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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CONCEPCION MEJIA, Plaintiff and Appellant, v. CITY OF SAN FERNANDO, Defendant and Respondent.	B283079 (Los Angeles County Super. Ct. No. BC591676)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle Williams, Judge. Affirmed.

Ball & Bonholtzer and Eric Bonholtzer for Plaintiff and Appellant.

Alderman & Hilgers and Allison R. Hilgers for Defendant and Respondent.

Concepcion Mejia sued the City of San Fernando (the City), alleging she sustained injuries after tripping and falling on an elevated section of sidewalk. The trial court granted summary judgment in the City's favor after determining the deviation in the sidewalk was trivial as a matter of law. Mejia appealed, and we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Around 8:00 p.m. on February 19, 2015, Mejia was walking on the sidewalk with her boyfriend, Fernando Cerritos, about a block and a half from her home in San Fernando. Mejia's toe struck a portion of the sidewalk that had been raised by tree roots, causing her to fall and suffer a broken wrist. Mejia subsequently filed a complaint against the City, in which she alleged a "2–3 inch elevated gap in the sidewalk was seamlessly blended with the pavement, and being unaware of the gap, [she] fell onto the pavement because of it, thus causing her to sustain severe and debilitating injuries."

The City moved for summary judgment, arguing the deviation in the sidewalk was not hidden and constituted a trivial defect as a matter of law. In support, the City submitted a declaration from Dale Warren, who supervises repairs to the City's public walkways. Warren inspected the sidewalk where the incident occurred and measured the deviation to be no more than one inch. Warren said the City had no record of other trip and fall accidents at the location.

The City also submitted excerpts from Mejia's deposition, in which she testified the incident occurred very close to her home, she was not looking down at the sidewalk when she fell, and there were streetlights and "medium" light sufficient to see where she was walking. The City pointed out that Mejia failed to

allege "any other conditions which contributed to the incident, such as poor lighting, weather conditions, moisture, or debris on the ground."

In opposition to the City's motion, Mejia relied primarily on a declaration from Philip Rosescu, who is a civil engineer. According to his declaration, Rosescu personally inspected the area where the incident occurred and measured the deviation in the sidewalk to be one and nine-sixteenths inches. He also measured the illumination in the area.

Rosescu opined that the "subject height differential and also the subject area in general presented a substantial trip hazard for pedestrians acting in a reasonable manner and thus . . . constituted a dangerous condition of public property at the time of the incident." He explained that studies of human ambulation have shown a minimum toe clearance between 0.50 and 0.60 inches, and any height differential in excess of that amount has the substantial possibility of causing a pedestrian to trip. Further, the height differential here was high enough to cause a trip, but low enough that it would not be obvious. In addition, Rosescu said a "shadow cast by the adjacent street light post would have completely obscured and concealed the subject area and sidewalk uplift at the time of the incident," and there were no visual cues or color differentials to draw attention to the deviation. Rosescu further noted his measurements showed illumination significantly below the minimum amount necessary for hazard detection, as stated in the Illuminating Engineering Society of North America's Lighting Handbook.

In addition to Rosescu's declaration, Mejia submitted excerpts of Warren's deposition, in which he testified that a year prior to the incident, a resident reported an uplift in the sidewalk

at the same location where Mejia fell. The City responded by partially "ramping" the sidewalk with asphalt. In response to counsel's questioning, Warren agreed the City repairs sidewalk deviations over three-quarters of an inch, but does not repair smaller deviations, which it considers trivial.

Mejia also submitted numerous photographs of the sidewalk where the incident occurred, which were attached to a declaration from her counsel. Counsel represented the photographs had been taken by Mejia and Cerritos. Mejia previously identified the photographs attributed to her, and said she took the photographs about a week after the incident. The photographs were taken in daylight and show a height differential between the slabs of concrete, and an asphalt "ramp" spanning a little over one-half the width of the sidewalk. Mejia indicated she tripped on a portion of the sidewalk directly adjacent to the asphalt ramp.

