For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DAVID AUBAIN, Appellant/Plaintiff, v. **KAZI FOODS OF THE V.I., INC. D/B/A PIZZA HUT ST. THOMAS,** Appellee/Defendant.	)	**S. Ct. Civ. No. 2016-0051** Re: Super. Ct. Civ. No. 461/2012 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Kathleen Y. Mackay

Argued: March 14, 2017
Filed: March 28, 2019

Cite as: 2019 VI 11

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:
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OPINION OF THE COURT

CABRET, Associate Justice.

¶1 David Aubain appeals the Superior Court's August 23, 2016 memorandum opinion and order granting summary judgment in favor of Kazi Foods of the Virgin Islands, Inc. d/b/a Pizza

Hut St. Thomas ("Kazi") in Aubain's negligence action. Because Aubain demonstrated the existence of a genuine issue of material fact as to whether Kazi had constructive notice of the dangerous condition, the Superior Court erred in granting summary judgment against him. Accordingly, we reverse the judgment and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 On September 5, 2011, David Aubain entered a restaurant owned by Kazi. After ordering his food, Aubain sat down on a bench, which immediately collapsed due to a loose wooden peg, causing him to fall and hit his chin, back, and hip. On August 20, 2012, Aubain filed a suit against Kazi for negligence.

¶3 During his deposition, the restaurant's security guard, Edward Pemberton, testified that he observed Vanzell Bass, the restaurant's maintenance supervisor, inspect the benches outside of business hours each month. Pemberton added that he personally fixed a loose peg on two benches—the bench that collapsed under Aubain and a different bench. Pemberton testified that after the bench collapsed, he "took it over—fortunately there were some guys, carpenters working at . . . the establishment next to us . . . and they fixed it. It took not even five minutes." He added that the carpenters fixed it by placing four screws in the bench to tighten the peg. When asked whether he fixed the other bench before the incident with Aubain, he said, "I think it was after."

¶4 When asked how the benches were inspected, Bass testified that he and Tony Simon, another employee, inspected the furniture weekly by "turn[ing] the tables, the benches up to look for loose things" prior to the restaurant opening. He also testified that a cleaning crew moves all the furniture once a month to clean the floors. Bass added that he and Simon were inspecting the furniture weekly around the time of Aubain's incident and did not notice a loose peg on the bench

in question. Bass testified that he never had to repair the bench that Aubain sat on, but he did have to change rotting wood on a bench at another restaurant location. He testified that he does not log these inspections.

¶5 When deposed, the restaurant's manager, Jacqueline Thomas, testified that the restaurant has used the same benches since 1995, after Hurricane Marilyn. She explained that she is the only one that checks the benches and chairs during business hours and she has never personally seen any of the benches repaired, although she is unsure of what happens when she is not there. She added that Bass is responsible for maintaining the furniture, but she did not recall Bass fixing chairs or benches in the restaurant. According to her, Antonio Fahie comes in once every two months to move the furniture so he can clean the floors.

¶6 On September 2, 2014, Kazi moved for summary judgment, arguing that no genuine issue of material fact existed regarding Kazi's lack of actual or constructive notice of the loose peg on the bench. For purposes of the summary judgment motion, Kazi concedes that Aubain fell. Aubain filed his opposition to Kazi's summary judgment motion on November 13, 2014, primarily arguing that Aubain's fall was foreseeable. On August 23, 2016, the Superior Court issued a memorandum opinion and order granting summary judgment in favor of Kazi, reasoning that Aubain failed to carry his burden of showing affirmative evidence that would allow a reasonable jury to infer that Kazi breached its duty of reasonable care.[1] Aubain filed a timely notice of appeal on September 21, 2016.

[1] The Superior Court also concluded that the doctrine of *res ipsa loquitur* did not apply in this case. Because Aubain has not briefed that issue on appeal, it is waived. *See* V.I. R. APP. P. 22(m) ("Issues that were . . . not briefed . . . are deemed waived for purposes of appeal[.]") and former V.I. S. CT. R. 22(m) (same); *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 309 n.10 (V.I. 2014) (declining to review argument not briefed on appeal).

II. JURISDICTION

¶7 "The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4, § 32(a). The Superior Court's August 23, 2016 memorandum opinion and order granting summary judgment was a final order within the meaning of section 32(a), and therefore we have jurisdiction over this appeal. *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 777 (V.I. 2015) (citing *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014)).

