SUPREME COURT OF NOVA SCOTIA
Citation: *Jordan v. Fenwick Holdings Limited*, 2025 NSSC 382

Date: 20250212
Docket: *HFX*, No. 489912
Registry: Halifax

Between:

Margaret Jordan

Plaintiff

v.

Fenwick Holdings Limited and Curt Chaffe Pharmacy Limited

Defendants

Judge:	The Honourable Justice Christa Brothers
Heard:	June 25, 2025, in Halifax, Nova Scotia
Decision:	December 2, 2025
Counsel:	Ronan Holland, for the Plaintiff Chistine Nault, for the Defendant, Fenwick Holdings Limited Parker Byrne, for the Defendant, Curt Chaffe Pharmacy Limited

By the Court:

Overview

[1] This action arises from a slip and fall the plaintiff alleges she had outside 5595 Fenwick Street in Halifax. The defendant, Fenwick Holdings Limited ("Fenwick"), is the owner of the premises at 5595 Fenwick Street ("Fenwick Building"). The Fenwick Building is an office building housing numerous commercial tenants. The plaintiff alleges that she incurred injuries on July 7, 2018, when she fell while disembarking from a vehicle in the turn-about area near the entrance of the Fenwick Building.

[2] The plaintiff testified on discovery and alleges in the pleadings that she was on her way into the Fenwick Building to attend the Shoppers Drug Mart pharmacy ("Shoppers"), owned by Curt Chaffe Pharmacy Limited, when she was injured.

[3] The plaintiff brings this action against Shoppers pursuant to Nova Scotia's *Occupiers' Liability Act*, S.N.S. 1996, c. 27 ("*OLA*"). This legislation imposes a duty of care on all property owners and occupiers to take reasonable steps to keep visitors safe from foreseeable risk of injury.

[4] Shoppers has applied for summary judgment on the evidence seeking a dismissal of the plaintiff's claim against it. For the reasons that follow, I grant Shoppers' motion.

Background

[5] In support of this motion, Shoppers filed the affidavit of Jeffrey Stoneham-Wilson (Stoneham-Wilson Affidavit) and relies on the discovery evidence of the opposing parties attached to that affidavit. The plaintiff relies on her own affidavit, filed on June 17, 2025, as well as her discovery evidence. While this is not a proper use of discovery under the *Civil Procedure Rules ("Rules")*, the defendants took no issue with the plaintiff's reliance on her own discovery evidence to defend the motion.

[6] Fenwick took a watching brief during the motion, submitting a short letter. At the motion hearing, Fenwick's counsel helpfully answered questions from the court, which ultimately clarified some of the issues.

[7] At the material time, Shoppers was one of several commercial tenants leasing space on the first floor of the Fenwick Building. In summary, the plaintiff has claimed against Shoppers in her Notice of Action filed on July 5, 2019 and then amended on July 8, 2019, as follows:

- Shoppers was carrying on business at the Fenwick Building;
- Shoppers was an occupier of the premises at the time;
- Shoppers had physical control and possession of the entrance to the premises and had responsibility for the care and control of the entrance to the premises;
- The plaintiff attended Shoppers for the purposes of shopping and retrieving mail from the post office located inside;
- When she disembarked from her vehicle at the cul-de-sac, she slipped on a crevice in the curb, or curb apron, that was uneven to the adjacent sidewalk;
- Shoppers had a duty of care to ensure the plaintiff's safety and that it breached this duty;
- The crevice in the curb or curb apron was caused by the neglect of the duty to maintain and repair, or erosion or poor maintenance of the entrance which Shoppers knew or ought to have known;
- Shoppers failed to exercise reasonable care to warn the plaintiff of the crevice and breached their duty to her;
- Shoppers is an occupier under the *OLA* and breached the duties imposed by this *Act*;
- Shoppers was negligent and caused the accident by failing to have adequate (or any) policies regarding maintenance and/or cleanup of the premises; failing to train or to adequately train employees regarding effective maintenance of the premises; and by failing to supervise or adequately supervise employees in the maintenance of the premises.

[8] Shoppers filed a Notice of Defence with Crossclaim against Fenwick on December 8, 2020. The Statement of Defence states in part:

> 6. At all material times, SDM [Shoppers] was not the owner and occupier of the Property or of the Building.

> 7. SDM states that at all materials times, Fenwick Holdings Limited (the "Defendant FHL") was the beneficial owner of the Property and of the Building.
>
> 8. SDM states that at all material times, SDM was party to a lease agreement (the "Lease Agreement") with the Defendant FHL, wherein SDM leased certain premises comprising of approximately 11,100 square feet (the "Leased Premises") within the Building.
>
> 9. SDM states that, pursuant to the Lease Agreement, the Defendant FHL is fully responsible for the maintenance of any exterior common areas including entrances, driveways, roadways, walkways, sidewalks, and parking areas on the Property.
>
> [Emphasis added]

[9] In the Statement of Crossclaim, Shoppers crossclaimed against Fenwick, pleading that in the event it was found liable for any injury, loss or damage suffered by the plaintiff, then such injury, loss or damage was caused or contributed to by the negligence, breach of contract or wrongdoing of Fenwick. Shoppers pleaded that Fenwick's negligence, breach of contract or wrongdoing included Fenwick's failure to:

> 3. …
>
> a. Properly or adequately maintain the condition of the entrances, driveways, roadways, walkways, sidewalks, and parking areas at 5595 Fenwick Street, Halifax, Nova Scotia, PID 00102764 (the "Property");
>
> b. Take necessary steps to ensure the Property was safe for pedestrian travel;
>
> c. Properly monitor the Property to ensure safety of pedestrian travel;
>
> d. Fulfill its contractual obligations as set out in the Lease Agreement between the Defendant FHL and SDM with respect to the Property (and as amended from time to time); and
>
> e. Such further and other wrongdoing as may appear from the evidence.
>
> 4. SDM pleads and relies upon the provisions of the *Occupier's Liability Act,* SNS 1996, c 27; the *Contributory Negligence Act*, RSNS 1989, c 95; and the *Tortfeasor's Act*, RSNS 1989, c 471, all as amended, and claims indemnity or contribution from the Defendant FHL in respect of the Plaintiff's claims and costs.