The photographs attributed to Cerritos display the area at night and appear to show a tall light pole casting a shadow over the sidewalk deviation. Cerritos explained at his deposition that the sidewalk generally looked the same in his photographs as it had at the time of the incident, although it appeared the City had since performed additional repair work on the deviation.[1]

In its reply, the City urged the court not to consider Mejia's arguments regarding a shadow because she failed to raise the issue in her complaint, government claim, and discovery responses. The City further argued the Cerritos photographs

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[1] At oral argument, Mejia's counsel represented that the photographs attached to his declaration were the same ones identified by Cerritos at his deposition.

were unauthenticated, lacked foundation, were of poor quality, and appeared to be altered. It asserted separate objections to the photographs on the same bases. In addition, the City objected to substantially all the substantive portions of Rosescu's declaration, with the exception of his statements regarding the size of the deviation.

The court sustained the City's objections to Rosescu's declaration. It overruled the City's foundation objections to the Cerritos photographs on the basis that the "photos were adequately identified during deposition, and [counsel] has personal knowledge such that he can authenticate the photos that were identified during deposition." The court did not address the City's assertion that Mejia failed to include in her complaint allegations related to the shadow.

After issuing its evidentiary rulings, the court granted the City's motion for summary judgment, finding the deviation in the sidewalk trivial as a matter of law. The court assumed the deviation was one and nine-sixteenths inches, but noted that deviations as large as one and one-half inches have previously been found trivial. The court did not consider the additional one-sixteenth of an inch in this case to be meaningful. The court further determined the Cerritos photographs were not sufficient to create a triable issue of fact, explaining: "The photos are not clear, and the Court cannot determine from the photos that there was a crack obscured by a shadow. At most, it appears a portion of the crack may have been obscured by a shadow; the remainder of the crack, however, is visible. Additionally, Plaintiff testified she was not looking down, but instead was looking straight ahead, at the time she was walking, so it is not clear that the existence of a crack would have been noted even absent a shadow

over a portion of same."

The court entered judgment in favor of the City, and Mejia timely appealed.

DISCUSSION

Mejia contends the trial court erred in granting summary judgment on the basis that the sidewalk deviation was a trivial defect as a matter of law. We disagree.

I. Standard of Review

Summary judgment will be granted when the moving and opposing papers "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) As a general rule, a defendant moving for summary judgment bears the burden of showing that one or more elements of a cause of action cannot be established, or that there is a complete defense to the action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

When the moving defendant makes this required showing, the burden shifts to the plaintiff to produce responsive substantial evidence sufficient to establish the existence of a triable issue of material fact on the plaintiff's cause of action. (See, e.g., *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261; *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.) Thus, a movant makes an initial showing on a motion for summary judgment when its evidence would be sufficient to sustain a judgment in that party's favor, and summary judgment is proper if the opposing party does not present evidence that is sufficient to present a triable issue. (See, e.g., *Nicewarner v. Kaiser Steel Corp.* (1983) 143 Cal.App.3d 31, 35.) An issue of fact "can only be created by a conflict [in the] evidence . . . not . . . by speculation or

conjecture." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807.)

On an appeal of summary judgment in favor of a defendant, we review the matter de novo, " ' " 'considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " ' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717.) We "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Ibid.*)

II. Applicable Law

Government Code section 835 provides: "[A] public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred . . . ." (Gov. Code, § 835.) A "dangerous condition" is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a); see § 830.2 [defining defects that are "not dangerous"].)

Whether a given defect is a dangerous condition is generally a question of fact. (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726 (*Fielder*).) Nonetheless, under what is referred to as the trivial defect doctrine, the court may determine that a defect is so minor, trivial, or insignificant that it does not constitute a dangerous condition as a matter of law.

(See *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 (*Stathoulis*); *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*); *Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388 (*Cadam*).) The doctrine stems from the recognition that "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition. The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects." (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 398.) The doctrine serves as a "check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Id*. at p. 399.)

III. We Decline to Consider Mejia's Theory that a Shadow Obscured the Deviation

The City urges us not to consider Mejia's arguments and evidence related to a shadow having been cast over the deviation. It contends that because Mejia did not raise the issue in her complaint, such evidence cannot be used to defeat its motion for summary judgment. We agree.[2]

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[2] Mejia insists the City waived this argument by failing to sufficiently raise it below. We disagree. In its motion for summary judgment, the City noted that Mejia failed to allege "any other conditions which contributed to the incident, such as poor lighting, weather conditions, moisture, or debris on the ground." Then, in its reply to Mejia's opposition, the City argued her reliance on evidence of the shadow was improper, and cited authority for the proposition that opposition papers cannot create issues outside the pleadings. This was more than sufficient to preserve the issue for appeal.

