Tentative Rulings for December 11, 2024
Department 502

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

22CECG00075 ***Juan Torres v. Rosalia Solis*** **is continued to Thursday, December 19, 2024, at 3:30 p.m. in Department 502.**

22CECG00916 ***Jorge Torres Maciel v. American Honda Motor Co.*** **is continued to Tuesday, December 31, 2024, at 3:30 p.m. in Department 502.**

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Tentative Ruling

Re: ***Doredda Grossman v. City of Fresno***
Superior Court Case No. 23CECG00345

Hearing Date: December 11, 2024 (Dept. 502)

Motion: by Defendant City of Fresno for Summary Judgment

Tentative Ruling:

To grant defendant's request for judicial notice. To deny summary judgment.

Explanation:

Judicial Notice

Defendant filed a request for judicial notice of (1) plaintiff's complaint filed January 31, 2023, and (2) the dismissal of plaintiffs Neil Grossman and Kyle Grossman entered on August 29, 2024. Judicial notice is granted pursuant to Evidence Code section 452 subdivision (d).

Summary Judgment

Summary judgment law turns on issue finding rather than issue determination. (*Diep v California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205, 1207.) The court does not decide the merits of the issues, but merely discovers, through the medium of affidavits or declarations, whether there are issues to be tried and whether the parties possess evidence that demands the analysis of a trial. (*Melamed v City of Long Beach* (1993) 15 Cal.App.4th 70, 76; *Molko v Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107; *Schwoerer v Union Oil Co.* (1993) 14 Cal.App.4th 103, 110.) In short, the motion is not a substitute for a bench trial.

A summary judgment motion must show that the "material facts" are undisputed. (Code Civ. Proc., § 437c, (b)(1).) The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74 [pleadings determine the scope of relevant issues on a summary judgment motion].)

The ultimate burden of persuasion on summary judgment/adjudication rests on the moving party. The initial burden of production is on defendant to show, by a preponderance of the evidence, that it is more likely than not that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 850.) In determining whether any triable issues of material fact exist, the court must strictly construe the moving

papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exist are to be resolved in favor of the party opposing summary judgment. (*Barber v. Marina Sailing, Inc*. (1995) 36 Cal.App.4th 558, 562.)

Defendant City of Fresno argues that two issues subject the complaint to summary judgment: (1) the alleged sidewalk defect was trivial and thus not a dangerous condition as a matter of law; and (2) the City of Fresno did not have actual or constructive notice of the uplifted or defective sidewalk.

Whether Sidewalk was a Trivial Defect

The trivial defect rule is codified at Government Code section 830.2: a claimed defect on public property is not a dangerous condition where the trial or appellate court views the evidence in the light most favorable to the plaintiff and 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 when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." This allows the issue to be tested by a motion for summary judgment. The fact that the government entity took action after an injury occurred to protect against a condition of public property cannot be used as evidence that the property was in a dangerous condition at the time of the injury. (Gov. Code § 830.5, subd. (b).) However, where evidence of this is independently relevant on some other issue, the policy objection to this evidence is overcome by the limited admissibility doctrine. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1341, *as modified on denial of reh'g (June 30, 2000)*.)

Particularly with sidewalk defects, the size of a rise or gap between portions of the sidewalk, while an important factor, is not the only determining factor: "all of the circumstances surrounding the condition must be considered in the light of the facts of the particular case." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 729.) For instance, courts have considered how long the defect has existed, the time of day or night the accident occurred or whether the sidewalk was shadowy, whether plaintiff had ever traveled over that portion of the sidewalk before, whether plaintiff contributed to the accident in any way, whether there were breaks in the sidewalk which were irregular and jagged or with missing pieces, whether there were foreign substances present (such as grease and oil), whether there is any evidence that other persons have been injured on this same defect, and any other "aggravating factor" that might be present in a particular case. (*Id.,* surveying numerous cases.) "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts. [Citations.] Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact." (*Id.* at p. 728 (internal quotes omitted).)

While the court in *Fielder* indicated that there is no "tape measure test" in determining whether a sidewalk defect was trivial as a matter of law, two slabs of sidewalk nonaligned horizontally "by a slight depression" may be found trivial as a matter of law "provided that there are no aggravating circumstances attending the defect."

(*Fielder, supra*, 71 Cal.App.3d at p. 729.) In the end, the rule is that "if reasonable minds can differ on the question it is one of fact, and that it is only when reasonable minds must come to the conclusion that the defect is so trivial that a reasonable inspection would not have disclosed it, that the question becomes one of law. Each case must be determined on its own facts." (*Id.* at p. 731.)

Here, there is no dispute that the plaintiff Doredda Grossman tripped on an area of sidewalk. It is not disputed that there were no cracks, jagged edges, or broken pieces in the area of the raised sidewalk and she did not see or avoid any other raised pieces of sidewalk on the date of her fall. There were no obstructions to plaintiff's view of the sidewalk. There is no evidence of reports to the City complaining of the defect in the sidewalk. From these facts the City comes to the conclusion that the defect in the sidewalk was trivial, as courts have held similar height differentials without aggravating factors such as broken or jagged edges or concealment of the defect. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927; *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74; *Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43.)

