NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

ESMAIEL JASSIM, Plaintiff and Appellant, v. BRENTWOOD CEDAR TREE HOA, Defendant and Respondent.	B305752 Los Angeles County Super. Ct. No. BC711946
ESMAIEL JASSIM, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B305930 Los Angeles County Super. Ct. No. BC711946

APPEAL from the judgments of the Superior Court of Los Angeles County, Jon R. Takasugi, Judge. Affirmed.

Carpenter, Zuckerman & Rowley and Haytham Faraj for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Corinne C. Bertsche; Hartsuyker, Stratman & Williams-Abrego and

Gregory Dilts for Defendant and Respondent Brentwood Cedar Tree HOA.

Office of the Los Angeles City Attorney, Michael N. Feuer, City Attorney, Kathleen Kenealy, Chief Deputy, Scott Marcus, Chief, Civil Litigation Branch, Blithe S. Bock, Managing Assistant City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendant and Respondent City of Los Angeles.

INTRODUCTION

After he tripped on an uplift in the sidewalk next to the Brentwood Cedar Creek Condominium complex, Esmaiel Jassim sued the Brentwood Cedar Tree HOA (the HOA) and the City of Los Angeles (the City)[1] for negligence and premises liability.[2]

Respondents separately moved for summary judgment. Both motions asserted Jassim could not prevail on his claims because the uplift was a trivial defect as a matter of law. In addition, the City argued Jassim could not prove it had actual or constructive notice of the uplift as required by Government Code section 835, subdivision (b).[3] In opposition, Jassim contended respondents were not entitled to summary judgment because there were triable issues of material fact with respect to whether the uplift's dangerousness was exacerbated by the presence of aggravating factors, and whether the City had notice of the uplift.

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1 Throughout this opinion, we refer to the HOA and the City collectively as "respondents."

2 Jassim also sued the County of Los Angeles but later dismissed it from the lawsuit without prejudice.

3 Unless otherwise specified, all undesignated statutory references are to the Government Code.

The trial court sustained respondents' objections to Jassim's evidence and granted their motions for summary judgment. Finding no error, we affirm.

BACKGROUND

Jassim's complaint alleged he was injured on November 3, 2017, when he "tripped on raised concrete due to an uneven/raised sidewalk, repaired, inspected, and/or maintained by . . . [respondents'] agents in a negligent fashion." He further alleged the sidewalk uplift was a "hazardous, dangerous condition[,]" of which respondents "had actual and/or constructive notice[.]" He alleged the City was liable for his injuries under section 835.[4]

Respondents filed separate motions for summary judgment. As noted above, respondents contended Jassim could not prevail on his claims because the uplift, where one slab of the sidewalk was slightly higher than the adjoining slab, was a trivial defect as a matter of law. Specifically, they argued the height differential between the two slabs, which the HOA's expert opined was 1.25 inches maximum and the City's expert opined was approximately one inch, fell within a line of California appellate court decisions holding similar walkway uplifts were trivial defects absent aggravating factors rendering them more dangerous. Further, they contended the evidence demonstrated no aggravating factors were present, as it showed, among other things: (1) the incident occurred in the early

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4 While his complaint asserted claims for negligence and premises liability against the City, Jassim later clarified he solely sought to pursue a claim based on a "dangerous condition of public property" against the City.

afternoon, when the weather was clear and sunny; (2) the sun was not in Jassim's eyes; (3) Jassim was familiar with the area; (4) the uplift did not have any jagged edges; and (5) Jassim's view of the uplift was not obstructed by any obstacles. In support of their arguments, respondents relied on photographs of the accident scene produced by Jassim in discovery, the declarations of their respective experts, and excerpts of Jassim's deposition.

Additionally, the City argued Jassim could not prove it had actual or constructive notice of the condition giving rise to his fall as required under section 835, subdivision (b). With respect to actual notice, the City contended it has not received any complaints, service requests, or prior claims of injury related to the uplift. Regarding constructive notice, the City argued that because the uplift was a trivial defect as a matter of law, Jassim could not prove the defect "'was of such an obvious nature that [the City], in the exercise of due care, should have discovered the [uplift] and its dangerous character.'" (Quoting § 835.2, subd. (b).)