It is well-settled that "the pleadings set the boundaries of the issues to be resolved at summary judgment. [Citations.] A 'plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]' [Citations.] A summary judgment or summary adjudication motion that is otherwise sufficient 'cannot be successfully resisted by counterdeclarations which create immaterial factual conflicts outside the scope of the pleadings . . . .' [Citation.]" (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648; see *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.) Accordingly, "[i]f the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264–1265.)

In her complaint, Mejia alleged she was injured due to a "2–3 inch elevated gap in the sidewalk . . . seamlessly blended with the pavement," which constituted a dangerous condition. The complaint is completely devoid of allegations even suggesting that anything other than the nature of the deviation created the dangerous condition. Nonetheless, in opposing the motion for summary judgment, Mejia argued the deviation was dangerous not simply due to its nature, but also because it was located next to a light pole that cast a shadow over it. This constituted a new theory as to why the condition was dangerous and raised a significant factual issue outside the scope of the pleadings. Under these circumstances, the proper course was to seek leave to amend the complaint prior to the hearing on the motion for summary judgment. There is no evidence in the record, however, that Mejia ever attempted to do so.

Mejia insists there was no need to amend the complaint because she was not required to allege the aggravating circumstances that created the dangerous condition. We disagree. "[A] claim alleging a dangerous condition may not rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439; see *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 439 [claims against a public entity must be pleaded with particularity].) Accordingly, to the extent Mejia's claim was premised on the fact that a shadow contributed to the dangerous condition—as she argued in opposition to the motion for summary judgment—she was required to include such allegations in her complaint.

Mejia further argues that requiring plaintiffs to allege all circumstances that contribute to a dangerous condition would put them at a disadvantage because it would lead to the disclosure of expert theories at the outset of litigation, well before they otherwise would have to be disclosed. Not so. If a plaintiff decides to rely on a theory not pleaded in the complaint—as Mejia did here—he or she can simply move to amend the complaint. Indeed, " '[t]here is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding.' " (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) That option was available to Mejia; she simply chose not to exercise it.

We also find no merit to Mejia's assertion that she adequately raised the issue of the shadow by alleging in the complaint that the deviation "seamlessly blended with the pavement." Even read liberally and in the light most favorable to

Mejia, it is clear this allegation refers to the nature of the deviation itself; it does not refer to any outside condition, such as a shadow.

Because Mejia failed to allege in her complaint that a shadow contributed to the dangerous condition, we decline to consider her arguments and evidence related to such a theory.

IV. The Trial Court Did Not Abuse its Discretion in Sustaining Objections to Rosescu's Declaration

Mejia contends the trial court erroneously sustained the City's objections to Rosescu's declaration.[3] We review the trial court's evidentiary rulings for abuse of discretion (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181), and find no error.

A. Background

The City asserted numerous objections in the trial court to various portions of Rosescu's declaration. In particular, it objected to his references to studies of human ambulation, his opinion that the deviation would have been difficult to see due to its size and the lack of visual cues, and his ultimate conclusion that the deviation was dangerous. The City further objected to Rosescu's references to light measurements and his observation that a nearby pole would have cast a shadow over the deviation. Among other things, the City asserted these portions of Rosescu's declaration lacked foundation, were irrelevant, and were not

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[3] Mejia asserts the trial court sustained objections to Rosescu's declaration "in its entirety." She is incorrect. The court sustained the City's objections to specific paragraphs of the declaration and considered the remaining portions to which no objections were raised. Indeed, the court relied on Rosescu's measurements of the deviation, which it assumed to be true.

necessary to determine whether the sidewalk deviation is dangerous. The court sustained all of the City's objections on the basis that "expert evidence is not necessary or helpful in determining whether a defect is trivial as a matter of law."