[10] Fenwick filed a Notice of Defence on August 26, 2022. Fenwick acknowledged in its Statement of Defence that it was the owner of the Fenwick Building and that Shoppers was a tenant:

> 3. As to paragraphs 2 and 3 of the Statement of Claim (Amended), FHL admits only that at all material times it was the owner of the building at 5595 Fenwick

> Street, Halifax, Nova Scotia, and further that the business commonly known as Shoppers Drug Mart was a tenant within the building, as defined in the lease agreement between the two parties, including subsequent amendments and ratifications as applicable.
>
> [Emphasis Added]

[11] Fenwick filed a Notice of Defence to Crossclaim on August 26, 2022, again admitting that it is the owner of the Fenwick Building but denying negligence, breach of contract and / or wrongdoing. Fenwick did not cross-claim against Shoppers to allege that it owed a duty of care to the plaintiff.

[12] The plaintiff amended her Statement of Claim on October 17, 2023. These amendments included removing the HRM as a defendant. This followed from the decision in *Jordan v. Fenwick Holdings Limited*, 2023 NSSC 290. The amendments also tightened up the wording of the Statement of Claim and simplified the claim's expression. The following paragraphs were included in the amended pleading:

> 3. The first named defendant, Fenwick Holdings Ltd. (hereinafter called "FHL"), is a body corporate with its registered office in the Province of Nova Scotia. At all material times, FHL was the owner and/or occupier and responsible for property management property located at 5595 Fenwick Street, Halifax, Nova Scotia (hereinafter called "the Premises").
>
> 4. The second named defendant, Shoppers Drug Mart #0133 Curt Chaffe Pharmacy Ltd. (hereinafter called "SDM"), is a body corporate with its registered office in the Province of Nova Scotia and was at all material times the owner and/or occupier of a retail store located at and forming part of the Premises.
>
> 5. On or about the 7th day of July, 2018, the plaintiff approached the Premises in a vehicle with the objective of shopping and retrieving mail within the Premises. While disembarking from her vehicle in the cul-de-sac drop-off area on the Premises, the plaintiff tripped and fell on a cut-out of the curb on the sidewalk adjacent to the entrance to the interior of the Premises. As a result, she suffered personal injury, loss and damage.
>
> 6. The defendants and each of them owed a duty of care to the plaintiff to take reasonable care to see that the plaintiff was reasonably safe on the premises. The plaintiff pleads and relies upon the provisions of the *Occupiers Liability Act*, 1996, c. 27 and in particular section 4 thereof.
>
> 7. The defendants and each of them breached their duty of care to the plaintiff under the *Occupiers' Liability Act*.

8. The plaintiff's accident occurred as a result of the negligence and breach of duty of each of the defendants, their respective servants, agent or employees, the particulars of which are as follows:

    a. They failed to properly maintain the Premises and in particular the curb area where the plaintiff fell;

    b. They allowed the curb on the Premises to fall into disrepair;

    c. They failed to remedy defects in the curb;

    d. They failed to sufficiently light the Premises to allow the curb defects to be easily viewed;

    e. The failed to properly paint the curb to alert patrons to its dangers;

    f. They failed to inspect the curb at a sufficient cadence to allow for a timely repair of the curb;

    g. They failed to guard and protect the plaintiff or divert her away from the danger on the Premises;

    h. Failed to have a safe location of ingress to the Premises;

    i. Failed to have a safe ramp for access to the Premises;

    j. They failed to warn the plaintiff of the danger present; and

    k. They were guilty of such other negligence, whether acts or omissions, as may appear from the evidence given at discovery or disclosed at trial.

[Emphasis added]

LAW AND ARGUMENT

Summary Judgment on the Evidence

[13] The general principles regarding summary judgment on the evidence are set out in *Rule* 13.04. There is no discretion under *Rule* 13.04 to refuse summary judgment where a judge is satisfied that there is no genuine issue of material fact, and where the claim or defence does not require determination of a question of law. Where a question of law must be answered, and the claim has no real chance of success, the court will grant summary judgment. Where the challenged pleading has a real chance of success, a judge has the discretion to decide the question of law if there are no material facts in dispute.

[14] The Nova Scotia Court of Appeal summarized the analysis under *Rule* 13.04 in *Shannex Inc. v Dora Construction Ltd.*, 2016 NSCA 89. This well-known and often-cited test consists of five sequential questions. The test was summarized by

Bourgeois J.A. in *SystemCare Cleaning & Restoration Limited v. Kaehler*, 2019 NSCA 29:

> [34] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04 (paras. [34] through [42]):
>
> > 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> >
> > 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> >
> > 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> >
> > 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
> >
> > 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[15] Jamieson J. (as she then was) stated in *Thornridge Holdings Limited v. Ryan*, 2023 NSSC 108:

> [36] "Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.
>
> [Emphasis Added]

[16] The parties were required to put their best foot forward on the motion. There was no request for an adjournment by any party to give them more time to do so.

Genuine Issue of Material Fact

[17] Shoppers has the onus of satisfying me that summary judgment is a proper question for consideration. To do so, it bears the burden of showing that there is no genuine issue of material fact for trial. If Shoppers fails, the motion for summary judgment must be dismissed.

[18] The Nova Scotia Court of Appeal has commented on what a material fact is in several decisions. In *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, the court stated:

> [37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.
>
> [38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.

