No. 24-CV-300

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ELIZABETH LITTELL
APPELLANT,

v.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES/

While walking on the sidewalk in Chinatown, appellant Elizabeth Littell tripped and fell on a granite paver in front of a building entrance. The building's owner had installed the paver pursuant to a regulation that permits property owners in the area to install nonstandard paving materials (in place of the standard red bricks) on the public sidewalk. The regulation further provides, however, that "[t]he adjacent property owner shall be responsible for the maintenance of any nonstandard paving material and design." 24 DCMR § 1105.9. Littell sued the District of Columbia for her injuries, but not the property owner. The District moved for summary judgment on several grounds, including that: (1) the District was not responsible for maintaining the nonstandard granite pavers because the regulation placed this responsibility solely on the building owner; and (2) Littell failed to show that the District had actual or constructive notice that the paver on which she tripped posed a hazardous condition. The Superior Court granted summary judgment on the first ground. The issues on appeal are:

1. Whether the trial court correctly granted the District summary judgment on the ground that the regulation placed responsibility for maintaining the nonstandard granite pavers solely on the building owner that installed them.

2. Whether the court's decision may be affirmed on the alternative ground that Littell failed to present evidence that the District had actual or constructive

notice that the granite paver over which Littell tripped created a hazardous condition.

3. Whether the court's decision may be affirmed on the alternative ground that the defective condition, a half-inch elevation between pavers, was de minimis as a matter of law.

STATEMENT OF THE CASE

On November 5, 2021, Littell filed her complaint. Appellant's Appendix ("App.") 10, 12-18. On February 3, 2022, the Superior Court (Dayson, J.) granted in part the District's motion to dismiss, dismissing Littell's claim of negligence per se. App. 20-27. On March 1, 2024, the court granted summary judgment for the District on the remaining counts. App. 28-36. Littell filed a timely appeal on March 26, 2024. App. 1.

STATEMENT OF FACTS

1. Pertinent Regulations.

Littell tripped in front of 810 7th Street, NW. It is undisputed that this location is within the "Downtown Streetscape Area" governed by Chapter 11 of Title 24 of the D.C. Municipal Regulations. *See* 24 DCMR § 1199.1 (defining this area). The regulations concerning "Standards for Sidewalk Treatment" in the Downtown Streetscape Area provide that the predominant material is "red brick." *Id.* §§ 1105.5 to 1105.6. Adjacent property owners, however, may replace the red

brick in places: "Variations in the predominant paving material may be made at building entrances and along the building line." *Id.* § 1105.9. Crucially, the regulations provide that, in that scenario, responsibility shifts to that property owner: "[t]he adjacent property owner shall be responsible for the maintenance of any nonstandard paving material and design." *Id.* § 1105.9(a). The regulations also require that "[t]he adjacent property owner shall always maintain and store at the site an extra ten percent (10%) of the nonstandard paving material." *Id.* § 1105.9(c).

2. Littell's Complaint And The Trial Court's Order Dismissing Two Claims.

In November 2021, Littell filed a complaint against the District alleging that she tripped and fell on November 9, 2018, at about noon, while walking on the sidewalk outside 810 7th Street, NW. App. 12-13. Littell alleged that she tripped over a "lip" between two "concrete blocks" that comprised the sidewalk, and that the District was responsible for the maintenance and safety of this portion of the sidewalk. App. 13. The complaint set forth four counts: (1) negligence, (2) negligence per se, (3) agency, and (4) negligent hiring, training, and supervision. App. 17-18.

The District moved to dismiss the complaint for failure to state a claim, and in February 2022 the Superior Court granted the motion in part. App. 20-27. The court dismissed Littell's claim of negligence per se, which rested on the allegation

that sidewalk condition violated provisions of the Americans with Disabilities Act ("ADA") and the International Building Code. App. 24-26; *see* App. 13. The court held that these provisions did not establish safety standards for sidewalks and thus could not support the negligence per se claim. App. 25-26. The court also clarified that Littell's third count, agency (i.e., vicarious liability), was "a theory of liability, . . . not a separate cause of action." App. 26. Littell does not challenge either aspect of this order on appeal.

3. The District's Motion For Summary Judgment.

During discovery, Littell produced more detailed evidence about the surface on which she tripped. In her deposition, she testified that she tripped on a pink paver that was slightly uplifted along the edge where it abutted a gray paver. Supplemental Appendix ("SA") 325 (Littell Depo. 60-61). Littell marked the spot with an arrow in the photograph below. SA 401.