In opposition, Jassim argued respondents were not entitled to summary judgment because "triable issues of fact exist as to the aggravating factors associated with the subject uplifted sidewalk, which subsequently precludes a finding that the uplifted sidewalk was a trivial defect as a matter of law." Specifically, based on his photographs of the accident scene and the declaration of his expert, Mark J. Burns, Jassim contended three aggravating factors rendered the uplift more dangerous despite its modest height: (1) the uplift's jagged edges; (2) at the time of the incident, a nearby building cast a shadow on the uplift, making it more difficult for a pedestrian to see; and (3) the grass in the planter next to the uplift reduced its visibility.

In opposing the City's motion, Jassim also argued "triable issues of fact exist as to whether or not the City possessed actual and constructive notice of [the uplift] prior to [the] incident[.]" With respect to both forms of notice, Jassim asserted his evidence demonstrated the City sent various employees to perform maintenance and repair work in the area at issue while the uplift was in existence. According to Jassim, these employees "likely" noticed or should have noticed the uplift while performing their duties.

Along with their replies, respondents submitted evidentiary objections to Burns's declaration.

The trial court sustained respondents' objections to the portions of Burns's declaration setting forth his opinions on the aggravating factors that exacerbated the uplift's dangerousness. In so doing, the court found Burns's opinions were speculative, not based on personal knowledge, and predicated on assumptions contrary to evidence. The court also noted no expert opinion "was needed to decide whether the size or irregular shape of the crack [in the sidewalk] rendered it dangerous. [Citation.]"

Subsequently, the trial court granted both motions for summary judgment. The court found respondents' evidence showed: (1) the height of the uplift was 1.25 inches at its highest point; and (2) "there was nothing obstructing [Jassim's] view of the crack [between the adjoining slabs] on a clear, sunny day." Consequently, it determined respondents showed they were not liable for Jassim's injuries because the uplift was a trivial defect as a matter of law, and shifted the burden to Jassim to show the existence of a triable issue of fact. Having excluded portions of Burns's declaration as discussed above, the trial court found

Jassim failed to satisfy his burden. Thus, the court concluded respondents were entitled to summary judgment.

In addition, the trial court determined the City was entitled to summary judgment because it produced sufficient evidence showing it did not have actual or constructive notice of the uplift. The court found Jassim failed to satisfy his burden in opposition to summary judgment on the notice issue because he "offer[ed] no evidence that [the City] had actual knowledge about the defect and because the undisputed facts show that the crack was a trivial defect and not of such an obvious nature that the [City] should have discovered it."

The trial court entered separate judgments in favor of the HOA and the City. Jassim timely appealed from each judgment. Subsequently, we granted Jassim's motion to consolidate the appeals for argument and decision.

DISCUSSION

I. The trial court did not abuse its discretion by excluding portions of Burns's declaration.

A. General Principles and Standard of Review

"'[A] properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact.' [Citation]. 'However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.]

Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests.'" [Citation]." (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 155 (*Sanchez*).) "These rules apply to expert witness declarations submitted in connection with a motion for summary judgment. [Citations.]" (*Ibid.*)

"We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion. [Citation.]" (*Sanchez*, *supra*, 8 Cal.App.5th at p. 154.)

B. Analysis

As noted above, the trial court sustained respondents' objections to the portions of Burns's declaration regarding the presence of aggravating factors that worsened the danger posed by the uplift. These opinions were largely set forth in paragraphs 11-13 of the declaration.

Burns opined "Jassim's perception of the subject uplift was inhibited by three elements." First, he stated "the shadow cast by the building located at 11706 Montana Ave, Los Angeles, CA 90049 would make the subject uplift more difficult to perceive." This conclusion was based on "sun data from November 3, 2017 at 1:00 PM[,]" which was attached to his declaration as an exhibit. According to Burns, the diagram on the "sun data" showed "the sun [was] in a position where it would [have] cause[d] the building to cast a shadow in the direction of the subject sidewalk" at a length of "1.18 meters (3.87 feet)." Burns opined "[t]he shadow cast from the building would inhibit . . .