[19] In *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, the court described a material fact as one that is “essential to the claim or defence”, noting that “[a] dispute over an incidental fact will not derail a summary judgment motion” (para. 27).

[20] In *Burton Canada Company v. Coady*, 2013 NSCA 95, Saunders J.A. described material facts as "important factual matters that anchor the cause of action or defence" (para. 42). In *Shannex*, *supra*, Fichaud J.A. defined a "material fact" as "one that would affect the result" (para. 34).

[21] In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.,* 2017 NSCA 61, the court noted that in determining whether there is a genuine issue of material fact, the motion judge cannot draw inferences or weigh evidence:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:

> [87] . . .
>
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
> >
> > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

[22] In *Burton v. Coady, supra*, Saunders J.A. summarized the "first stage" of the summary judgment inquiry at para. 42:

> At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry…

[23] When assessing whether there are genuine issues of material fact, it is important to keep in mind which alleged facts are relevant to the claims being advanced. The plaintiff's claim against Shoppers is that it owed her a duty of care under the *OLA* as an "occupier" of the part of the Fenwick Building premises where she allegedly fell. The definition of "occupier" under s. 2(a) of the *OLA* is as follows:

> 2 In this Act,
>
> (a) "occupier" means an occupier at common law and includes
>
> > (i) a person who is in physical possession of premises, or
> >
> > (ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on the premises or the persons allowed to enter the premises, and, for the purpose of this Act, there may be more than one occupier of the same premises.

[24] "Premises" is defined at s. 2(b)(i) as including "land and structures, or either of them, except portable structures and equipment".

[25] Section 3 of the *OLA* stipulates that it applies in place of the rules of common law for the purpose of determining the duty of care that an occupier of premises owes persons entering on the premises in respect of damages to them or their property.

[26] Section 4(1) of the *OLA* imposes a duty on an occupier to take reasonable care to see that each person entering on the premises is reasonably safe while on the premises. Section 4(2) states that the duty applies in respect of the condition of the premises, the activities on the premises, and the conduct of third parties on the premises. Section 4(3) provides that the following factors are relevant to whether the occupier's duty of care has been discharged:

> (a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;
>
> (b) the circumstances of the entry into the premises;
>
> (c) the age of the person entering the premises;
>
> (d) the ability of the person entering the premises to appreciate the danger;
>
> (e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and
>
> (f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection

[27] Section 9 of the *OLA* provides that where under a lease of premises a landlord is responsible for the maintenance or repair of the premises, the landlord owes the same duty to each person entering on the premises as is owed by the occupier of the premises.

[28] Accordingly, the material facts in this matter relate to whether Shoppers had responsibility for, and control over, the turn-about area at the entrance to the Fenwick Building where the plaintiff alleges that she fell, and to the factors outlined at s. 4(3) of the *OLA*.

[29] In the plaintiff's affidavit on the motion, she confirmed the location of her alleged slip and fall and referred to a photograph she marked at discovery. The plaintiff described the circumstances and location of her fall in the following paragraphs of her affidavit:

> 12. As described in the transcript at pages 71-94, at the time of the accident, I got out of my husband's car in the turning circle and had taken a package from the car intending to go from the car to enter the Fenwick building by the front doors to go to the post office which was situated inside the Shoppers Drug Mart, in order to post the package.
>
> 13. As described in the transcript at pages 80-81, I was attempting to proceed onto the sidewalk, attempting to take a step, when I caught my foot and tripped and fell in the "apron" of the sidewalk.

…

21. From the evidence of Curtis Chaffe at discovery, I have come to understand and do so believe that customers would use the drop-off area at the front of the building at 5595 Fenwick Street to drop off people to enter Shoppers Drug Mart (transcript pp. 19-21).

22. I, having been present at the discovery of Curtis Chaffe on July 17, 2024, now recall the fact that Curtis Chaffe was present and came to assist me after my fall on July 7, 2018, and that he was a witness to the aftermath of that fall.

23. Prior to and on the date of the accident, I was aware that there was a large red sign with the name "Shoppers Drug Mart" on the exterior of 5595 Fenwick Street as depicted in a photo of the building attached hereto and marked as Exhibit "D". I say that this sign advertised the main entrance to gain access to the property occupied by SDM and prior to and on the date of the accident, I used this main entrance to gain access to that property.

[Emphasis added]

[30] The area described can be seen in the following photograph entered at discovery.

[31] The plaintiff gave evidence at discovery on July 16, 2024. The transcript is attached to the Stoneham-Wilson Affidavit. During discovery, the plaintiff marked the photograph below to identify the location of the curb of the sidewalk outside the Fenwick Building where she allegedly fell.

[32] There is no dispute about the location of the plaintiff's alleged fall. Nor is there any dispute that Fenwick owns the Fenwick Building and that Shoppers was a tenant. Finally, there is no dispute that the rights and obligations of Fenwick (as "the Landlord") and Shoppers (as "the Tenant") vis-à-vis the leased premises and the common areas were as set out in the lease agreement (the "Lease"). The Lease defines the common areas as follows:

> 1.3 "Common Areas and Facilities" means the lands and Building and includes but without limitation, roadways, land-scaped areas, washrooms available for public use, common corridors and walkways, common loading areas, stairways and elevators used by public or by Tenants generally, fire detection, fire prevention and communication systems, and all other areas and facilities from time to time provided, designated or made available by the Landlord for the use of the Tenant and other Tenants or members of the public, and includes the foundations, exterior weather walls, structural subfloors and roofs, bearing walls, structural columns and beams of the Building, and also includes all the equipment or installations, utilities, facilities and apparatus in or associated with any of the foregoing (except where specifically excluded) all as from time to time existing.

