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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| AURORA RODRIGUEZ,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF LYNWOOD,<br><br>Defendant and Respondent. | B276499<br><br>(Los Angeles County Super. Ct. No. BC514907) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Tofer & Associates, Michael P. Green, for Plaintiff and Appellant.

Alvarez-Glasman & Colvin, Noel Tapia, Christopher G. Cardinale, and Tania Ochoa, for Defendant and Respondent.

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In this trip and fall case, Aurora Rodriguez appeals from a summary judgment in favor of respondent City of Lynwood. We conclude the sidewalk defect over which appellant tripped and fell was trivial as a matter of law. The judgment is affirmed.

## FACTUAL AND PROCEDURAL SUMMARY

Appellant broke her wrist when she fell after stumbling over a depression in the sidewalk at Martin Luther King Boulevard in Lynwood. She was walking from St. Francis Hospital, where she worked, to Quest Lab across the street, along a route she had taken many times over the years without an incident. She had crossed the boulevard at a crosswalk and was walking southbound when she encountered the triangular depression at the corner of one of the panels in the sidewalk. She had seen the depression before. The incident occurred mid-morning on July 22, 2011. The day was clear and the sidewalk dry.

Appellant filed a government tort claim and then sued respondent on the theory that the defect in the sidewalk was a dangerous condition of public property (Gov. Code, § 835). Respondent moved for summary judgment, arguing that the defect was trivial, and respondent lacked notice of it. Respondent relied on a declaration by John Brault, a biomechanics consultant, who investigated the scene of the fall, took photographs, and measured the depression in 2014. According to Brault's measurements, the depression was seven-eighths of an inch deep, and four and one-half inches long and wide. Brault saw no obstructions or shadows at the scene. He opined that walking southbound, as appellant was, it would have been "highly difficult" to trip over the depression. Respondent also

relied on a declaration by its employee Joseph Kekula, who reviewed city records between 2008 and 2011 and found no evidence of accidents and complaints related to that location.

Appellant's opposition to the motion was based on the declaration of Gary Gsell, a retired street services superintendent for the City of Los Angeles. Having reviewed photographs provided by Brault and appellant, Gsell opined that the depression was seven-eighths of an inch deep at one end and one and one-quarter inches at the other.

Gsell stated that in the 1970's, the manual of the City of Los Angeles Bureau of Street Services set a standard for repair of defects one-quarter of an inch deep, but the standard became more "relaxed" in the 1980's, focusing on "safety versus height." Nevertheless, the City of Los Angeles Department of Building and Safety recommended repair of one-quarter of an inch height differentials to comply with the Americans with Disabilities Act, and as superintendent, Gsell instructed his subordinates to follow that standard. Gsell also claimed to be "aware of other standards in other communities within the Southern California area," and found a similar "standard practice" of repairing defects one-quarter of an inch or greater when crews already were in the field, and three-quarters of an inch or greater after an inspection.

Based on photographs obtained from "Google Earth," Gsell opined that respondent had created the defect. He reached that conclusion because, in 2008, the depression in the sidewalk abutted an unimproved wedge of dirt, but the wedge had been partly covered with concrete panels by 2011. Gsell assumed the panels were laid by respondent and that they "invited" pedestrians to walk on the defective part of the sidewalk. Based on a photograph of appellant's shoe in the depression, which was

taken sometime after the fall, Gsell opined that "the right edge of her shoe caught the northern edge" of the panel that was laid sometime between 2008 and 2011, where before there would have been a depression, but no edge.

The trial court granted respondent's motion, finding that the depression, measuring less than one inch, was trivial as a matter of law as there were no additional aggravating factors.

This appeal followed.

## DISCUSSION

A motion for summary judgment may be granted only "if all the papers submitted 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); *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) We review the trial court's decision de novo, viewing the evidence in the nonmoving party's favor. (*Ibid.*)

Government Code section 835 provides in relevant part that "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." The plaintiff also must establish that either the condition was created by a negligent act or omission attributable to the public entity or the public entity had actual or constructive notice of the condition. (*Ibid.*) A public entity is charged with constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for such a period of time and was

of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (*Id*., § 835.2, subd. (b).)

"A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury . . . ." (Gov. Code, § 830.2; see also *id*., § 830, subd. (a).) To determine whether a defect is trivial as a matter of law, the court first "reviews evidence regarding the type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of any additional factors such as the weather, lighting and visibility conditions at the time of the accident, the existence of debris or obstructions, and plaintiff's knowledge of the area. If these additional factors do not indicate the defect was sufficiently dangerous to a reasonably careful person, the court should deem the defect trivial as a matter of law." (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567–568 (*Stathoulis*), citing *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 729 (*Fielder*).)