III. DISCUSSION

¶8 We exercise plenary review over the Superior Court's decision to grant Kazi's motion for summary judgment. *Machado*, 61 V.I. at 379. In undertaking plenary review, we apply the same standard as the trial court, viewing "all inferences from the evidence in the light most favorable to [Aubain], and tak[ing] [his] allegations as true if properly supported." *Bertrand*, 63 V.I. at 778.

¶9 We have previously observed that "summary judgment is a drastic remedy and should not be used to short-circuit litigation by deciding disputed facts without permitting the parties to reach a trial on the merits." *Brodhurst v. Frazier*, 57 V.I. 365, 373-74 (V.I. 2012); see also *Rymer v. Kmart Corp.*, 68 V.I. 571, 575 (V.I. 2018) (characterizing summary judgment as a drastic remedy). Accordingly, "[s]ummary judgment . . . should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." *Id.* (quoting *Machado*, 61 V.I. at 379–80). The burden is on the moving party to "identify those portions of the record that demonstrate the absence of a genuine issue of material fact, at which point the burden shifts to the non-moving party to present 'affirmative evidence' from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436–37 (V.I. 2013). The movant may carry this burden by pointing out that there is an absence

of evidence to support the nonmoving party's case. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). If a moving party does not carry its initial burden of production, the nonmoving party is not obligated to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. *United Corp. v. Hamed*, 64 V.I. 297, 309–10 (V.I. 2016).

¶10 Aubain maintains that the Superior Court erred when it rejected his foreseeability analysis and concluded that he did not present evidence to show that Kazi breached its duty of care. We address each of Aubain's arguments in turn.

A. Breach of Duty

¶11 Aubain argues that the Superior Court committed reversible error when it concluded that he had not proffered evidence to show that Kazi breached its duty of care to him. Kazi argues that the "lower court properly held that Kazi had presented sufficient evidence that it had no notice of a loose peg on the bench in question; thereby shifting the burden to present affirmative evidence to the contrary onto the Appellant." In reviewing the Superior Court's grant of summary judgment, "we must analyze the court's decision in the context of the substantive law governing the cause of action." *Pedro v. Ranger Am. of the V.I., Inc.*, 63 V.I. 511, 516 (V.I. 2015). The foundational elements of a negligence cause of action are: (1) a legal duty of care to the plaintiff; (2) defendant's breach of that duty of care; (3) factual and legal causation; and (4) damages. *Coastal Air Transp. v. Royer*, 64 V.I. 645, 651 (V.I. 2016). Because Kazi has conceded the existence of duty, causation, and damages for the purpose of summary judgment, we need only determine whether the record before the court presented a triable issue on the question whether Kazi breached its duty to maintain its premises in a reasonably safe condition. *Machado*, 61 V.I. at 394; *see Heins v. Webster Cty.*,

552 N.W.2d 51, 57 (Neb. 1996) ("We impose upon owners and occupiers only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.").

1. Foreseeability

¶12 Aubain argues that the Superior Court erred in determining that his foreseeability analysis was unnecessary to his breach of duty argument. The Superior Court explained that, in determining whether Kazi breached its duty, it must "ask not whether Aubain's entry and consequent injury were foreseeable, but ask instead whether Kazi had notice, actual or constructive, of the dangerous condition that injured Aubain." Although Aubain's opposition to Kazi's motion contained an extensive discussion of foreseeability, the Superior Court treated it as an argument addressing the question of defendant's notice of a dangerous condition, explaining that while foreseeability of harm and notice of a dangerous condition "share a certain conceptual overlap . . . . [n]otice requires a far more concrete inquiry into the particular cause of Aubain's injury." We agree with the Superior Court's reasoning.

¶13 This Court has recognized foreseeability as "the touchstone of premises liability in the Virgin Islands" because foreseeability permeates every element of a negligence claim. *Machado*, 61 V.I. at 394. For example, this Court has used foreseeability to determine the duty of care in premises liability actions. *Id.* at 386 (using foreseeability of harm to ascertain a land possessor's duty of reasonable or ordinary care); *see also Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1258 (Ill. 1977) ("[T]here is foreseeability, the touchstone of the quality of an act as negligence, the most important test in determining [the existence of] duty."). And we employed foreseeability language when engaging in a breach of duty analysis in *Antilles School, Inc. v. Lembach*, 64 V.I. 400, 411 (V.I. 2016), where we observed that "[i]n today's society, it is eminently foreseeable that a person with limited or no vision might attend an event that is open to the public, and that such

an individual may injure himself if he must cross a bridge that lacks a sufficient protective barrier, particularly when he must walk across it at night."