Jassim's ability to perceive the danger because the subject sidewalk defect would appear more level."

Next, Burns stated "the grass in the planter adjacent to the uplift makes the location of level ground difficult to discern. An uplift can only be perceived when it can be contrasted with its surroundings. When looking at the subject uplift from normal eye level as shown in [the photographs of the uplift provided by Jassim], there is no contrast in color between the subject uplift and the adjacent sidewalk panel nor is there contrast between the subject uplift and the adjacent grass."

Lastly, he opined that, "as seen in [the photographs of the uplift], the right side of the sidewalk is non-uniform and creates a jagged edge. The danger posed by the uplift is exacerbated by the jagged features of the sidewalk defect."

Jassim contends the trial court abused its discretion by excluding the portions of Burns's declaration quoted above. In support of his position, he argues: (1) Burns's "conclusions involved subjects sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[ ]"; (2) Burns adequately explained the reasons underlying his conclusions; and (3) his opinions were properly based on his "review of documentation and other data related to the case" and "his expertise in Mechanical Engineering."

For the reasons discussed below, we disagree with Jassim's contentions and discern no abuse of discretion.

First, the trial court did not abuse its discretion by excluding Burns's opinion that the uplift was "more difficult to perceive" due to a shadow cast by a nearby building as speculative and conclusory. Burns's declaration does not reflect he went to the accident scene in-person to observe whether the

building's shadow affected the uplift's visibility. Instead, his opinion was based entirely on the "sun data from November 3, 2017 at 1:00PM." Burns, however, did not identify the source of this "sun data," explain how it was generated, or elucidate the meaning of the information therein. Nor did he explain how the diagram in the "sun data" demonstrates the building would have cast a shadow in the area of the uplift, or how such a shadow "inhibit[ed] . . . Jassim's ability to perceive the danger [by making] the subject sidewalk defect . . . appear more level." Accordingly, his opinion on this point "'has no evidentiary value [citation] and [was properly] excluded" because it is based on "'speculative [and] conjectural factors [citation],'" and is "'unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion[.]'" (*Sanchez*, *supra*, 8 Cal.App.5th at p. 155.)

Next, Burns's opinion related to "the grass in the planter adjacent to the uplift" is based on facts unsupported by evidence. He opines the grass is problematic because, "[w]hen looking at the subject uplift from normal eye level . . . , there is no contrast in color between the subject uplift and the adjacent sidewalk panel nor is there contrast between the subject uplift and the adjacent grass." The photographs of the uplift however, do not support his conclusion. Rather, the photographs show the grass next to the uplift does not obscure its visibility. Moreover, the photographs clearly depict color contrasts between the uplift, the adjacent sidewalk panels giving rise to the uplift, and the grass next to those panels (i.e., the sidewalk panels are both gray, the uplift is a dark, black line between the two panels, and the grass is green). Thus, Burns's "'opinion [on this matter was] based on assumptions of fact without evidentiary support

[citation], . . . and [was properly] excluded from evidence. [Citations.]'" (*Sanchez*, *supra*, 8 Cal.App.5th at p. 155; see also *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338 ["It is well settled that an expert's assumption of facts contrary to the proof destroys the opinion. [Citation.]"].)

For similar reasons, the trial court appropriately excluded Burns's opinion that "[t]he danger posed by the uplift is exacerbated by the jagged features of the sidewalk defect." In arriving at this conclusion, Burns stated that the photographs of the uplift indicate "the right side of the sidewalk is non-uniform and creates a jagged edge." Not so. Instead, the photographs unambiguously demonstrate the uplift's edges were straight, uniform, and smooth. Thus, his opinion on this point "'has no evidentiary value [citation]'" because it was "'based on assumptions of fact without evidentiary support [citation][.]'" (*Sanchez*, *supra*, 8 Cal.App.5th at p. 155; see also *Hyatt v. Sierra Boat Co.*, *supra*, 79 Cal.App.3d at p. 338.)