According to Littell's expert, the vertical lip created by the pink paver was roughly half an inch. SA 292 ("approximately ½").

After discovery, the District moved for summary judgment on Littell's remaining claims. As relevant here, the District pressed two main arguments.

First, the District argued that it was not responsible for maintaining the site where Littell tripped. That portion of the sidewalk was indisputably composed of nonstandard granite pavers, not standard red bricks. The Downtown Streetscape regulations placed responsibility for maintaining the nonstandard granite pavers solely on the adjacent property owner, and not on the District. SA 4-5 (citing 24 DCMR § 1105.9). The District contended that the adjacent property owner's maintenance responsibility flowed from the regulations as a matter of law and,

contrary to Littell's suggestion, did not require a separate "covenant of maintenance" between the owner and the District. Moreover, the District cited evidence that the adjacent building owner routinely inspected, maintained, and repaired the granite paver over which Littell had tripped. SA 379-80.

Second, the District argued that it did not have actual or constructive notice that these granite pavers posed a hazardous condition. Littell's primary evidence related to actual notice was a 311 submission by Jennifer Smith from October 2017 that broadly complained about "disrepair" along many blocks of the "brick sidewalk" on 7th Street. SA 86-87. Because this report never identified the location where Littell later tripped and referred only to "bricks," not granite pavers, it did not give the District actual notice of the hazard. Nor did Littell establish that the District had constructive notice, because she did not present any evidence about how long the defect existed before her fall. The District also produced photographs of the area in front of the building taken just weeks before the accident, which showed no visible defects in the pavers. SA 123-25 (October 19, 2018).

4. The Superior Court's Order Granting Summary Judgment For The District.

In March 2024, the Superior Court granted the District's motion for summary judgment. App. 28. The court held that, under 24 DCMR § 1105.9, the adjacent property owner (810 Seventh Avenue SPE, LLC) was responsible for the

maintenance of any paving material located at the entrance of its building that was not standard red brick, and the undisputed evidence showed that Littell tripped on a pink granite paver, not a red brick. App. 34. The court rejected Littell's argument that the District remained responsible because the District and the property owner had not signed a covenant of maintenance, noting that Littell "does not cite, and the Court cannot find, any authority for these assertions." App. 34. The court thus concluded that Littell could not establish that the District (rather than the building owner) had a duty to maintain the area where Littell tripped. App. 35. Given this holding, the court did not reach the District's lack-of-notice argument.

The court also held that Littell failed to establish that the District was negligent in hiring, training, or supervising its employees. SA 35. Littell does not challenge that ruling on appeal.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *See Clampitt v. Am. Univ.*, 957 A.2d 23, 28 (D.C. 2008). This Court's standard "is the same as the trial court's standard for initially considering a party's motion for summary judgment; that is, summary judgment is proper if there is no issue of material fact and the record shows that the moving party is entitled to judgment as a matter of law." *Id.* (citing Super. Ct. Civ. R. 56(c)).

SUMMARY OF ARGUMENT

1. The Superior Court properly held that Littell's negligence claim against the District failed because the District had no duty to maintain the portion of the sidewalk on which she tripped. As a matter of law, that duty belonged to the adjacent property owner. Under the common law, an adjacent property owner that makes special use of a sidewalk owes a duty to pedestrians to maintain it in a reasonably safe condition and is liable for injuries resulting from its negligence in failing to do so. The adjacent property owner here made "special use" of the sidewalk by installing decorative pavers and thus was liable for Littell's injuries by its failure to maintain them.

Here, there is more than just the common law: there is also positive law—a regulation concerning "Standards for Sidewalk Treatment," 24 DCMR § 1105—that places the duty to maintain the pavers on the adjacent property owner. The regulations permit "[v]ariations in the predominant paving material . . . at building entrances and along the building line" but provide that "[t]he adjacent property owner shall be responsible for the maintenance of any nonstandard paving material and design." *Id.* § 1105.9(a). Notably, the regulations do not impose any responsibility on the District to maintain nonstandard pavers installed by a property owner. The language of the regulation is unambiguous and supports the ruling of the trial court.