¶14 Although foreseeability is implicated to some degree in every element of negligence, each element requires a distinct and separate analysis. *See Westin Operator, LLC v. Groh*, 347 P.3d 606, 614 n.5 (Colo. 2015) (explaining that elements of negligence have different foreseeability analyses); *see e.g.*, *Bodkin v. 5401 S.P., Inc.*, 768 N.E.2d 194, 203 (Ill. App. Ct. 2002) ("To determine whether a duty exists, the court must consider the following factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on defendant."); *Jeffords v. Lesesne*, 541 S.E.2d 847, 851 (S.C. Ct. App. 2000) (in a proximate cause analysis, "[t]he standard by which foreseeability is determined is that of looking to the natural and probable consequences of the act complained of"); *Scully v. Middleton*, 751 S.W.2d 5, 6 (Ark. 1988) ("We have held that before a negligent act may be used as the basis to recover damages, there must be a showing that the negligent act proximately caused the damages sustained and that such damages were reasonably foreseeable.").

¶15 Accordingly, to establish that Kazi breached its duty, Aubain must show that the defendant had actual or constructive notice of the condition, not merely that the incident was foreseeable. *Machado*, 61 V.I. at 392; *Perez v. Ritz-Carlton (V.I.), Inc*., 59 V.I. 522, 529–30 (V.I. 2013) (explaining that breach of duty analysis requires notice); *see Hellamns v. Yale-New Haven Hosp., Inc.*, 82 A.3d 677, 680 (Conn. Ct. App. 2013) ("[I]t is incumbent upon [plaintiff] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [the] injury or constructive notice of it." (original alterations omitted)). Although "[n]otice is bound to the concept of foreseeability in that some knowledge or a reason to anticipate

a danger is required," *Canaday v. Midway Denton U.S.D. No. 433*, 218 P.3d 446, 454 (Kan. Ct. App. 2009), the notice requirement ensures that the defendant had the opportunity to take corrective measures to prevent or warn against a particular hazard before liability attaches. *See Cordova v. City of Los Angeles*, 353 P.3d 773, 774 (Cal. 2015) (explaining that notice allows the defendant to correct the situation before holding defendant liable); *Ingersoll v. DeBartolo, Inc.*, 869 P.2d 1014, 1015 (Wash. 1994) (explaining that notice "'afford[s the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger'"). Therefore, the Superior Court did not err in its explanation of the law that, in the context of a premises liability action, a plaintiff must establish breach of duty by showing that the defendant had actual or constructive notice of the dangerous condition. *See Perez*, 59 V.I. at 529–30; *Wienke v. Champaign Cty. Grain Ass'n*, 447 N.E.2d 1388, 1389 (Ill. App. Ct. 1983) ("[M]ore than foreseeability was required to show a breach of duties on [defendants'] parts.").

2. Creation of a Dangerous Condition

¶16 In essence, Aubain argues that Kazi had actual notice of the dangerous condition because Kazi itself created that condition by failing to inspect the benches. Kazi maintains that all of the testimony demonstrates that Kazi did sufficiently inspect the benches and that Aubain did not provide evidence that Kazi created the dangerous condition.

¶17 Even if the benches were not inspected as Aubain claims, a breach of the duty of care by virtue of a defendant's creation of a dangerous condition is conceptually distinct from a breach premised upon a defendant's failure to sufficiently inspect its premises. A factfinder may reasonably infer that a defendant had actual notice of a dangerous condition that he created, but a factfinder may not draw the same inference from a defendant's failure to inspect for a possible

defect. *See Billings v. K Mart Corp*., 654 So. 2d 530, 532 (Ala. 1995) ("[W]hen the hazard was created by the defendant . . . notice of the hazardous condition is imputed to the defendant."); *cf. Morse v. State*, 905 S.W.2d 470, 476 (Tex. Ct. App. 1995) ("The significant difference between the situation in which the [defendant] itself created the condition and that in which something else created it is that the [defendant] will have actual knowledge of its existence if it created the condition."). Therefore, we reject Aubain's argument that Kazi created the dangerous condition by failing to inspect its premises.