In addition, the trial court did not abuse its discretion by finding Burns's opinions were unnecessary to determine whether any of the uplift's features rendered it more dangerous. The parties all relied on the same photographs of the uplift to make their arguments under the trivial defect doctrine. Those photographs clearly depict the uplift, and were the same ones Burns based his opinions on. Therefore, "'there [was] no need for expert opinion[,]'" as "'[i]t is well within the common knowledge of lay judges . . . just what type of a defect in a sidewalk is dangerous.' [Citation.]" (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928 (*Caloroso*).)

Accordingly, we conclude the trial court did not abuse its discretion by excluding Burns's opinions on whether aggravating factors made the uplift more dangerous.

II. The trial court correctly granted respondents' motions for summary judgment.

A. Standard of Review

"A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id*., subd. (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Ibid*.) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [citation.])

"We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. [Citation.]" (*Grebing v. 24 Hour Fitness USA, Inc*. (2015) 234 Cal.App.4th 631, 636-637.)

B. Trivial Defect Doctrine

1. Governing Legal Principles

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. [Citations.]" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) However, "persons who maintain walkways, whether public or private, are not required to maintain them in 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 Rests.* (1987) 192 Cal.App.3d 394, 398.)

Consequently, "[i]t is well established that a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property. [Citation.] Courts have referred to this simple principle as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that [the] plaintiff must plead and prove. The 'trivial defect defense' is available to private, nongovernmental landowners. [Citation.]" (*Caloroso*, *supra*, 122 Cal.App.4th at p. 927.)[5]

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5 Generally, unless a statute provides otherwise, "'abutting property owners . . . ha[ve] no affirmative duty to maintain or repair a public sidewalk and [are] not liable for injuries occurring there which resulted from the failure to maintain it. [Citations.]" (*Dennis W. Williams v. Foster* (1989) 216 Cal.App.3d 510, 515.) At no point in these proceedings has the HOA addressed whether this rule bars Jassim from recovering against it. Instead, it has exclusively relied on the trivial defect defense to show Jassim cannot prove the element of duty as required to succeed on his claims for negligence and premises liability. Having concluded respondents were entitled to summary judgment because they

The trivial defect defense also applies to claims under the Government Claims Act, section 810 et seq. Under this statute, "'[l]iability may attach to a governmental entity if there is a dangerous condition on governmental property. (§§ 830, 835.) A condition is "dangerous" if it 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 it will be used." (§ 830, subd. (a).) Conversely, a condition is "not dangerous," if "the trial court 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 when such property . . . was used with due care . . ." in a reasonably foreseeable manner. (§ 830.2.)'" (*Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1103-1104 (*Huckey*).)

"In appropriate cases, the trial court may determine, and the appellate court may determine de novo, whether a given walkway defect was trivial as a matter of law. [Citations.] 'Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment.' [Citation.] If, however, the court determines that sufficient evidence has been presented so that reasonable minds may differ as to whether the defect presents a substantial risk of injury, the court may not

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established the uplift was a trivial defect as a matter of law, we need not address whether the HOA had a duty to maintain the sidewalk abutting its property.

conclude that the defect is trivial as a matter of law. [Citation.]" (*Huckey*, *supra*, 37 Cal.App.5th at pp. 1104-1105, fn. omitted.)

"In determining whether a given walkway defect is trivial as a matter of law, the court should not rely solely upon the size of the defect . . . although the defect's size 'may be one of the most relevant factors' to the court's decision. [Citation.] The court should consider other circumstances which might have rendered the defect a dangerous condition at the time of the accident. [Citation.] [¶] These other conditions or factors include whether there were any broken pieces or jagged edges in the area of the defect, whether any dirt, debris or other material obscured a pedestrian's view of the defect, the plaintiff's knowledge of the area, whether the accident occurred at night or in an unlighted area, the weather at the time of the accident, and whether the defect has caused any other accidents. [Citations.] In sum, '[a] court should decide whether a defect may be dangerous only after considering all of the circumstances surrounding the accident that might make the defect more dangerous than its size alone would suggest. [Citation.]" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105, italics omitted.)

"The court's analysis of whether a walkway defect is trivial involves as a matter of law two essential steps. 'First, the court reviews evidence regarding type and size of the defect. If that preliminary analysis reveals a trivial defect, the court considers evidence of additional factors [bearing on whether the defect presented a substantial risk of injury]. 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 . . . .' [Citation.]" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.)