Littell's arguments to the contrary lack merit. *First*, she argues that there was no "covenant of maintenance" between the adjacent property owner and the District. But the owner's responsibility flows from the regulation, not any covenant, so the lack of a covenant is irrelevant. *Second*, she cites photographs of District personnel repairing the pavers, but provides no timeframe or context. In any case, the fact that District repaired the pavers on one occasion does not change the fact that the building owner is legally responsible for their maintenance. *Third*, she cites cases involving a snow-removal statute, but those decisions turned on that statute's provision of a specific remedy—a suit by the District government—which the regulation at issue here does not have. *Fourth*, she argues that if the District is not liable, a pedestrian would have no relief. This argument is refuted by cases making abutting (or adjacent) property owners liable for injuries caused by their special use of a public sidewalk.

2. An alternative ground for affirmance is that Littell failed to offer evidence that the District had either actual or constructive notice that the granite pavers on which she tripped presented an unsafe or defective condition. To begin, there was no evidence the District had actual notice. Below, Littell relied on a 311 service request by Smith, but this submission broadly complained about the status of many blocks of 7th Street and referred only to "bricks," not pavers. Littell also relied on an affidavit from Smith, made four months after the accident, stating that

she also tripped over the pavers. But Smith's affidavit does not say when this occurred and does not state that she relayed this information to District officials. Next, there was no evidence the District had constructive notice. Littell herself acknowledged that the defect was "latent" and provided no evidence of the length of time it existed. According to her expert, the lip she tripped on was only "about one half inch high." SA 292. Nor was the defect especially dangerous, like an open manhole. On the other hand, photographs of the area, some taken less than three weeks before the accident, show no visible defects.

3. Another alternative ground for affirmance is that the defect was de minimis as a matter of law. Minor defects in sidewalks in urban areas are prevalent and are generally not actionable. In *Briscoe v. District of Columbia*, 62 A.3d 1275 (D.C. 2013), a pedestrian tripped on a curb with an indentation two to three inches long and one inch deep. *Id*. at 1277. The trial court granted summary judgment in the District's favor and this Court affirmed, "conclud[ing] as a matter of law that any defect in the curbstone was *de minimis*." *Id*. at 1278-79. The half-inch lip between the pavers on which Littell tripped is substantially smaller than the defect in *Briscoe*. Moreover, appellate courts in other jurisdictions have held that sidewalk defects significantly greater than the one in this case were not actionable as a matter of law. Although Littell's expert asserted that the half-inch lip violated standards set by the 2013 District of Columbia Building Code and

2010 guidance implementing the Americans with Disabilities Act ("ADA"), he misinterpreted those standards, which do not say that a half-inch lip anywhere on a public sidewalk is a defect actionable in tort.

ARGUMENT

I. The Superior Court Correctly Held That The District Was Not Responsible For Maintaining The Nonstandard Pavers On Which Littell Tripped.

The trial court correctly held that Littell's negligence claim against the District failed because the District had no duty to maintain the portion of sidewalk on which she tripped. As a matter of law, that responsibility belonged to the adjacent property owner. Littell's arguments otherwise are unpersuasive.

Even at common law, the District's liability for sidewalk defects had important limits. In particular, as this Court held decades ago, "although the District as the municipality is under a duty to exercise reasonable care in maintaining its sidewalks, this duty becomes secondary to the abutter's when he makes such 'special use' of the sidewalk." *District of Columbia v. Texaco*, *Inc.*, 324 A.2d 690, 692 (D.C. 1974); *see* 19 Eugene McQuillin, *The Law of Municipal Corporations* § 54:69 (3d ed.) (2024 update) ("If the abutter makes special use of the sidewalk, he or she owes a duty to the public to maintain it in a reasonably safe condition for pedestrians lawfully using it, and must exercise reasonable care to guard the public from injury. If the abutter does not, he or she becomes liable to

any persons injured as a proximate result of his or her negligence." (footnotes omitted)); *see also Roman v. Bob's Disc. Furniture*, 983 N.Y.S.2d 845, 846 (N.Y. App. Div. 2014) ("Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner. However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk." (citations omitted)). This common-law principle would likely be enough on its own to shift responsibility to the adjacent property owner in this case: by installing its own decorative pavers, the property owner made "special use" of the sidewalk, and that special use caused Littell's injury.