3. Notice through a Recurring Condition

¶18 Aubain also argues that Kazi had constructive notice of the dangerous condition because loose pegs were a recurring condition in the restaurant's benches. To support this allegation, Aubain claims that Pemberton, as Kazi's employee, "testified that he personally has noticed loose pegs in benches other than the one at issue here, and had fixed one or two of these other benches himself." Kazi draws this Court's attention to the deposition of Pemberton, which reveals that Pemberton testified that only one other bench had a loose peg, and when asked whether he fixed the other bench before the incident with Aubain, he said, "I think it was after."

¶19 We have previously recognized that one "way that notice of a dangerous condition can be imputed to a land possessor is through evidence that the condition persisted over a long enough period of time that the owner should have become aware of it through the exercise of reasonable care." *Machado,* 61 V.I. at 393. But, in order to establish notice through a recurring condition, the recurring condition must occur prior to the incident at issue. *See Mahoney v. J. C. Penney Co.*, 377 P.2d 663, 673 (N.M. 1962) ("[C]onstructive knowledge may be presumed from the *prior recurring conditions*." (emphasis added)); *Lane v. Burlington Coat Factory Warehouse Corp.*, 767 N.Y.S.2d 741, 741-42 (N.Y. App. Div. 2003) ("[P]laintiffs failed to raise a triable issue of fact whether

defendants had constructive notice of a recurring dangerous condition, inasmuch as they failed to establish that Burlington had knowledge that, *on prior occasions*, water had accumulated on the floor in the area where plaintiff fell." (emphasis added)).

¶20 Because the evidence in the present case shows that the other loose peg was discovered after Aubain's fall, its discovery cannot serve as the basis for charging Kazi with constructive notice of the dangerous condition. *See e.g., Perez*, 59 V.I. at 535 (explaining that there was a question of fact regarding constructive notice where there was rainfall before plaintiff's fall and prior knowledge that leaves and debris would come running down the pathway after it rained). And even if Pemberton fixed another loose peg before Aubain's fall, the fact that a loose peg was discovered on a bench only once before Aubain's fall does not demonstrate a *recurring* condition. *Cf, Heigle v. Miller*, 965 S.W.2d 116, 121 (Ark. 1998) ("Here, the presence of the foreign substance on the bathroom floor was not a one-time incident; the facts presented show that there was a recurring condition that frequently made the bathroom floor slick and unsafe.").

¶21 Aubain also argues that rotting wood on benches at another restaurant owned by Kazi provided constructive notice of the loose peg on the bench at the waterfront restaurant where Aubain fell. But, in order to establish constructive notice, the recurring condition must be similar in nature to the dangerous condition that caused plaintiff's injury. *See Moody v. Haymarket Assocs.*, 723 A.2d 874, 875 (Me. 1999) ("In a negligence action, evidence of *similar accidents or occurrences*, or the absence thereof, may be relevant circumstantially to determine whether a defective or dangerous condition, notice thereof, or causation existed on the occasion in question." (emphasis added)). However, Aubain has not proffered any evidence to indicate that Kazi had actual knowledge of loose bench pegs prior to Aubain's fall and, as such, he has failed to establish that Kazi had constructive notice premised upon knowledge of a recurring condition.

4. Notice through Failure to Inspect and Maintain its Premises

¶22 Alternatively, Aubain attempts to establish constructive notice by arguing that Kazi's failure to maintain and inspect its benches in a reasonable manner raises an inference that the dangerous condition existed long enough for the owner to have discovered it. Aubain contends that conflicting testimony concerning Kazi's inspection practices creates a genuine issue of material fact regarding whether Kazi had constructive notice that the dangerous condition existed. Yet, the Superior Court concluded that there was no genuine issue of material fact with respect to the reasonableness of Kazi's inspections and that Kazi was entitled to judgment as a matter of law.