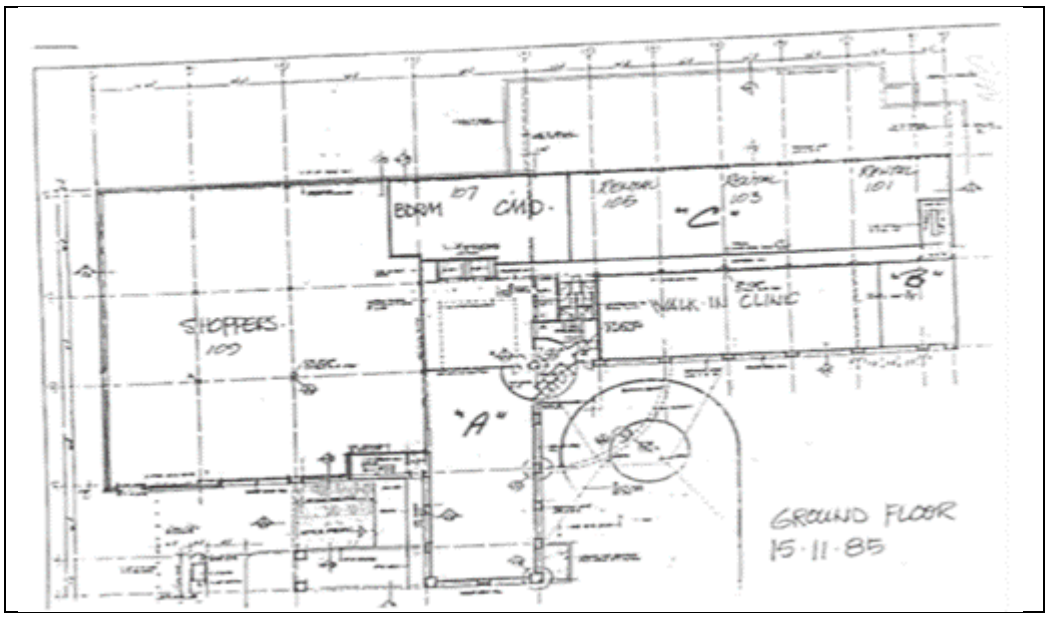
[33] The parties all agree that the turn-about area where the plaintiff claims to have fallen is included in the common areas.

[34] The Lease identifies the areas under the control and occupation of Shoppers at clause 1.9:

> 1.9 "Leased Premises" means the rentable premises having a Gross Leaseable Area of approximately eleven thousand one hundred (11,100) square feet ~~and the basement space having an area of approximately one thousand five hundred~~

~~(1,500) square feet~~, in the approximate location outlined in red on the plan attached to this Lease as Schedule "C" excluding the roof, floor, ceiling slabs, interior walls separating such premises from adjacent premises and exterior walls, but including the inside surfaces of the walls, ceilings and floors of the Leased Premises, exterior and interior windows and including all mechanical and electrical equipment, water, gas, sewage, telephone and other communication facilities and electric power services and utilities installed within the Leased Premises for the exclusive use of or under the control of the Tenant. The Tenant acknowledges that the location of the Leased premises in the Building and the dimensions thereof as indicated on the Schedules attached to this Lease are approximate.

[35] Schedule "C" includes the following plans for the ground floor of the Fenwick Building at the time the Lease was executed:



[36] The above plan shows that the turn-about area of the driveway where the plaintiff fell is at the entrance to the Fenwick Building used by customers of the commercial tenants. Tenants (and their invitees) are permitted to use the common areas pursuant to clause 2.2:

2.2 Use of Common Areas and Facilities

The Tenant's use and occupation of the Leased Premises shall include the right to use those portions of the Common Areas und Facilities designated by the Land, in common with others entitled to such use. Such use shall at all times be subject to the provisions of this Lease, all relevant statutes and to any rules and regulations prescribed by the Landlord in connection with the Common Areas and Facilities.

[37] The Lease dictates that tenants have a revocable license to use the common areas, and that the Landlord has full control of the operation and maintenance of the common areas:

> 9. COMMON AREAS AND FACILITIES
>
> 9.1 License
>
> All Common Areas and Facilities which the Tenant may be permitted to use pursuant to this Lease are to be used only under a revocable license, and if the amount of such area is diminished, the Landlord shall not be subject to any liability or the Tenant entitled to any compensation or diminution or abatement of rent as a result, nor shall such diminution of the Common Areas and Facilities be considered to be constructive or actual eviction or breach of any covenant for quiet enjoyment. The Landlord shall have the full control of the operation, maintenance, arrangement and use of the Common Areas and Facilities as it may in its sole discretion determine. Without limiting the generality of the foregoing, in the event that the Landlord determines, in its discretion, to convert the parking into pay parking, it shall be entitled so to do, provided that the overall parking spaces available are not reduced by more than ____ percent (___%) of the aggregate parking spaces available and the proceeds from such pay parking are utilized to defray the operating costs of the parking lot and, the Landlord shall not be subject to any liability or the Tenant entitled to any compensation or diminution or abatement of rent as a result, nor shall such diminution of the Common Areas and Facilities be considered to be constructive or actual eviction or breach of any covenant for quiet enjoyment.
>
> Provided however that the Tenant shall have uninterrupted access to the Leased Premises through the Common Areas and Facilities adjacent to the Leased Premises, such access to be limited so that proper security may be maintained for the Building. Provided that the Landlord shall only convert the parking into pay parking, if in Landlord's discretion, acting reasonably, pay parking is necessary to deter long term parking. It is further understood and agreed that nothing herein shall prohibit or prevent the Tenant from reimbursing its customers for all or part of the charges relating to pay parking.
>
> 9.2 Maintenance
>
> The Landlord agrees to light and maintain any exterior Common Areas and Facilities (including removal of snow, refuse and litter) and to heat, light ventilate, cool and maintain any interior or enclosed Common Areas and Facilities, and to otherwise use reasonable efforts to maintain the Common Areas and Facilities, and to otherwise use reasonable efforts to maintain the Common Areas and Facilities, as would a reasonably prudent owner of a similar building.
>
> [Emphasis added]