There is some dispute as to the amount the sidewalk was raised.[1] Defendant asserts that the section indicated by plaintiff's own hand pointing out where she tripped was no more than an inch in measurement. Plaintiff asserts that the lift was between one inch and one and three-sixteenth of an inch, varied along the width of the sidewalk. Plaintiff argues that a lack of any accidents at that location reported to the City does not render the condition trivial, as it does not take into account unreported incidents, and should not preclude a determination that the sidewalk posed a substantial risk of injury.

Plaintiff provides declarations by James Flynn, P.E. and Jace Priester, P.E. who reviewed historic Google Earth photos of the area in question and/or visited the subject area of the sidewalk. Mr. Flynn provided the measurements on which plaintiff is relying (i.e. up to one and three-sixteenths of an inch) and Mr. Priester opined that "through the use of the previously mentioned Google Street View imagery and by performing rudimentary photogrammetry on-scene during the course of my scene inspection," he believed that a photo of an incident submitted on FresGO and identified as a different portion of the sidewalk was in fact the same area in which plaintiff fell. (Priester Decl., ¶ 11.)

The evidence presented by plaintiff has demonstrated that the defect in the sidewalk at issue is one where "reasonable minds can differ" and does not support granting summary judgment.

[1] Plaintiff improperly filed a "Response to Separate Statement [of UMF]" that will not be considered. The summary judgment statute does not provide for this. (*Nazir v. United Airlines*, Inc. (2009) 178 Cal.App.4th 243, 248.)

Constructive Notice

Even if the defect in question is presumed to be nontrivial, the plaintiff must still prove that the public entity had actual or constructive notice of the condition and failed to remedy it within a reasonable time. (Gov. Code § 835.2; *Reinach v. City and County of San Francisco* (1958) 164 Cal.App.2d 763, 766.) Constructive notice is established only if plaintiff shows 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." (Gov. Code § 835.2, subd. (b).)

> Although constructive notice of a defect may be imputed to a public entity that fails to have a "reasonably adequate" inspection system, constructive notice will *not* be imputed if the defect is not sufficiently obvious.
>
> So what makes a dangerous condition sufficiently "obvious" to warrant charging a public entity with negligence for failing to discover it?
>
> A defect is not obvious just because it is *visible*.
>
> A defect is not obvious just because it is nontrivial. That a defect in public property is not trivial establishes only that it qualifies as a "dangerous condition." Nontriviality, without more, does not also mean that that the defect is *obvious*; if it did, then the constructive notice element would be automatically satisfied in every instance where that dangerous condition preexisted the accident and thus would effectively write the negligence element out of the statute. This is why courts have treated the question of whether a defect is too trivial to qualify as a dangerous condition as distinct from the question of whether the defect is obvious enough to impart constructive notice.

(*Martinez v. City of Beverly Hills* (2021) 71 Cal.App.5th 508, 520, internal citations omitted.)

Similar to the analysis of whether a defect is trivial, "whether a nontrivial defect is sufficiently obvious, conspicuous, and notorious that a public entity should be charged with knowledge of the defect for its failure to discover it depends upon "all [of] the existing circumstances. [Citation.]" (*Martinez*, *supra*, 71 Cal.App.5th at p. 521.) Those circumstances include (1) the location, extent, and character of the use of the public property in question, looking at both its intended use for travel as well as the actual frequency of travel in the area; and (2) the magnitude of the problem of inspection, considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which the failure to inspect would give rise. (*Ibid*.)

Here, the physical characteristics of the defect are not in dispute. Defendant has provided evidence to say that no complaints have been made regarding the defect in the sidewalk through its citizen reporting system. (Conner Decl., ¶ 7.) No other injuries have been reported in that area of sidewalk. (*Ibid*.) Due to budget constraints and staffing issues, the City's hundreds of miles of streets and sidewalks are "virtually impossible" to have inspected by City employees. (*Id*. at ¶ 4.) The City relies on private property owners to report sidewalk hazards adjacent to their property, as required by the municipal code,

and private citizens may report complaints through the City's general information phone line or the "FresGo" website. (*Ibid.*)

Defendant contends that similar sidewalk height differentials have been found to be minor defects and that courts have held that defects up to the size of one and one-half inch are minor and that "there could not be constructive notice where the defect was minor." (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 74-77.) Additionally, the absence of complaints regarding the sidewalk in question supports the reasonable conclusion that the sidewalk defect is not a dangerous condition. (See *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 243 [hot coals covered in sand in a beach fire ring not a dangerous condition where evidence demonstrated there were no reports of similar injuries at the beach over the past five years and over 130,000 people visited the beach during summer season the year of the incident].)

Plaintiff argues that the lack of inspection system by the City does not render the defect in the sidewalk as not obvious. Plaintiff asserts that numerous City of Fresno employees traverse the subject area frequently, including by street sweepers. Plaintiff also suggests that in the City's FresGO Concrete-Sidewalk and Curb/Gutter-#11670414 (COF000276-000279), a photograph was included directly under the comment by City employee, Dennis Kim, dated April 13, 2022, and (pursuant to Mr. Priester) demonstrates the possibility or probability that the location where plaintiff was injured was the subject area of a prior incident that did not get inspected by the City. The opinion that a reasonable inspection would have revealed the defect, when construed liberally, supports finding a dispute as to whether the uplift was sufficiently obvious to support constructive notice to the City.

Therefore, the court intends to deny the City's motion for summary judgment.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/09/24.
(Judge's initials) (Date)