¶23 This Court has recognized that, "in the absence of actual notice, evidence that the owner 'should have discovered the danger and taken steps to remedy it' can establish constructive notice." *Machado*, 61 V.I. at 393–395 (quoting *Williams,* 50 V.I. at 195–96); *see also Rymer,* 68 V.I. at 579-82 (discussing constructive notice). Although a land possessor is not an insurer of the safety of its patrons, the possessor does owe them a duty to maintain its premises in a reasonably safe condition. *See Machado*, 61 V.I. at 393 (concluding that the Superior Court erred in holding that defendant land possessor did not owe a duty of care to its patrons). Even in the absence of direct evidence establishing the precise length of time a dangerous condition existed, a plaintiff may satisfy the constructive notice requirement by introducing evidence tending to show that the defendant failed to conduct reasonably frequent and thorough inspections of the premises. *See, e.g.*, *Rymer*, 68 V.I. at 581 (regarding the issue of constructive notice in the premises liability context, the fact that "an accident occurred in a common area where [store] management and workers traverse frequently, suggest[s] that the [defective condition] was readily discoverable to employees exercising reasonable care"); *Moore v. Wal-Mart Stores, Inc.*, 3 Cal. Rptr. 3d 813 (Cal. App. 5th Dist. 2003) (noting that "the plaintiff can demonstrate the store owner had constructive

notice of the dangerous condition by showing that the site had not been inspected within a reasonable period of time"); *Guerrero v. McDonald's Int'l Prop. Co.*, 2006 Guam 2 ¶ 23 (Guam 2006) (explaining that constructive notice may be inferred from insufficient inspections).[2]

¶24 In this case, the witnesses offered varying testimony regarding the frequency of the inspections. For example, Bass testified that either he or his fellow employee, Simon, inspected the benches weekly by "turn[ing] . . . the benches up to look for loose things" prior to the restaurant opening, but Pemberton testified that Bass inspected the benches only once a month. In contrast, Thomas testified that she never observed Bass inspect the benches during business hours, but that she visually checked the furniture daily when cleaning. Citing these discrepancies, Aubain argues that there was a genuine dispute of material fact as to whether the frequency of Kazi's inspections was reasonable, thus presenting a material issue as to whether Kazi had constructive notice of the defect due to the inadequacy of its inspections.

¶25 The Superior Court disregarded the conflicting testimony as merely a "facial discrepancy." But, these factual discrepancies are directly relevant to the issue of whether Kazi conducted reasonably frequent inspections. Consequently, by highlighting this variation in the evidence, Aubain has carried his burden of identifying evidence raising a factual question as to how

[2] Nevertheless, the constructive notice requirement will not be satisfied when a defendant introduces uncontroverted evidence showing that the defect could not have been discovered even through reasonable inspection. *See Benham v. King*, 700 N.W. 314, 320 (Iowa 2005) (concluding the defendant did not have constructive notice, the Supreme Court of Iowa noted "there was no evidence [the defendant] could have discovered the particular defect that caused the harm to [the plaintiff] through the exercise of reasonable care"); *Parks v. K. Schuster Markets, Inc.*, No. 182087, 1996 WL 33357154 at *1 (Mich. Ct. App. Sept. 27, 1996) (unpublished) (explaining constructive notice was not satisfied because there was no evidence introduced that would indicate reasonable inspections would have maintained the chair in safe condition to avoid the chair break). Here, we note that there is no argument on appeal that the loose peg would not have been discovered through reasonable inspections. In fact, drawing all reasonable inferences in favor of Aubain, the record supports the opposite conclusion, as Pemberton's testimony that "[i]t took not even five minutes" to fix the bench by simply reinforcing the loose peg with four screws suggests that the loose peg would have been identified in the course of a reasonable inspection.

frequently Kazi inspected its premises and whether that frequency reflected reasonable care. In this case, the existence of that factual issue rendered summary judgment inappropriate.

¶26 Moreover, considering the frequency of the inspections, the Superior Court opined that, "the record lacks any evidence that would allow the jury to infer that monthly inspection[s] [are] inadequate," suggesting that expert testimony from the bench manufacturer or others was required. *But see Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1209 (2001) (recognizing lay witness testimony can support an inference that the owner possessed constructive notice of the dangerous defect). Although the Superior Court is correct that expert testimony may well aid the trier of fact in evaluating Aubain's claim, proffering expert proof on an issue as prosaic as the process of ordinary wear and tear of furniture—in this case, the wooden connecting peg of a bench loosening over time—was not required, as such matters are well within the common experience of ordinary people in everyday life. Therefore, the Superior Court should have identified the discrepancies in lay witness testimony as evidence creating a triable issue of fact.[3] *See* Virgin Islands Rule of Evidence 701;[4] *Jackson-Flavius v. People*, 57 V.I. 716, 732 (V.I. 2012) (interpreting Federal Rule of Evidence 701 the Court noted, "lay testimony 'results from a process of reasoning familiar in everyday life'" (citation omitted)).