[38] Clause 11 sets out the Landlord's obligations, including to keep the common areas in good repair and condition:

> 11.1 Landlord's Obligations
>
> The Landlord shall keep in good repair and condition those portions of the Building consisting of its foundations, exterior weather walls, structural subfloors and roofs, bearing walls, structural columns and beams; any portion of the fire detection, fire prevention, water, sewage and electrical systems serving the premises of more than one tenant and the Common Areas and Facilities. If as a result of any destruction of or damage to the Building, the Landlord is obliged to repair such destruction or damage in accordance with the provisions of the lease and as a result is requited to undertake any substantial rebuilding, the Landlord may, in lieu of performing such repairs, rebuild in accordance with any plan chosen by the Landlord. The Landlord will locate the Tenant in a space which is located in the same relative location to the entrance to the building and the elevators, as are the Leased Premises.
>
> It is understood and agreed that repairs of a structural nature, including but not limited to repairs to the roof, roof deck, roof membrane, load bearing walls, floor slab, and foundations shall be the Landlord's responsibility and no amount shall be included under the terms of this Lease for such items as Operating Expenses. The Tenant acknowledges that other leases in the Building will provide for the above items to be included as Operating Expenses.
>
> [Emphasis added]

[39] Clause 1.2 deals with Fenwick's operating expenses, which include the cost of repairs to and maintenance of the common areas:

> 1.12 "Operating Expense" means such of the Landlord's costs and expenses, without duplication, which are properly attributable in accordance with generally accepted accounting principles to the maintenance, operation, supervision and administration of the Common Areas and Facilities to the extent that is reasonable for a prudent owner of a facility such as the Building to incur them, and shall include, but without limitation, the following:
>
> (a) The cost of insurance in respect of fire, extended coverage endorsement perils, public liability and property damage and rental income insurance and any other casualties against which the Landlord may reasonably insure, or a mortgage from time to time may determine;
>
> (b) The cost of cleaning and snow removal and of maintaining and operating fire detection, fire prevention and lighting systems;
>
> (c) Policing, supervising, security, and traffic control;

(d) The cost of salaries, fees or other amounts paid by the Landlord to any person, partnership or corporation employed or engaged to carry out maintenance and operation. If any such amounts are paid to employees of the Landlord such costs shall include contribution towards, the usual fringe benefits, unemployment insurance, pension plan contributions and similar matters;

(e) The cost of the rental of any equipment and the cost of any building supplies used in maintenance and operation of the Common Areas and Facilities including without limiting the generality of the foregoing the cost of any materials or labour necessary to maintain or repair the surface of the parking lot provided that any such costs with respect to the surface of the parking lot shall be included only after the Second Lease Year;

(f) Realty taxes (including real property, municipal , school and local improvement taxes, assessments and rates and all taxes, assessments and rates of a like nature imposed in respect of real property from to time to time by any municipality or public authority, including any costs and fees incurred by the Landlord contesting any of the same in good faith) in respect of the Common Areas and Facilities and lands underlying or attributable to the Common Areas and Facilities in accordance with generally accepted accounting principles, provided however, that "realty taxes" shall not include any amounts which are attributable to the development costs of the Building in accordance with generally accepted land development practice;

(g) Business taxes in respect of the Common Areas and Facilities (if any);

(h) Repairs and replacements to, and maintenance and operation of the Common Areas and Facilities, including gardening and landscaping costs;

(i) Depreciation or costs including interest payable on the undepreciated capital cost, if any, of all fixtures and equipment which, by their nature, require periodic replacement or substantial replacement, excluding buildings or structures and permanent parts thereof and excluding the heating, ventilating, air-conditioning and mechanical equipment;

(j) All other costs and expenses not of a capital nature directly attributable to the Common Areas and Facilities;

(k) Management fees for the operation of the said Common Areas and Facilities not to exceed ___ percent (__ %) of Tenant's basic rent, it being understood that between the Landlord and the Tenant, the Tenant shall not be responsible for any further administrative charges; and

(l) The audited statement referred to in Paragraph 3.4 hereof.

…

[Emphasis added]

[40] Clause 8.1 provides that each of the tenants must contribute to Fenwick's operating expenses:

> 8. 1 Tenant's Contribution to Operating Expense
>
> In each Lease year, the Tenant will pay to the Landlord as Additional Rent its Proportionate Share of Operating Expenses incurred by the Landlord in such Lease Year.

[41] Also relevant is Schedule "D", Rules and Regulations, which makes clear that the Landlord controls the common areas:

> 3. The sidewalks, entries, passages, elevators and staircases shall not be obstructed or used by the Tenant, its agents, servants, contractors, invitees or employees for any purpose other than ingress to and egress from the offices. The Landlord reserves entire control of all parts of the Building employed for the common benefit of the Tenants and without restricting the generality of the foregoing, the sidewalks, entries, corridors and passages not within the Leased Premises, washrooms, lavatories, air-conditioning closets and other closets, fan rooms, janitor's closets, electrical closets and other closets, stairs, escalators, elevator shafts, flues, stacks, pipe shafts and ducts and shall have the right to place such signs and appliances therein, as it may deem advisable, provided that ingress to and egree [*sic*] from the Leased Premises is not unduly impaired thereby.
>
> [Emphasis added]

[42] Fenwick's evidence, given by its designated manager for discovery, pursuant to *Rule* 14.14, Robert Schelleman, Manager of Commercial Property of Universal Realty Group, confirmed that the area where the plaintiff alleges she fell is a common area that Shoppers does not occupy, control, or have the responsibility to maintain or the right to alter:

> Q. Common Areas and Facilities, 1.3.
>
> A. On page 3?
>
> Q. Yeah. So without reading that now, and I'll give you the opportunity to read it if you wish. But what is your understanding of what the common areas and facilities are? Like where are they?
>
> A. So the common areas, generally speaking, would be all the areas that are not tenant spaces. Lobbies vestibules, stairwells, washrooms that are for the public.
>
> Q. Yes.
>
> A. Entrances.

