Court of Appeals addressed another case in which an invitee was injured after falling into a hidden depression in the grassy median of a shopping center parking lot. Holding that the plaintiffs could not show constructive knowledge on the part of the defendants, the Court of Appeals noted that the maintenance coordinator who regularly inspected the property could not tell what had caused the depressions or how long they had been there. Witt v. Ben Carter Props., LLC, 303 Ga. App. 107 (2010). See also Norman v. Jones Lang LaSalle Ams., Inc., 277 Ga. App. 621 (2006) (affirming summary judgment for the defendants where a plaintiff-employee who suffered injury after tripping over boxes in her dimly lit office could not show that the defendants – the owner and property manager – had put the boxes in her office or knew that they were there).

In this case, it is undisputed that the holes had been in The Landing at least three years before Plaintiff fell. It is also undisputed that Frank Miller, the person in charge of inspecting the premises, *knew* that these holes were there – he had personally ordered for the trees to be removed, for the stumps to be ground, and for the holes to be filled. The evidence also suggests that, over the course of the three years after the holes were filled, the mulch and other materials eroded, exposing the depressions. All of these facts support the conclusion that the hazard existed for a significant period of time and that Defendants were aware of the hazard during the entirety of its existence.

b. Defendants failed to exercise ordinary care to inspect their premises.

The record also supports the conclusion that – during the three years that the hazard existed – Defendants' employees did not perform reasonable inspections of the premises. Defendants rely wholly on the deposition of their operations manager, Frank Miller, to illustrate that they exercised ordinary care in inspecting the premises. However, it was not Frank Miller's job to thoroughly inspect the landscaping at The Landing, and his testimony illustrates that his inspections of the landscaping were superficial at best.

In *Armenise,* the employee that Defendant offered to provide evidence of the reasonableness of their inspections was the landscaping supervisor, *i.e.*, the person in charge of maintaining the lawns and searching for and filling holes. The defendants in *Witt* also proffered the deposition of their landscaping supervisor, whose landscaping duties included searching for depressions and filling them with sand. Witt v. Ben Carter Props., LLC, 692 S.E.2d at 751. By contrast, Miller is Defendants' operations manager, whose responsibilities include, but are not limited to, monitoring the property's interior and exterior construction as well as taking care of the facility's heating, air conditioning, and electrical issues. (Miller Depo. at 45:8-14). Miller testified that he inspected the property a few times a week by driving around the property and occasionally getting out and walking around. (Miller Depo.

at 45:20-24). However, Miller acknowledged that this kind of surface-level inspection did not provide him with the same knowledge of the property that ERMC, the party responsible for the landscaping, had.

> Q. And so if you didn't see any holes, then you wouldn't expect that ERMC would have seen holes in order to fill up any holes; correct?
>
> […]
>
> A. I can't answer for ERMC. A lot of times they can see things that other people can't see. They're out there every day working on the property.

(Miller Depo. at 63:22-64:7). In fact, like the landscapers in *Armenise* and *Witt*, it was ERMC's responsibility to find and fill any holes on the property – not Miller's. (See Miller Depo. at 62:23-63:3) ("[ERMC] was instructed on a daily basis or weekly or whatever in their normal daily landscaping work if they see any holes or have you, to fill them up because it was as a safety hazard. That's just normal procedure").

Defendants argue that Miller's inspections absolve them of liability. However, the kind of inspection that absolves a proprietor of liability hinges on reasonability, and Miller's inspections were not reasonable under the circumstances. First, Miller was the person who ordered that the trees be cut down, that the stumps be ground, and that the holes be filled. Miller testified that he specifically wanted the holes to be filled because holes on the landing constitute a safety hazard.

> Q. Why did you want the holes filled?
>
> A. Because it would have been a safety hazard. If they removed the stumps – and after they remove the stumps, I wanted to make sure that they filled the hole.

(Miller Depo. at 67:24-68:3). Because of his knowledge that the removal of the trees and their stumps could result in a hazardous situation, Miller should have performed more than a cursory review of the landing. Miller should have been aware of and attentive to the

maintenance of mulch or other materials in these holes to ensure a level ground for invitees to traverse. Miller should have informed ERMC that they should perform a more careful revision of The Landing because of the known potential hazard. Miller should have monitored – or specifically asked ERMC to monitor – the erosion of mulch and other materials that had been used to fill the holes. These steps in the face of a known hazard would have made Miller's inspections of the premises reasonable. However, what Miller testifies to having done – driving around the property and looking for "anything unusual" – does not suffice to absolve Defendants of culpability in this case. (Miller Depo. at 49:12-17).

Finally, as the Court can clearly see from the photograph produced *supra,* there are noticeable holes in The Landing. Plaintiff marked one such hole with an "x," and Defendants admitted that there was indeed a hole caused by the removal of a tree in the spot that Plaintiff identified. It is well within reason that if one such hole – that was the result of removing holly trees on the landing – existed, then other holes could also exist where other trees had been removed. Also, as Plaintiff noted above, she identified one hole that *can clearly be seen in the picture* as one of the places where she likely fell. Of the other hole that is less obvious in the photograph, Plaintiff has stated that it simply was not as obvious in the picture because of the angle from which the picture was taken. (Frost Depo. at 168:13-16). However, even if this hole was partially obscured, that does not release Defendants from their duty of finding it and filling it.

> [E]ven if a defect is hidden or obscured from view, if the evidence shows that the proprietor *should have discovered it by a reasonable inspection of the premises*, then an inference will arise from the breach of the duty to inspect the premises and keep it safe that the proprietor has constructive knowledge of the presence of the defect.