¶27 Yet, the Superior Court inexplicably concluded that Kazi was entitled to summary judgment without first making the prerequisite conclusion that weekly or monthly inspections were reasonably frequent as a matter of law. *See Ramotar v. Kroger Co.*, 743 S.E.2d 591 (Ga. Ct. App.

[3] In effect, the Superior Court impermissibly shifted the burden to prevail on summary judgment to the non-moving party by neglecting to consider the conflicting evidence concerning reasonableness of the inspections. It is the moving party that must show that there is "no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law." *Hamed*, 64 V.I. at 302 (citation and internal quotation marks omitted).

[4] Although the Federal Rules of Evidence governed the relevant proceedings, we have since adopted the identical Virgin Islands Rule of Evidence 701. *In re Adoption of Virgin Islands Rules of Evidence*, No. 2017-002, 2017 WL 1293843, at *1 (V.I. Apr. 3, 2017). Therefore, for clarity and simplicity we refer to V.I. R. EVID. 701 in this opinion.

2013) (explaining that a factual question remained whether the inspection procedure was reasonable as matter of law because that determination depends on "the nature of the business, the size of the store and the number of customers"). In the absence of any determination that Kazi's inspections were reasonably frequent, the Superior Court lacked a basis to conclude on summary judgment that Kazi lacked constructive notice of the alleged dangerous condition. *See CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 102 (Tex. 2000) ("[P]laintiff would be entitled to recover if he presented evidence that [defendant] actually knew that the platform and step unit had become unstable or if a reasonable inspection would have revealed that the unit was no longer safe.").

¶28 The Superior Court also failed to address the question whether the character of the inspections performed by Kazi was reasonable. The differing testimony of witnesses in defendant's employ regarding the character of the inspections—visual versus physical inspection, and what that entails—created a genuine issue of material fact as to whether the inspections were performed in a reasonable manner. *See Judson v. Camelot Food, Inc.*, 756 P.2d 1198, 1200 (Nev. 1988) (holding there were genuine triable issues as to whether a proper and adequate inspection, if made by the defendant, could have disclosed the alleged defective condition of the bench).

¶29 Thus, viewing the evidence identified on summary judgment in the light most favorable to Aubain, there is a genuine issue of material fact as to whether Kazi's inspections were reasonably frequent and thorough and, in turn, whether constructive notice of the defective bench may be imputed to Kazi. *See McGarity v. Hart Elec. Membership Corp.*, 706 S.E.2d 676, 682 (Ga. Ct. App. 2011) ("The reasonableness of the frequency of inspections is routinely decided by jurors. A jury can assess whether the circumstances of this case required more frequent inspections, taking into account, for example, the nature of the business, the nature of the dangerous condition, and the property location."); *Megge v. Lumbermens Mut. Cas. Co.*, 206 N.W.2d 245, 248 (Mich. Ct.

App. 1973) ("The frequency of the inspections, their character, and [defendant]'s reliance on them are factual issues for jury resolution."). Because the testimony of the witnesses created a genuine issue of material fact concerning whether the inspections were reasonably frequent and adequate, the Superior Court erred in granting summary judgment. *See Barker v. Osman*, 340 So. 2d 965, 966 (Fla. Dist. Ct. App. 1976) (reversing court's decision to grant summary judgment where there was a genuine issue of material fact regarding the reasonableness of the inspection); *Straughter v. J.H. Harvey Co.*, 500 S.E.2d 353, 355–56 (1998) (reversing court's decision to grant summary judgment where movant did not show reasonable inspection procedures were in place and followed); *Gairy v. 3900 Harper Ave., LLC*, 45 N.Y.S.3d 564, 564 (N.Y. App. Div. 2017) (explaining that a motion for summary judgment is properly denied where movant had not shown reasonable inspection procedure).

IV. CONCLUSION

¶30 Although the Superior Court did not err in requiring Aubain to demonstrate that Kazi had actual or constructive notice of the dangerous condition, the Superior Court nevertheless erred in granting Kazi's motion for summary judgment because, in responding to the motion, Aubain identified conflicting testimony of Kazi's employees about the frequency and nature of its inspections of the benches, and thus demonstrated the existence of a triable issue concerning whether Kazi had constructive notice of the defect. As a result, Kazi failed to establish that it was entitled to the drastic remedy of summary judgment. Accordingly, we reverse the judgment of the Superior Court and remand this case for further proceedings consistent with this opinion.

Dated this 28th day of March, 2019.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court