2. Analysis

Jassim contends the trial court erred by finding: (1) respondents adequately established the uplift in the sidewalk was a trivial defect as a matter of law and thereby satisfied their initial burden on summary judgment to demonstrate he cannot prove an essential element of his claims; and (2) the evidence he submitted failed to create a triable issue of material fact. As discussed below, we disagree and conclude the trial court correctly determined respondents were entitled to summary judgment under the trivial defect doctrine.

We first consider the "'evidence regarding type and size of the defect.'" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.) On this point, as noted above, respondents submitted the photographs of the uplift produced by Jassim in discovery. The HOA also submitted the declaration of John Tyson, who has "over thirty-two years' experience in Accident Reconstruction, Safety, and Forensic Engineering." The City submitted the declaration of Mark Blanchette, Ph.D., whose "areas of expertise include the assessment of walkway safety and injury biomechanics."

Jassim's photographs depict two misaligned adjacent slabs of concrete sidewalk. One slab is slightly elevated above the other along a portion of the joint where the two slabs meet. The resulting crack in the sidewalk has straight, defined edges. Several photographs depict a tape measure alongside the uplift reflecting the height differential between the slabs is approximately 1.25 inches at the point of greatest difference.

Tyson and Blanchette each reviewed Jassim's photographs of the uplift and separately inspected the accident scene in August 2019. Both experts observed that in the time between the

accident and their respective inspections, the uplift had been "ground down[.]"

Nevertheless, "using a level and tape measure, [Tyson] was able to take measurements [at the accident scene], which were corroborated by [Jassim's] photographs[.]" Further, by using a level, points of reference taken from the photographs depicting "tape measurement[s]" of the uplift's height, "the photographs of the entire separation between the slabs[,]" and his "observation of the slope of the unrepaired portions of the sidewalk, [Tyson] was . . . able to measure the slope and height of the sidewalk prior to the repairs being made." Ultimately, he opined "[n]o area of the sidewalk pictured would have had a greater than 1.25 inches height differential."

Similarly, although Blanchette acknowledged "any measurement[s] taken on the day of [his] inspection would not pertain to the condition of the uplift on the day of the incident, prior to grinding[,] [¶] [t]here [was] information on which [he] could reasonably rely as to the magnitude of the height differential of the uplift on the date of the incident." Specifically, based on Jassim's photographs, he opined "the height differential of the uplift on the far right or eastern side of the sidewalk where the concrete abuts the grass parkway is approximately 1 inch; this is the point of greatest elevation change between the two concrete sidewalk segments."

Jassim contends we should not consider Tyson's or Blanchette's opinions regarding the height of the uplift in evaluating whether respondents satisfied their initial burden on summary judgment. Specifically, he contends their opinions on this matter are speculative because neither expert was able to measure the uplift during his inspection of the accident scene.

The record, however, does not reflect Jassim raised these evidentiary objections in the trial court. We therefore need not consider his arguments on this issue, as they have been forfeited.[6] (Code Civ. Proc., § 437c, subd. (b)(5) ["Evidentiary objections not made at the hearing [on the summary judgment motion] shall be deemed waived."]; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 525 [to preserve evidentiary issues on appeal, litigants must object in writing before the summary judgment hearing or orally at the hearing].)

Accordingly, respondents' evidence demonstrates the uplift was no greater than 1.25 inches in height. "Sidewalk elevations ranging from three-quarters of an inch to one and one-half inches have generally been held trivial as a matter of law. [Citations.]" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1107.) Consequently, our "'preliminary analysis'" of respondents' "'evidence regarding [the] type and size of the defect[ ] . . . reveals a trivial defect[.]" (*Id.* at p. 1105.) We therefore "'consider[ ] evidence of any additional factors bearing on whether the defect presented a substantial risk of injury.'" (*Ibid.*, brackets omitted.)