Armenise 466 S.E.2d at 60 (emphasis added).

In *Witt,* the plaintiff's husband testified that he could not find the holes where she had fallen until he probed the area on his hands and knees. Witt, 303 Ga. App. at 108. In

Armenise, the landscaper had to walk slowly around the area pressing down the grass with his feet until he his foot sunk into the depression. Armenise, 566 S.E.2d at 59-60. Again, in *Witt* and *Armenise*, there was no evidence of what caused the depressions or how long they had been there, therefore there was nothing to put the defendants on notice of what kind of hazard they should be looking for or where the hazard might exist. In the instant case, however, Defendants knew that their removal of trees on the property had produced holes. They knew that exposed holes on the land created a hazard for invitees. (Miller Depo. at 67:24-68:3). They knew exactly where these holes were. Even if these holes – which are clear in the photo – were obscured, a reasonable inspection of the property would have led to their discovery.

A. Plaintiff had no knowledge of the hazard.

Nothing in the record supports that Plaintiff had any knowledge of the hazard on The Landing, nor has Defendant made any such argument.

CONCLUSION

The very picture on which Defendant's rely in their Brief supports the conclusion that there were holes on the landing at Briar Place Mall that created falling hazards for invitees. The picture also supports the conclusion that Plaintiff fell into one of these holes – the hole on the right side of the car that she marked with an 'x.' Defendants admit in their brief that there were holes in the landing. See Defendant's Brief at 8. Also, as Plaintiff noted in her deposition, simply because the other hole isn't visible in this photograph does not mean that the hole isn't there – it only means that the angle from which the photograph was taken was not optimal to capture the depression. It is not beyond the pale of reason for another hole caused from the removal of another tree might be a foot away from the hole that Defendants admit was there. As stated above, the record in this case is replete with evidence that supports the conclusion that Defendants had both actual and constructive knowledge of this hazard, therefore their motion for summary judgment should be DENIED.

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS FOR WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED

Pursuant to Uniform Superior Court Rule 6.5, Plaintiff hereby files this Statement of Material Facts for Which There Exists a Genuine Issue to be Tried:

Defendant's Undisputed Material Facts and Alleged Supporting Evidence:	**Plaintiff's Response and Supporting Evidence:**
7. Plaintiff pointed out in her deposition that she believes she fell in a depression to the right of her car. Deposition of Joan Reese Frost, hereinafter "Frost Depo." at 168:10-16	**Disputed.** Plaintiff testified that she could not tell from the photograph proffered by Defendant what hole she had fallen into. Plaintiff marked two holes on the photograph, and testified that she could have fallen into either. Frost Depo. at 168:10-16.
8. According to Plaintiff, the area was a smooth grassy plain, cut smooth across. Frost Depo. at 164:8-11.	**Disputed.** Plaintiff actually testified that "[i]f you take a step back from [The Landing] and look across, it *looks like* a smooth, level plain." Frost Depo. at 164:14-20. Plaintiff goes on to testify that upon examination, the depressions were more noticeable, and "there are about ten [more holes] that you can't really see unless you actually are standing on this median and looking down at [The Landing and not across at it]." Frost Depo. at 165:8-10.

14. ERMC was responsible for the tree removal as well as covering up any holes and general maintenance of the property.	**Disputed**. As the owner of the property, The Landing at Briar Place had a nondelegable duty to maintain the premises regardless of its contractual relationship with ERMC. See Simmons v. Universal Prot. Servs., LLC, 349 Ga. App. 374, 379, 825 S.E.2d 858, 863 (2019) ("When an independent contractor is on the premises, and the owner or occupier has not delivered full possession and complete control of the premises, the owner or occupier of the premises must use ordinary diligence to ensure that the property remains safe for invitees to the property. Such duty on the part of the owner or occupier of the premises is a nondelegable duty"). The fact that ERMC had been contracted to landscape the area does not mean that they were solely responsible for ensuring that it was safe to traverse – ultimately, that responsibility fell squarely on Defendants.
21. Mr. Miller indicates that there had never been a tree in the area where Plaintiff indicates she fell.	**Disputed.** Plaintiff fell behind her car. When she was shown a photograph of the area, she marked two places where she believed she could have fallen. Plaintiff marked both of those places with an "x." Both Defendants and Franklin Miller admit that one of the places that Plaintiff marked with an "x" was a hole that had been left by the removal of a tree. Also, whether or not Mr. Miller would remember specifically whether or not another tree existed one foot from the place where Defendants' conceded contained a tree nearly ten years after it was removed raises a credibility issue which is proper for jury resolution.
22. Mr. Miller looked in the parking lot and landscaped area that same day, after Plaintiff's fall, and did not see anything.	**Disputed.** Both Franklin Miller and Defendants acknowledge that a hole from a removed tree existed on The Landing on the date that Plaintiff was injured. Aff. of James Franklin Miller ¶ 5; Defendants' Brief in Support of their Motion for Summary Judgment at 8. Both Franklin Miller and Defendants acknowledge that this hole was obvious in

	the photograph that Plaintiff marked. Aff. of James Franklin Miller ¶ 5; Defendants' Brief in Support of their Motion for Summary Judgment at 8. Plaintiff disputes Defendant's statement that both Miller and Defendants can clearly and unequivocally identify a hole in the photograph, but Mr. Miller could not have seen the very same hole on the incident date.