Q. So …

A. Any spaces accessible by anyone any person, I'd guess you'd say.

[Emphasis Added]

(Discovery Transcript of Robert Schelleman, July 17, 2024, p. 16)

Q. All right. And then outside the set of two doors you have some kind of a sidewalk?

A. Correct.

Q. And the sidewalk leads onto what I call a kind of a turning circle.

A. Yeah.

Q. Do you know what I mean?

A. Correct.

Q. So the turning circle, is that for vehicles, like cars to drop off people or things for use in the building?

A. I think it's generally assumed that it's for a drop off. Yeah.

Q. For drop off?

A. Yeah.

Q. Okay.

A. You know, we … I would say it's more for people than for things. But, you know …

Q. Yes.

A. … that's my interpretation.

Q. Right. It's more for people. Well, it's certainly used by people …

A. Correct. Yeah.

Q. … to access that building, right?

A. Yes.

Q. <u>That turning circle, is that a common area?</u>

A. <u>No. Well, I would say, I mean, I guess it is. But common area generally refers to the areas that the tenants pay operating costs on. So I wouldn't refer to the … I mean, that is accessible by the public. It's more the driveway to the building, I guess.</u>

Q. <u>Driveway to the building. But it's not … it's not belonging to HRM. It's not a public road.</u>

A. <u>No. It's … it belongs to the building. Yes. It's just that nobody … I guess, you know, the tenants do pay common area costs to maintain it.</u>

Q. Yeah.

A. It just doesn't figure into the proportion share of their leased premises.

Q. Right. For the calculation of …

A. So I guess you could call it common area. Yeah. I guess.

Q. Yeah.

A. Sure.

Q. It's … let's be clear. This driveway with the turning circle is owned by Fenwick Holdings Limited?

A. Yes. Correct.

Q. It is.

A. I would have to check the name. But I 'm … it's Fenwick Holding.

Q. That's …

A. Yeah.

Q. Yeah. Fenwick.

A. The building owns the driveway.

Q. And, likewise, the side … the sidewalk between that turning circle and the doors, the first set of two doors, that sidewalk, is that a common area?

A. It's a public area.

Q. Mm-hmm.

A. I don't use that term common area. I .. it's more a public area. Only because in my I guess world, common areas are a form of proportion share of a tenancy's premises.

Q. Yeah. And …

A. So that … so that is part of the building. It's more a public area than I would say common area. And that's strictly my interpretation.

Q Yeah. Would it be fair to say that when you talk about common areas, you're thinking does the tenant pay towards those common areas?

A. No. It's more that it literally a proportionate share of that space …

Q. Yeah.

A. … is attached to the tenant's lease premises to make up their area, their square footage. So …

Q. Yes.

A. … this office is occupied by Intact would … would be, I don't know, 5,000 square feet of usable area. And then they would have another number. It's

called a rentable area. And that is their proportionate share of everything that's not … everything else. Elevator lobbies. Hallways that are …

Q. Yeah.

A. … accessible by everybody. Mechanical rooms, washrooms, shafts that penetrate the building from top to bottom. All that sort of stuff.

(Discovery Transcript of Robert Schelleman, July 17, 2024, pp. 18-21)

They also, the tenants, as part of the common area costs, pay to maintain the driveway, the sidewalks.

(Discovery Transcript of Robert Schelleman, July 17, 2024, p. 22)

Q. Yeah. Coming back then to the driveway with the turning circle and the pavement from the turning circle to the set of two doors. You called it that it's public, a public area. But you said, I think, already that's it's owned by the company Fenwick Holdings?

A. Correct.

Q. Okay. Are you sure or not sure if that's included in the common areas then?

A. When you say common areas, do you mean a formula of making up the total square footage of a tenant's space?

Q. Yeah. I don't know, to be honest.

A. So it's not … it doesn't … the area of the …

Q. Yes.

A. … sidewalk …

Q. Yes.

A. … the square footage of the sidewalk does not form any part of any tenants' rentable area.

Q. Yes.

A. They pay common area costs towards maintenance, upkeep, and repair of the sidewalk, the driveway. All of those items.

Q. So they do pay some portion?

A. Correct.

Q. Contribution …

A. Correct.

Q. … towards things like the sidewalk?

A. Correct.

Q. And that turning circle also?

A. Correct. And the garden that's in front. Yeah. There's a little garden bed in front of that. The front lawn. The walkways that go behind the building.

Q. So the tenant pays whatever their contribution is towards those facilities that are provided …

A. Correct.

Q. … by the landlord?

A. Correct.

Q. And the landlord is responsible to maintain those areas. Correct?

A. Correct.

Q. So the landlord is responsible to maintain the driveway that's on their land?

A. Correct,

Q. With a turning circle. Correct?

A. Yes.

Q. And also the pavement from the turning circle to the doors?

A. The concrete from the …

Q. Yes.

A. Yes. Correct.

(Discovery Transcript of Robert Schelleman, July 17, 2024, pp. 23-25)

Q. So this is a kind of a picture from … is that a picture from the roadway?

A. Probably from just inside the sidewalk.

Q. Just inside the public sidewalk?

A. I would think. Yeah. I don t …

Q. Yeah.

A. It would be … maybe on the sidewalk. The sidewalk will be roughly here.

Q. Right. There's a canopy that kind of covers that … the sidewalk near the entrance to the building there's a canopy. Do you see that?