As noted above, the photographs of the uplift and its surrounding area (taken shortly after the accident and before repair) reflect the uplift had straight (i.e., non-jagged) edges, and that no broken pieces were in the area. The photographs also indicate the uplift was readily visible, and was not obscured by

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6 In their appellate briefs, none of the parties addressed whether Jassim forfeited his challenges to the admissibility of Tyson's and Blanchette's declarations. Thus, we invited supplemental briefing on the issue under section 68081. The parties agree that by failing to object in the trial court, Jassim's evidentiary arguments have been forfeited on appeal.

shadows, dirt, grass, debris, or any other material. Blanchette opined that, "[b]ased on [his] site inspection and review of the evidence available to [him] . . . , [he was] not aware of any visual obstructions which would inhibit . . . Jassim's ability to see the [uplift]."

With respect to the conditions at the time of the incident, Jassim testified at his deposition that: (1) he tripped and fell around 1:00 p.m., while walking back to his daughter's home from a children's center with his wife and grandchild; (2) the weather was "[c]lear" and "[s]unny[,]" but the sun was not in his eyes; (3) he had walked on the sidewalk before but never noticed the uplift; (4) he was not hurrying or carrying anything while walking; (5) shortly before falling, he was not distracted; (6) when he fell, he did not feel anything under his feet; and (7) moments after he fell, he was able to see the "uneven concrete" he had tripped on from a "[c]ouple feet" away. Further, as discussed below, the City submitted evidence showing it received no reports of incidents or injuries related to the uplift in the five years leading up to the incident. (See section II.C.2.i, *post*.)

Based on the evidence set forth above, we agree with the trial court that respondents demonstrated there were no "other circumstances which might have rendered the defect a dangerous condition at the time of the accident. [Citation.]" (*Huckey*, *supra*, 37 Cal.App.5th at p. 1105.) Thus, respondents showed Jassim cannot establish the element of duty required to succeed on his claims for premises liability and negligence against the HOA (see *Caloroso*, *supra*, 122 Cal.App.4th at pp. 926-927), or prove the uplift was a "dangerous condition" under section 830 (see § 830.2), because the uplift was a trivial defect as a matter of law.

The burden therefore shifted to Jassim to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p).)

Jassim contends he submitted sufficient evidence to defeat summary judgment. In support of his position, he appears to raise four arguments. We address each in turn.

First, Jassim asserts the photographs in the record demonstrate there are triable issues of fact concerning whether the uplift was a trivial defect. Specifically, he contends the photographs demonstrate "the raise in elevation" where the two concrete slabs met was "obscure[d]" by a "shadow of the edge of the raised portion of the sidewalk upon the seam." Jassim also argues one of the photographs indicates the uplift may have been "more than two inches" tall. Further, he contends "photographs of the shoes" he was wearing when he fell "illustrate the defect was not trivial[ ]" because they depict a "scuff on the toe of the shoe [that] covers a significant portion of the toe."

Jassim's argument based on the photographs is unavailing. With respect to his first point, none of his photographs of the uplift or its surrounding area demonstrate its visibility was obscured by any shadows. With respect to his second point, Jassim did not dispute the maximum height differential between the two slabs was 1.25 inches in the trial court. Nor did he include in his separate statement of disputed facts that the uplift may have been two inches tall. (See *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 ["*[A]ll* material facts must be set forth in the separate statement. 'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*.'"].) Further, as Blanchette points out, the photograph on which Jassim relies does not depict the height differential between the two slabs. Instead, it depicts the height

between the top of the raised slab and the ground. Regarding his third point, Jassim did not submit any evidence establishing the scuff on his shoe resulted from the accident, or that it was necessarily caused by an uplift greater than 1.25 inches tall.

Next, Jassim appears to argue that "[t]he Google street images attached . . . to Burns['s] declaration" and his deposition testimony establish the portion of the sidewalk where he fell was in the shade when the incident occurred. While this may be true, none of this evidence, nor any other evidence in the record, demonstrates shadows or shade obscured the uplift's visibility. On the contrary, the photographs of the accident scene reflect the uplift is readily visible even in the shade, and Jassim testified he could see the uplift from a "[c]ouple feet" away shortly after he fell.