B. Analysis

Mejia first contends the trial court erred in sustaining objections to Rosescu's expert opinions related to "gait mechanics" and "human factors." She insists the opinions were helpful because they established that "as the height [of a deviation] rises so does the danger to pedestrians," and the deviation in this case was "high enough to pose a substantial tripping hazard . . . yet low enough to make it difficult to see . . . . "

Expert opinion is limited to testimony "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) In this case, whether the height of the sidewalk deviation posed a danger to pedestrians was a matter well within the common knowledge of the trial court. (See *Fielder, supra*, 71 Cal.App.3d at p. 732 ["It is well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous"]; *Caloroso, supra*, 122 Cal.App.4th at p. 928 ["no expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous"]; *Cadam, supra*, 200 Cal.App.4th at p. 389 [same].) Indeed, to determine whether the height of the defect rendered it dangerous, the court could simply review the numerous photographs of the sidewalk submitted by the parties; there was no need to resort to expert opinion. Accordingly, the trial court did not abuse its discretion in

sustaining the City's objections to the portions of Rosescu's declaration related to "gait mechanics" and "human factors."

Mejia's reliance on *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, is misplaced. In *Kasparian*, the Court of Appeal considered expert declarations submitted by both parties before concluding there were triable issues of fact as to whether a recessed drain was dangerous. (*Id.* at pp. 28–30.) Mejia contends *Kasparian* shows that courts may consider expert evidence—including evidence related to "human factors"— to determine if a defect is trivial. *Kasparian*, however, is distinguishable. Unlike the present case, the defendant in *Kasparian* waived his objections to the expert declarations. (*Id.* at p. 23.) Moreover, the nature of the defect in that case was more complex than the simple sidewalk deviation at issue here, and involved questions regarding industry standards and building codes related to drain installation. (*Id.* at p. 29.)

Mejia next contends the trial court erred in excluding portions of Rosescu's declaration concerning his light measurements and his statement that a nearby pole would have cast a shadow over the deviation. We agree with Mejia that the court erred in its reasoning for excluding this evidence. The evidence was not expert opinion, but instead concerned Rosescu's personal observations. Nonetheless, we review the trial court's ruling, not its reasoning; if the ruling is correct on any ground, we affirm. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.) Here, Rosescu's observations are relevant only to Mejia's theory that a shadow contributed to the dangerous condition. As discussed above, Mejia could not rely on such a theory because she failed to assert it in her complaint. Accordingly, the evidence was irrelevant and properly disregarded by the trial court.

V. The Deviation in the Sidewalk was Trivial as a Matter of Law

Mejia asserts that, even absent evidence of the shadow, there was sufficient evidence to create triable issues of fact as to whether the deviation constituted a dangerous condition. We disagree.[4]

To determine whether a condition is trivial as a matter of law, the size of the defect is an important factor, but not the only one. (*Fielder, supra*, 71 Cal.App.3d at p. 731.) The court must also consider circumstances that might render the defect more dangerous than its size would suggest. This includes "whether the defect consisted of a mere difference in level of two adjacent horizontal slabs as distinguished from a protrusion such as a piece of steel reinforcement (rebar) sticking above the concrete, whether the accident occurred in an area where the view of the defect is obstructed, whether the defect resulted in injuries to persons other than the claimant, the shape and configuration of the defect, whether it occurred at night in an unlighted area, and any other conditions surrounding the defect." (*Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 267–268, fn. omitted; see *Stathoulis, supra*, 164 Cal.App.4th at pp. 567–568; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.)

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[4] Mejia insists the City did not meet its initial burden by submitting sufficient evidence to show the deviation is trivial. We disagree. The City presented evidence that the deviation is at most one inch. It further submitted Mejia's deposition testimony in which she recounted the circumstances of the incident, and pointed out that Mejia alleged no other aggravating circumstances. This was sufficient to meet the City's initial burden.

Generally, "when the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder, supra*, 71 Cal.App.3d at p. 726.) However, "no court has fixed an arbitrary measurement in inches below which a defect is trivial as a matter of law and above which it becomes a question of fact whether or not the defect is dangerous." (*Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43 (*Beck*); see *Fielder, supra*, at p. 731 [a rigid "tape measure test" is "unsound"].) Indeed, numerous courts have found defects of one inch or more to be trivial, insignificant, or minor. (See *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 363 (*Nicholson*) [one and one-half inches]; *Meyer v. City of San Rafael* (1937) 22 Cal.App.2d 46, 47 (*Meyer*) [up to one and three-eighths inches]; *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 316 (*Heskel*) ["at most a few inches in height"]; *Dunn v. Wagner* (1937) 22 Cal.App.2d 51, 53 [one inch]; *Beck, supra*, at pp. 41–42 [one and seven-eighths inches].)[5]