Absent aggravating circumstances, courts have held height differentials of up to one and seven-eighths inches trivial as a matter of law either because they were not dangerous or because they were insufficient to impart notice of dangerousness. (See, e.g., *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 364–366 (*Nicholson*) [assuming one and one-half inches height differential was dangerous, but finding it "minor" for purposes of

constructive notice, absent additional aggravating factors]; *Whiting v. City of National City* (1937) 9 Cal.2d 163, 166 [finding three-quarters of inch height differential to be "minor" defect]; see also *Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 44 [no liability for height differential of up to one and seven-eighths inches absent aggravating factors]; *Fielder*, *supra*, 71 Cal.App.3d at pp. 721, 733–734 [depression of three-quarters of inch deep was trivial absent evidence of surrounding circumstances; but see *Barone v. City of San Jose* (1978) 79 Cal.App.3d 284, 289–290 [reversing summary judgment in case of "irregular and jagged break with a difference in elevation of approximately one inch," absent evidence of surrounding circumstances and in light of plaintiff's ongoing efforts to obtain records of prior accidents].)

Generally, it is the presence of aggravating circumstances that creates a triable issue of material fact for height differentials at about the one-inch mark. (*Fielder*, *supra*, 71 Cal.App.3d at pp. 729–731 [distinguishing cases where height differential was two or more inches]; see, e.g., *Stathoulis*, *supra*, 164 Cal.App.4th 559, 567–569 [three closely situated irregularly shaped one-inch potholes in area about whose condition prior complaint had been lodged]; but see *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 831 [amendment concerning res ipsa loquitur (Gov. Code, § 830.5) intended to eliminate inference of dangerousness arising from mere happening of accident, as applied to relatively trivial defects or unforeseeable uses of public property in older cases].)

Appellant based her argument that there are triable issues of material fact on her expert's declaration. There are two problems with her approach. First, an expert's opinion does not determine whether a defect is dangerous due to its depth because

the court must independently evaluate the circumstances of the fall and it is "'well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous.' [Citation.]" (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928 (*Caloroso*), citing *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705 & *Fielder*, *supra*, 71 Cal.App.3d at p. 732.)

Second, the value of an expert's opinion is only as good as the facts and reasoning upon which it is based. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; see also *Nardizzi v. Harbor Chrysler Plymouth Sales, Inc*. (2006) 136 Cal.App.4th 1409, 1415 [courts are not bound by speculative expert testimony].) To the extent that Gsell opined the depression was over an inch deep at one end, his opinion is not supported by the evidence. The photographs in the record, on which Gsell relied, show that the depth of the depression was measured with a ruler gauge and a transparent ruler. The ruler gauge clearly shows a depth of less than an inch at the point of measurement. The transparent ruler indicates a similar reading. It is unclear how Gsell reached his conclusion that the depression was an inch and one-quarter deep without performing an actual measurement. That the farther edges of the depression can be seen next to the ruler gauge and through the transparent ruler and that they appear to be higher up on the two-dimensional photographs is not evidence of an alternative measurement of depth. But even accepting Gsell's opinion that the depth of the depression is slightly over one inch, that fact is not by itself determinative of the dangerousness of the defect. (See *Fielder*, *supra*, 71 Cal.App.3d at p. 729.)

Gsell's averments about the standard practices of repairing sidewalk defects between one- and three-quarters of an inch in

the City of Los Angeles and some unnamed municipalities in Southern California are insufficient to raise a triable issue of fact. As to the standards and practices in the City of Los Angeles, Gsell referenced his department's recommendations and his personal instructions, which he suggested were required to comply with "the Americans with Disabilities Act." Gsell did not claim any knowledge of respondent's standards and practices; nor is there evidence that the height differentials he referenced have been adopted as indicators of dangerousness in California or as standards binding on respondent for purposes of establishing liability under Government Code section 835. (Cf. *Stathoulis*, *supra*, 164 Cal.App.4th 559, 568, fn. 4 [expert fails to establish binding standard on lighting]; *Caloroso*, *supra*, 122 Cal.App.4th at pp. 928–929 [expert failed to establish building codes and standards "have been accepted as the proper standard in California for safe sidewalks"].)

Gsell's opinion about the mechanics of appellant's fall is speculative. The photographs in the record are not identified by the exhibit numbers referenced in his declaration, but as described, we assume he based his opinion on the photograph on page 110 of the clerk's transcript, which depicts a hand placing the front of a sneaker into the depression. Since appellant testified she was southbound when she fell, the right edge of the sneaker appears to cover the eastern edge of the panel Gsell assumed respondent poured between 2008 and 2011. The photograph does not show whether the sneaker "caught" the edge of the panel, nor did appellant testify that was how she tripped.

Gsell's assumption that respondent created the defect in the sidewalk also is speculative. The photographs on which he relies indicate that the subject depression preexisted the laying of

panels in the abutting unimproved part of the sidewalk. There is no evidence that respondent laid the panels or when exactly they were laid; nor is there any indication that appellant sought discovery on these issues. (Cf. Code Civ. Proc., § 437c, subd. (h) [summary judgment motion may be denied or continued to allow discovery].)

Our independent review of the evidence indicates that the defect in the sidewalk was insignificant. Absent prior accidents or any other aggravating circumstances regarding its nature and location, and in light of appellant's admitted familiarity with the area and her prior knowledge of the existence of the defect, we find no triable issues of fact regarding its dangerousness. Summary judgment for respondent therefore was proper.

## DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.