Third, Jassim contends paragraphs 8, 12, and 13 of Burns's declaration, which were not excluded by the trial court, "create a dispute of material fact[.]" He relies on the portions of the declaration where Burns opines: (1) the uplift was "very likely . . . cause[d]" by "tree roots directly adjacent to [it]"; (2) Jassim "had no reason to expect there was a defect in the sidewalk" because it was "in reasonably good repair"; and (3) "the height differential present on the sidewalk on the date of the incident was excessively dangerous if unseen[.]"

We reject Jassim's argument. Even assuming, *arguendo*, those portions of the declaration were admissible, they do not demonstrate the existence of a triable issue of material fact. Specifically, Jassim does not explain, and we cannot discern, how the purported cause of the uplift or his supposed lack of reason to expect its existence "'ma[de] the defect more dangerous than its size alone would suggest.' [Citation.]" (*Huckey*, *supra*, 37

Cal.App.5th at p. 1105.) Moreover, while Burns opined the uplift might have been "excessively dangerous if unseen[,]"as discussed above, the evidence reflects the uplift was not obscured by obstacles or materials of any kind.

Lastly, Jassim contends Tyson's and Blanchette's statements that the uplift was ground down after the incident suggest it was not a trivial defect, because "if the [uplift] . . . was really a trivial defect, it follows that [r]espondent[s] would not have repaired it after the [incident] occurre[d][.]" In so doing, he acknowledges "Evidence Code section 1151 forbids the introduction of evidence of a defendant's remedial measures taken after the occurrence of an injurious event[.]" Nevertheless, Jassim contends "an exception to this rule applies here because this evidence impeaches [r]espondent[s'] argument that the height . . . of the [uplift] . . . was a trivial defect[.]" In support of his position, he cites *Sanchez v. Bagues & Sons Mortuaries* (1969) 271 Cal.App.2d 188 (*Bagues*).[7]

Pursuant to Evidence Code section 1151: "When, after the occurrence of an event, remedial or precautionary measures are

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7 Jassim also appears to suggest Evidence Code section 1151 is inapplicable because respondents did not object to the portions of their respective experts' declarations concerning the subsequent remedial measures in the trial court, and therefore forfeited any contentions regarding the statute's applicability under Code of Civil Procedure section 437c, subdivision (b)(5). We reject this argument because, as the City points out: (1) Jassim does not cite any legal authority supportive of his position; and (2) respondents did not have any reason or opportunity to object to his reliance on the evidence of the subsequent remedial measures to show the uplift was not a trivial defect, as he did not raise this argument in the trial court.

taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent remedial measures is inadmissible to prove negligence or culpable conduct in connection with the event." A similar rule applies in the context of claims for injuries caused by dangerous conditions on public property. Specifically, Government Code section 830.5, subdivision (b) states: "The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury."

In *Bagues*, the Court of Appeal noted that "in appropriate circumstances, evidence of subsequent precautions or repairs may properly be admitted when it tends to impeach the testimony of a witness. [Citations.]" (*Bagues*, *supra*, 271 Cal.App.2d at pp. 190-191.) This exception to the "general rule in regard to subsequent remedial conduct" (*id.* at p. 190), however, only applies "'[i]f one in charge of installing safety measures were to testify that, in his opinion, the construction which was questioned was proper and it should develop that he himself ordered the performance of additional safety measures[.]'" (*Id.* at p. 191, italics omitted.) Applying those principles, the Court of Appeal held that the plaintiff's evidence showing the installation of abrasive tape on the stairs where she slipped was properly excluded because "there is no evidence that the witness [whom she sought to impeach] . . . had anything to do with installing or ordering the installation of the new abrasive tape." (*Id.* at p. 192)

Jassim's argument is without merit because *Bagues* does not apply here. Unlike the plaintiff in *Bagues*, Jassim does not seek to use evidence of subsequent remedial measures to impeach a witness's testimony. Instead, he endeavors to use the evidence

to demonstrate the uplift was dangerous, and therefore was not a trivial defect as a matter of law. The Court of Appeal in *Bagues*, however, did not hold or otherwise suggest evidence of subsequent remedial measures may be admissible for that purpose. (See *Bagues*, *supra*, 271 Cal.App.2d at pp. 190-192.) Moreover, Jassim does not cite, and we have not been able to locate, any other authority supportive of his position.