But here there is more than just the common law: there is positive law—the regulations concerning "Standards for Sidewalk Treatment," 24 DCMR § 1105—which directly governs the issue. They provide that the standard paving material for sidewalks in the Downtown Streetscape Area is red brick. *Id.* § 1105.5. But property owners are allowed to make "[v]ariations in the predominant paving material . . . at building entrances and along the building line." *Id.* § 1105.9. If they do, however, the regulations explicitly make them responsible for that material: "[t]he adjacent property owner shall be responsible for the maintenance

of any nonstandard paving material and design." *Id.* § 1105.9(a). Consistent with that responsibility for maintenance, the regulations also require the property owner to "always maintain and store at the site an extra ten percent (10%) of the nonstandard paving material." *Id.* § 1105.9(c). Notably, the regulations do not impose any responsibility on the District to maintain nonstandard pavers installed by a property owner.

"It is axiomatic that when the language of a statute or regulation is unambiguous and does not produce an absurd result the court will not look beyond its plain meaning." *District of Columbia v. Brookstowne Cmty. Dev. Co.*, 987 A.2d 442, 447 (D.C. 2010) (internal quotation marks and brackets omitted). Moreover, "the statutory construction canon *expressio unius est exclusio alterius* informs [the Court] that when a list is enumerated it may be presumed to be exhaustive unless otherwise provided." *Id*. at 447-48. Here, the plain language of the regulation is unambiguous: if an adjacent property owner installs nonstandard pavers, it becomes responsible for maintaining them. And the regulation expressly and exclusively imposes such responsibility on that property owner, not the District. That result is not remotely absurd. The trial court's decision should therefore be affirmed.

Littell advances four contrary arguments, but each lacks merit. *First*, Littell asserts that the District remained responsible for the site of her accident because it

did not enter into a "covenant of maintenance" with the adjacent property owner. Br. 3, 10-11. But as the trial court noted, Littell cites no authority for the idea that a covenant of maintenance was required here. App. 34 ("Plaintiff does not cite, and the Court cannot find, any authority for these assertions."). The regulation operates of its own force, expressly providing that "[t]he adjacent property owner is responsible for the maintenance of any nonstandard paving material and design." 24 DCMR § 1105.9(a). There is no mention of any requirement for a covenant of maintenance in any regulation or statute.

To be sure, the District *can* enter into a covenant of maintenance to ensure that a nearby property owner maintains something located in public space. As the District's witness testified, this could "include sidewalk or paving material," "street furniture," or "other customized assets that are associated with the property." App. 70. But the fact that the District can enter into such agreements generally does not mean that such an agreement is required to give effect to 24 DCMR § 1105.9(a). Indeed, that theory would make the regulation entirely superfluous.

Second, Littell points to photographs supposedly showing the District's agents performing maintenance on the granite pavers outside of 810 7th Street, NW. Br. 11-12 (citing Pl. Ex. 8, App. 37-41). But she does not provide any context or timeframe for these photographs. No witness provided any account of

what these photographs depict. Moreover, even if the District made repairs on one occasion, that does not change the fact that the regulation places responsibility for maintaining the nonstandard pavers solely on the abutting property owner that installed them. That makes sense: if a neighbor happens to prune an adjacent tree just beyond her property line—whether out of kindness, by mistake, or for some other reason—that does not make her responsible for maintaining the adjacent property in perpetuity.

Third, Littell invokes two snow-removal cases, *Albertie v. Louis & Alexander Corp.*, 646 A.2d 1001 (D.C. 1994), and *Radinsky v. Ellis*, 167 F.2d 745 (D.C. Cir. 1948). These cases held that although the District's snow-removal statute requires abutting property owners to timely remove snow from public sidewalks, a pedestrian injured by an uncleared sidewalk cannot sue the abutting property owner in tort. Littell contends that the same logic must apply here, leaving the District as the proper defendant. Br. 13-16.

Littell's reliance on these snow-removal cases is misplaced. The reason the injured pedestrian could not sue the abutting property owner for failing to clear snow, this Court explained in *Albertie*, was that the snow-removal statute "authorizes and directs the Corporation Counsel to enforce the statute." 646 A.2d at 1003-04 (citing D.C. Code § 7-906 (1981)). The Court therefore declined "to read a private right of action into the snow removal law," noting: "where a statute

or regulation expressly provides a particular remedy, a court must be chary of reading others into it. Where, as here, the legislature has specified the relief which is appropriate to redress a violation, courts are not authorized to devise different (and in this case far more drastic) remedies: *expressio unius est exclusio alterius*." *Id*. at 1004 (internal quotation marks and brackets omitted). *Radinsky* likewise cited the section of the snow removal statute authorizing the Corporation Counsel to sue noncompliant property owners. *See* 167 F.2d at 746.