A. I do.

Q. Yeah. Who's responsible for maintaining the canopy?

A. That would be Universal.

Q. Yeah. Universal for the landlord?

A. Correct.

Q. Yeah. And that canopy, there's a … there seems to be a pillar that I can see there that lands in the garden circle there. Just, so there's a turning circle and then there's a pillar. Do you see the pillar that's supporting the canopy?

A. I do.

Q. Yeah. Okay.

MS. NAULT: Okay. I don't. Can you point it out?

WITNESS: Right in here.

MS. NAULT: Oh. In back behind the trees there?

MR. HOLLAND: It's in the …

WITNESS: In among … in amongst the bushes there.

Q. In the bushes. And the bushes is in that circular garden area?

A. Yes.

(Discovery Transcript of Robert Schelleman, July 17, 2024, pp. 33-34)

Q. … Ms. Jordan during her discovery yesterday.

A. Yes. Photograph 45 …

Q. That's right.

A. … and the yellow sticky? Okay. Yes.

Q. Yeah.

MS. NAULT: Exhibit 1 is what we …

WITNESS: Oh, sorry.

MS. MACDONALD: Yes.

WITNESS: Yes. All right. Okay.

MS. MACDONALD: We'll call it Exhibit 1 for the … the record. Sorry.

Q. No. It's all right. You, during your evidence this morning you … you referenced a few different types of spaces. Your interpretation of the spaces within the building, whether or not they're represented that way in the … what we'll call the head lease. The leased premises common areas and what you described as public space or public areas.

A. Correct.

Q. You … you'll see the black circle in sharpie. Is this … does this fall within the leased premises common area, public area? How would you describe that?

A. I would call it the … I would refer to this as public area.

Q Okay.

A. It's certainly not under the care and control of Shoppers Drug Mart, first of all. It's accessible to the public even when the building is closed. That's … and that's just sort of our rationale for that. It just … when we call it public area it just keeps … there's a legal definition in the lease of what is common area.

Q. Mm-hmm.

A. And it probably says that this is that. We just refer to it as public area because it's accessible by the public.

Q. Okay. And so, would patrons of all businesses or workers of all businesses in the building use this space?

A. I would think so.

Q. Okay. And you spoke about operating expenses and the tenant's contribution to those operating expenses. Would Shoppers contribute to the costs of maintenance of this area depicted in the photo?

A. Yes.

Q. Okay. But you say that Shoppers would have care and control of that space. So can you describe how that works for me?

A. Well, just because they contribute to the cost of maintaining it doesn't mean that they are able to put any claim on it, or even need to. Or, you know, feel the need to repair it or maintain it. You know, it's the … the building maintains the common areas .

Q. Mm—hmm.

A. Including … and the public. What we call the public areas. So if, for instance, none of the tenants physically, or however, remove any snow or ice from the sidewalk, but yet, they all contribute to the cost of snow and ice removal.

Q. Okay. And you said that they … none of the tenants, for instance, contribute to the maintenance. They don't have to contribute …

A. Physically.

Q. Physically.

A. Yes.

Q. Contribute to the maintenance physically?

A. Financially they … they do contribute. But …

Q. Right.

A. … it's not up to them to …

Q. And physically … I guess physically they actually don't have the right pursuant to the lease to maintain …

A. I wouldn't …you know, it would be odd for them to, you know, be out there doing anything in that area for maintenance or repair, or setting up their business to sell from there. Whatever. You know, that just wouldn't be …

Q. Right.

A. Yeah.

Q. So if they decided to go out and dig up the pavement and …

A. That would be odd.

Q. … put in something new …

A. Yeah.

Q. … you'd have a problem with that?

A. We would probably have an issue with that. Yes.

Q. Okay.

A. Yes.

Q. All right. Have you ever known … I'll use the word "Shoppers". But that could mean whatever business is operating, corporations operating out of that Shoppers, to do any maintenance in this area that's photographed?

A. No.

(Discovery Transcript of Robert Schelleman, July 17, 2024, pp. 42-45)

[43] Fenwick's counsel conceded at the hearing that Fenwick does not resile from any admissions made by its corporate manager in his discovery evidence. Suffice it to say, this motion would have been unnecessary or at the very least straightforward and uncomplicated if a request was made under *Rule* 20.03 for Fenwick to admit it was the owner and occupier and the sole entity in control of the common or public area of the alleged fall.

[44] The evidence for this matter is straightforward and undisputed. The discovery evidence provides all the material facts for trial, including that:

(a) Fenwick owned the Fenwick Building;

(b) Shoppers was one of several commercial tenants leasing space in the Fenwick Building;

(c) The Premises, being the curb and sidewalk outside the main entrance where the plaintiff allegedly fell, was a common or public area of the Fenwick Building;

(d) The Lease provided that Fenwick had responsibility for, and control over, the condition of the common areas of the Fenwick Building. The tenants, including Shoppers, had no obligation nor right to control or maintain these areas.

(e) The Lease required Shoppers and other commercial tenants to pay to Fenwick, as additional rent, their respective proportionate shares of operating expenses, which include the cost of repairs to and maintenance of the common areas.

[45] In this matter, I easily conclude that there is no genuine issue of material fact. There is no genuine issue concerning where the plaintiff alleges she fell. All parties agree that if she fell in the manner she alleges, it was in the common area. There is no genuine issue of material fact in relation to Fenwick being the owner and occupier with exclusive control over and responsibility for maintaining the common areas under the Lease. The plaintiff has not pointed to any evidence giving rise to a genuine issue as to whether, notwithstanding the terms of the Lease, Shoppers ever took it upon itself to maintain or repair the turn-about area where the plaintiff allegedly fell.