In *Beck, supra*, 150 Cal.App.2d 39, for example, the plaintiff allegedly tripped over a one and seven-eighths inch deviation in a sidewalk, which had apparently been caused by tree roots. (*Id.* at pp. 40–41, 43.) The court determined the

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[5] Mejia correctly points out that several of these cases concerned only whether the owner had constructive notice of the defect. (See *Nicholson, supra*, 5 Cal.2d 361; *Meyer, supra*, 22 Cal.App.2d 46; *Heskel, supra*, 227 Cal.App.4th 313.) The California Supreme Court, however, has looked to some of those cases to determine whether a defect was dangerous (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74), and Courts of Appeal frequently do the same (see, e.g., *Stathoulis, supra*, 164 Cal.App.4th at p. 568; *Fielder, supra*, 71 Cal.App.3d at p. 724, fn. 4).

deviation was trivial as a matter of law, explaining that "the difference in elevations of the sidewalk was in a residential area at the edge of the city. There was nothing to hide the defect or obstruct the view of one approaching it. The respondent tripped over it in broad daylight. She testified nothing distracted her attention as she approached the point where she tripped and fell." (*Id.* at pp. 43–44.)

Considering all the circumstances here, we conclude the deviation in the sidewalk was trivial as a matter of law. The evidence showed the deviation was, at most, one and nine-sixteenths inches, which is smaller than the defect determined to be trivial in *Beck*. Although the deviation was minor, it was simultaneously obvious. Mejia alleged the deviation blended seamlessly with the pavement, but her photographs of the area taken shortly after the incident show otherwise. The photographs reveal significant contrast between the exposed portion of the raised slab and the unraised slab, which immediately draws attention to the minor deviation. Further, the fact that a portion of the sidewalk is ramped makes it obvious the slabs are not level. Mejia's photographs also reveal no jagged edges or debris around the deviation that might have made it more dangerous.[6] Further, although the incident took place in the evening, Mejia testified there were streetlights and "medium" light sufficient to see where she was walking. Finally, there is no

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[6] Mejia insists there was broken asphalt near the deviation, which she claims is apparent in photographs taken by Warren three months after the incident. We do not perceive any broken asphalt in those photographs. Moreover, Mejia's own photographs—which she took one week after the incident—show no debris near the deviation.

evidence that any other pedestrian has been injured at the same location.[7] Considering these circumstances, we think a reasonably prudent pedestrian approaching the deviation would have had no difficultly avoiding an injury. The defect was trivial as a matter of law.

Mejia insists evidence that she was unfamiliar with the area is sufficient to preclude summary judgment. We disagree. Regardless of whether Mejia had previously traversed this specific section of sidewalk, the deviation was both minor and obvious, making it easily avoidable. Evidence of Mejia's knowledge of the area has little, if any, significance under these circumstances.

We are also not persuaded by Mejia's contention that the City implicitly admitted the deviation was dangerous. In *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, the California Supreme Court refused to find a two-inch hole in a sidewalk trivial as a matter of law after a city inspector admitted the condition was hazardous and required correction. (*Id.* at pp. 811–812.) Mejia argues there was a similar admission in this case, and points to Warren's deposition testimony that the City does not repair deviations under three-quarters of an inch, which it considers trivial.

We do not agree with Mejia that Warrens's testimony implies the City considers larger deviations to be dangerous. Moreover, unlike the city inspector in *Laurenzi*, Warren never

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[7] Mejia argues that, because the City previously received a complaint about the sidewalk, it is likely there had also been an accident at the location. This is pure speculation and not sufficient to create a triable issue. (See *Horn v. Cushman & Wakefield Western, Inc., supra*, 72 Cal.App.4th at p. 807.)

admitted the specific deviation at issue was dangerous. In any event, the City's opinion on what constitutes a trivial deviation is not controlling. (See *Cadam, supra*, 200 Cal.App.4th at p. 388.) Whether the deviation was trivial is an issue of law for the court to decide. For all the reasons discussed above, we conclude it was just that.

DISPOSITION

The judgment is affirmed. The City is awarded its costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.