That logic does not apply here. Unlike the snow-removal statute, 24 DCMR § 1105.9 does not provide a particular enforcement mechanism or specify a particular remedy. It simply provides that the abutting owner is responsible for the maintenance of the nonstandard pavers it installed. Thus, the *expressio unius* rationale underlying the snow-removal cases does not carry over. Allowing an injured plaintiff to sue the adjacent property owner is perfectly consistent with 24 DCMR § 1105.9. And a different result in these two different contexts is understandable. A building owner's installation of nonstandard (usually decorative) pavers in front of the building is a voluntary act, for the owner's benefit. It is quite different from a failure to adequately clear snow and ice, the precipitation of which cannot be controlled. It makes sense that responsibility rests entirely with the property owner in the first of these scenarios.

Fourth, Littell argues that if the District is not held liable for the failure to maintain nonstandard pavers on public sidewalks, injured pedestrians will have "no redress." Br. 13; *see* Br. 17. That is wrong. They can obtain redress by suing the property owner who installed and failed to maintain those pavers. Littell's assertion that the owner "owed Ms. Littell no duty at common law" because it "do[es] not own or operate the public sidewalk" is mistaken. Br. 17. As noted, cases like *Texaco* already impose a common-law duty on adjacent property owners who make "special use" of a public sidewalk to safeguard pedestrians. The regulation goes even further, explicitly imposing a duty on adjacent property owners to maintain any nonstandard pavers that they install.

Similarly without merit is Littell's argument that the regulation "lacks a provision authorizing enforcement . . . through private actions for damages against the adjacent property owners." Br. 17. No such express cause of action is required. An injured pedestrian can simply bring a common-law negligence claim against the property owner.

For all these reasons, the Superior Court correctly ruled that Littell cannot establish that the District, rather than the abutting property owner, owed her a duty of care to maintain the nonstandard pavers it installed in front of the building.

II. Littell Failed To Offer Evidence That The District Had Actual Or Constructive Notice Of A Defective Condition In The Granite Pavers.

An alternative ground for affirmance, argued by the District below (but not mentioned in Littell's brief), is that Littell failed to offer evidence that the District had either actual or constructive notice that the granite pavers on which she tripped presented an unsafe or defective condition. Although the Superior Court did not decide the case on this ground, this Court may affirm on this alternative basis. *See Whiting v. Wells Fargo Bank, N.A.*, 230 A.3d 916, 921 (D.C. 2020) ("We may affirm the trial court's ruling on any basis supported by the record if the appellant will suffer no procedural unfairness.").

In order for a plaintiff like Littell "to succeed on her claim of negligence against the District, she must prove that her injuries were caused by an unsafe or defective condition of the street, of which the District had timely notice, either actual or constructive." *Williams v. District of Columbia*, 646 A.2d 962, 963 (D.C. 1992); *see District of Columbia v. Woodbury*, 136 U.S. 450, 463 (1890) (precluding liability "unless [the District] had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger obviated"). Littell failed to put forward sufficient evidence that the District had timely notice of either kind.

A. Littell did not show that the District had actual notice of a defective condition.

To establish actual notice, Littell needed to present evidence that appropriate District officials were timely informed that the particular pavers on which Littell tripped were defective before the accident occurred. Such evidence is lacking here. Below, Littell relied on two pieces of evidence to try to show actual notice: (1) a 311 service request submitted by Smith roughly a year before the accident, and (2) an affidavit Smith prepared for this litigation. SA 145-47. Neither supports a non-speculative inference that the District had actual notice.

Smith's 311 service request, submitted on October 19, 2017, complained that "[t]he brick sidewalk from 7th & I, all the way to the Mall is in horrible disrepair." SA 86-87. However, the service request did not identify *which* block of the many blocks on 7th Street between I Street and the National Mall she was referring to. Moreover, Smith's submission referred exclusively to "bricks" and "Brick (red)" as the damaged material—not to granite pavers. *See* SA 86-87. It thus gave no notice of a defective granite paver in front of 810 7th Street, NW. And indeed, there is no evidence that the defect that caused Littell's injury even existed at the time Smith submitted her 311 service request.