[46] Having found that there is no genuine issue of material fact, I move on to the second question under *Shannex*, *supra*.

Question of Law

[47] The second question to consider is whether the challenged pleading requires the determination of a question of law, either pure, or mixed with a question of fact. In *Shannex*, *supra*, Fichaud J.A. explained that a pleading that requires no determination of a question of law "would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law" (para. 34).

[48] As noted by the plaintiff, the challenged pleading requires the determination of whether Shoppers is an "occupier", under the *OLA,* of the common area where she says she fell. This is a question of law mixed with a question of fact (*MacKay v. Starbucks Corp*., 2017 ONCA 350 at para. 2; *Brothers v. Alexander*, 2023 NSSC 320, at para. 24).

[49] The answer to the second question is Yes.

Real Chance of Success

[50] The third question in the test for summary judgment is whether the challenged pleading has a real chance of success. In *Burton v. Coady*, *supra*, Saunders J.A. explained the meaning of "real chance" as follows:

> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning — that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> Is there a reasonable prospect for success on the undisputed facts?

[51] For the plaintiff to avoid summary judgment, there must be a reasonable possibility that she will successfully establish on the undisputed facts that Shoppers was an occupier of the area in front of the Fenwick Building where she allegedly fell, and that Shoppers breached its statutory duty to take reasonable care to see that she was reasonably safe while on the premises. As noted earlier, this would require, *inter alia*, evidence that Shoppers had responsibility for, and control over, the condition of the turn-about area in front of the Fenwick Building where she allegedly fell.

[52] The plaintiff argues that although Fenwick reserved to itself full control over and responsibility for the common areas under the Lease, Shoppers still falls within the statutory definition of "occupier" under the *OLA* by virtue of its financial contribution to Fenwick's operating costs. In other words, the plaintiff's position is that a commercial tenant that pays its proportionate share of the landlord's expenses associated with maintenance and repair of common areas exercises sufficient responsibility for and control over the condition of the premises to meet the definition of an "occupier" under the *OLA*.

[53] The plaintiff relies on *Pammett v. McBride Corp*., 2013 ONSC 2382, an Ontario motion for summary judgment in an occupiers' liability case. The plaintiff in that case slipped and fell on a walkway that formed the main entrance to a Tim Hortons operated by the defendant, McBride Corp., a franchisee. The place where the plaintiff fell was not included in the premises leased by McBride Corp, but rather was owned by the landlord. The landlord engaged the services of a winter

maintenance contractor to maintain the parking lot and walkways. As a tenant, McBride was responsible for paying its proportionate share of common area costs towards the maintenance of external areas, including the area where the plaintiff fell. The evidence indicated, however, that in addition to paying its share of the landlord's operating expenses, McBride's employees assumed responsibility for maintaining the walkway.

[54] The main issue was whether a trial was required to determine if McBride was an occupier under Ontario's legislation. Justice Smith ruled:

> [25] I find that McBride has not met its onus on a balance of probabilities to satisfy me that there is no genuine issue requiring a trial to determine whether or not it is an occupier under the OLA because its employees assumed responsibility for maintaining the walkway in a safe condition by checking it regularly and salting the walkway outside of the leased premises as required, which constituted the main entrance to the Tim Hortons restaurant. This case is very similar to the facts in *Moody*, *supra*, as the entrance way was used almost exclusively by customers of the Tim Hortons restaurant and this entrance/walkway was maintained by employees of McBride.
>
> [Emphasis Added]

[55] This case does not support the plaintiff's position that financial contribution by a commercial tenant to the landlord's operating costs, on its own, makes the tenant an occupier of the common spaces under the *OLA*. The court's decision that there was a genuine issue as to whether McBride was an occupier was based on McBride's employees having taken it upon themselves to regularly maintain the walkway, and the fact that the entrance way was used almost exclusively by customers of the Tim Hortons. These facts are distinguishable from the case before me. In the present case, Shoppers' customers were not the only or primary users of the area where the plaintiff allegedly fell; it is the common entrance to the Fenwick Building used by all commercial tenants and their customers. Nor is there any evidence that Shoppers ever took any action to inspect, salt, or otherwise maintain the common entrance or the turn-about area where the plaintiff alleges she fell.

[56] The facts of the plaintiff's case are also distinguishable from those in *MacKay v. Starbucks Corp. supra,* In *MacKay*, *supra*, the defendant, Starbucks, had exclusive use of the patio area where the plaintiff claimed to have fallen. Starbucks maintained the area in question, including the patio and area leading to the patio by the sidewalk. Employees were given a shovel and salt and sand to care for the area, and instructed to maintain a clear passageway to ensure

customers' safety. These facts led the trial judge to find that Starbucks had the requisite responsibility and exerted the requisite amount of control over the sidewalk entrance to its patio and over its customers who used that area to access its store to be an occupier within the meaning of the Ontario legislation. The Ontario Court of Appeal affirmed the trial judge's decision.

[57] Again, Shoppers neither created nor controlled the common entrance, which was used by all tenants and the public who enter the Fenwick Building to visit any of the offices or businesses inside. The plaintiff has led no evidence that Shoppers has ever maintained nor monitored this common entrance area.

[58] The plaintiff has not provided a single authority to support her position that a commercial tenant's financial contribution to the landlord's operating expenses, without more, is sufficient to give rise to an occupier's duty of care under the *OLA*, such that her claim has a real chance of success.

[59] The plaintiff has not established that the challenged pleading has a real chance of success. As a result, I grant Shoppers' motion for summary judgment.

Conclusion

[60] I grant summary judgment dismissing the plaintiff's claim against Shoppers. Both parties requested the ability to provide written submissions on costs. Unless the parties can reach agreement, written submissions shall be provided to the court within 30 days of this decision.

Brothers, J.