Nor does Smith's affidavit show that the District had actual notice. The affidavit, dated March 27, 2019—more than four months after Littell's accident—states that Smith tripped on the pavers at 810 7th Street, NW. SA 239 ¶ 5. But it

does not indicate *when* this occurred. It could have been *after* Littell's November 2018 accident or years before. In any event, the fact that Smith also tripped at this location does not itself show that the District received actual notice; Smith needed to *tell* the District about the problem. On that score, Smith's affidavit simply refers back to her 311 submission. SA 239 ¶ 7. But for the reasons already discussed, that 311 submission did not provide actual notice.

Smith's affidavit also states that she saw someone fall on pavers at *819* 7th Street at some unspecified time before 2018. SA 239 ¶ 6. However, this clearly is not notice of a defective condition at *810* 7th Street, which is on the other side of the street. And again, the affidavit does not allege that Smith informed District officials that she or anyone else fell on either set of pavers.

B. Littell did not show that the District had constructive notice of a defective condition.

Likewise, Littell failed to offer evidence that the District had constructive notice of a defective condition in the granite pavers on which she fell. "When assessing whether the District had constructive notice, every such case must be determined by its peculiar circumstances." *Briscoe*, 62 A.3d at 1280 (internal quotation marks and brackets omitted). "The relevant circumstances that a court may consider include such things as the length of time that the defective condition existed, whether the condition was obvious or latent, and the severity or

dangerousness of the condition." *Id*. Here, all of these factors cut against constructive notice.

To start, Littell produced no evidence that the defect existed for any significant length of time. *See Jones v. District of Columbia*, 123 A.2d 364, 366 (D.C. 1956) (affirming directed verdict for the District where the plaintiff "offered no evidence as to how long the alleged defect existed"). Littell herself did not testify about how long the defect had existed before her accident. *Cf. Lynn v. District of Columbia*, 734 A.2d 168, 170 (D.C. 1999) ("In deposition [the plaintiff] stated the condition had existed for '[m]ore than a month' and '[p]robably' for a year."). Nor did Smith's affidavit provide any such information. Although the affidavit refers to Smith's 311 submission on October 2017, SA 239 ¶ 7, as discussed, that submission said nothing about the granite pavers in front of 810 7th Street, *see* SA 86-87. And Smith did not say when she herself tripped on the pavers at that location. *See* SA 239.

The only evidence as to the state of the granite pavers in front of 810 7th Street before Littell's accident were five photographs of the area produced by the District. SA 121-25. Two were taken on October 1, 2017 (SA 121-22), and three on October 19, 2018 (SA 123-25)—mere weeks before the November 8 accident. These photographs show no visible defects in the pavers.

In addition, the defective condition of the pavers was "latent" rather than "obvious." *Briscoe*, 62 A.3d at 1280. Indeed, in trying to minimize the force of the District's photographs, Littell herself described the defect as "latent." SA 146 (noting the "latent nature of the subject defective condition"). Smith's affidavit likewise describes a latent rather than obvious defect: "The pavers pop up when you step on them." SA 239 ¶ 4. Similarly, according to Littell's own expert, Douglas Gardner, the lip she tripped on was only "about one half inch" high. SA 94. Nor was the defect especially dangerous, like an open manhole. Finally, although Littell asserted below that the area around 810 7th Street experienced "high pedestrian traffic," SA 149, she offered no evidence in support of that assertion.

Because Littell failed to produce evidence of actual or constructive notice, the Superior Court's judgment may be affirmed on this independent ground.

III. The Defect Was De Minimis As A Matter Of Law.

There is yet another independent ground for affirmance: even if the District were responsible for maintaining the granite pavers and had notice of the lip between the pavers, the defect was de minimis as a matter of law. The Court may affirm on this alternative ground because it is supported by the record and there is no procedural unfairness to Littell. *See Whiting*, 230 A.3d at 921. This basis for

affirmance rests on undisputed facts from Littell's own expert, and Littell can respond to the District's legal arguments in her reply brief.

Not every imperfection on a sidewalk or road constitutes a defective condition significant enough to trigger a duty of repair. This Court has "judicially recognized what pedestrians living in urban areas know from their own experience; namely, that minor [defects] are not an unusual condition for city sidewalks and are in fact what might be called a very prevalent condition." *Briscoe*, 62 A.3d at 1278 (brackets in original) (quoting *Proctor v. District of Columbia*, 273 A.2d 656, 658 (D.C. 1971)). The Court in *Briscoe* quoted with approval the following statement by the Supreme Court of California:

> It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city would be held liable upon a showing of a trivial defect.

Id. (quoting *Barrett v. City of Claremont,* 256 P.2d 977, 980 (Cal. 1953)); *see* 19 Eugene McQuillin, *The Law of Municipal Corporations* § 54:120 (3d ed. 2024) ("Not every defect in a sidewalk is actionable. For instance, slight inequalities are nearly always found, at one place or another, especially where there is much travel. Minor defects or obstructions are generally not actionable.").

In *Briscoe*, a pedestrian tripped on a curb with an indentation two to three inches long and one inch deep. 62 A.3d at 1277. The trial court granted summary judgment in the District's favor and this Court affirmed, "conclud[ing] as a matter of law that any defect in the curbstone was *de minimis*." *Id*. at 1278-79. Based on photographs in the record, this Court agreed with the trial court's assessment that the defect was "very small" and "the kind of thing that . . . is all over the place." *Id.* at 1279.

Briscoe is on point and compels affirmance here. According to Littell's own expert, the lip between the pavers on which she tripped "was about one half inch" tall. SA 94; *see* SA 133 (same). That defect is substantially smaller than the defect in *Briscoe*, which this Court held to be de minimis as a matter of law. And as in *Briscoe*, record photographs reveal that the lip was small and of a kind that is commonplace on city sidewalks. *See* SA 135-36, 401.

Appellate courts in other jurisdictions have held that sidewalk defects significantly greater than the one in this case are, as a matter of law, not actionable. For example, in *City of Memphis v. McCrady*, 124 S.W.2d 248 (Tenn. 1938)—cited favorably by this Court in *Proctor*, 273 A.2d at 659—the Supreme Court of Tennessee held that the defendant was entitled to a directed verdict in a suit by a pedestrian who was "tripped by a block of the concrete sidewalk that extended two and a half inches above the adjacent block." 124 S.W.2d at 248. Similarly, the

Supreme Court of Oklahoma affirmed the grant of summary judgment for a municipality where the defect "consisted of a rise of two (2) inches in two sections of the sidewalk at the point where the plaintiff tripped." *Rider v. City of Norman*, 476 P.2d 312, 312 (Okla. 1970). The Illinois Appellate Court reached the same result in a case where "the discrepancy between the levels in the sections of the sidewalk [was] 1 ⅞ inches." *Birck v. City of Quincy*, 608 N.E.2d 920, 922 (Ill. App. Ct. 1993). So did a New York appeals court in a case where one sidewalk slab "sloped downward approximately two inches over the 12 linear inches leading up to the adjacent slab on which plaintiff tripped." *Chirumbolo v. 78 Exchange Street, LLC*, 26 N.Y.S.3d 637, 639 (N.Y. App. Div. 2016). And in California, "[s]idewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law." *Huckey v. City of Temecula*, 250 Cal. Rptr. 3d 336, 347 (Cal. Ct. App. 2019) (citing cases). By the same token, the half-inch lip in this case—a commonplace imperfection on city sidewalks—is likewise de minimis as a matter of law.

In the trial court, Littell's expert, Gardner, asserted that the half-inch lip violated standards set by the 2013 District of Columbia Building Code and 2010 guidance implementing the Americans with Disabilities Act ("ADA"). *See* SA 131-33 (reproducing the allegedly relevant standards). But these standards fail to

undercut the conclusion that the defective condition of the pavers in this case was de minimis for purposes of tort liability.

To start, both sets of standards address *accessibility* for the disabled, not safety from personal injury. More importantly, Gardner misinterpreted the standards. Both standards say that the walking surface of an "accessible route" should have vertical changes in level of no more than "¼ inch." SA 132. But they do not say, contrary to Gardner's assumption, that the entire public sidewalk is or must be an "accessible route." Instead, they say that there must be "[a]t least one accessible route" from "public streets and sidewalks . . . to the accessible building or facility entrance they serve." SA 132 (ADA guidance); *see* SA 131 (similar language from the building code). A photograph in Gardner's own report proves that, despite the damaged paver, there remained multiple accessible routes from the sidewalk to the building entrance. SA 135 (Photo 1). There was thus no violation of these standards in the first place.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 18, 2024, this brief was served through this Court's electronic filing system to:

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