In any event, even if Jassim had sought to use the evidence of subsequent remedial measures to impeach Blachette's opinions regarding the uplift's dangerousness,[8] the argument would fail. Here, as in *Bagues*, the record does not reflect Blanchette "had anything to do with" the uplift being ground down after the accident occurred. (*Bagues*, *supra*, 271 Cal.App.2d at p. 192.) Consequently, the exception to Evidence Code section 1151 for purposes of impeachment does not apply. (See *id.* at pp. 191-192.) Jassim therefore cannot rely on the evidence of the subsequent remedial measures taken to address the uplift to discredit Blanchette's opinion regarding its dangerousness, or to support any other inferences regarding respondents' culpability in connection with the incident. (See *Bagues*, *supra*, 271 Cal.App.2d at pp. 191-192; see also Evid. Code, § 1151; Gov. Code, § 830.5, subd. (b).)

Accordingly, Jassim has not shown there are any triable issues of fact. Thus, the trial court correctly granted summary judgment in respondents' favor, as they produced undisputed evidence showing the uplift was a trivial defect as a matter of law, and established they were not liable for Jassim's injuries.

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8 Unlike Blanchette, Tyson only measured the uplift's height and did not opine on its dangerousness.

C. Actual or Constructive Notice of the Uplift

1. Governing Legal Principles

To prevail on a claim for injuries resulting from a dangerous condition on public property, the plaintiff must demonstrate "[t]he public entity had actual or constructive notice of the dangerous condition under [s]ection 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (§ 835, subd. (b).) "A public entity had actual notice of a dangerous condition . . . if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (§ 835.2, subd. (a).) "A public entity had 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." (§ 835.2, subd. (b).)

2. Analysis

Jassim contends the trial court erred by granting summary judgment in the City's favor because "[r]easonable minds could differ as to whether . . . [it] had actual or constructive notice of the defect." As discussed below, we disagree and conclude the City was entitled to summary judgment because the undisputed evidence demonstrates Jassim cannot prove notice as required by section 835, subdivision (b).

i. Actual Notice

To demonstrate lack of actual notice, the City submitted the declaration of Sherman Torres, who is a "Street Services General Superintendent I[ ] in the City's Bureau of Street

Services, Street Maintenance Division of the Department of Public Works." According to Torres, given "[t]he large amount of sidewalks" within the City's limits and "the limited resources of the Bureau of Street Services[,]" the City only "inspect[s] and repair[s] sidewalks . . . in response to either complaints or requests for service or repair that are transmitted to the Bureau." He related that the City maintains a searchable database containing "the Bureau's records of all reports of complaints, service requests, formal claims, or inquiries about a specified address created within a specified time period." Torres stated "the results of the search covering the time period from October 2012 through November 3, 2017[ ]" did not reveal "a single report of a sidewalk uplift reported or complained about in the stretch of sidewalk" where the accident occurred.

The City also submitted the declaration of Martin R. Boags, "a Deputy City Attorney" who "supervise[s] the Claims Section within the Claims & Risk Management Division of the City Attorney's Office." According to Boags, the City maintains a "database for the tracking, management and monitoring of claims submitted to the City," known as "'CityLaw[.]'" "The CityLaw database is searchable by various fields, including name of claimant, date, location and summary description." Boags "performed a search in the CityLaw database for all claims submitted to the City for injuries allegedly suffered [on the sidewalk where Jassim fell] . . . for the five year period prior to November 3, 2017. The search produced no record of any claim for personal injuries due to a sidewalk uplift [in that area] . . . against the City."

Based on the evidence above, the City showed it did not receive actual notice of the uplift within a sufficient time to

address it before the accident occurred. The burden therefore shifted to Jassim to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p).)

Jassim contends he satisfied his burden by submitting the following evidence: (1) the declaration of Mike Rago, who works and lives in the area where the incident took place; (2) "the Google Earth photographs" attached to Burns's declaration; and (3) records from the Bureau of Street Services demonstrating "the City had sent numerous work crews" to perform maintenance and repairs in the area where the accident occurred. As discussed below, we disagree and conclude this evidence does not create any triable issues of material fact.

In his declaration, Rago stated that he has resided at his current address "for more than 13 years[ ]" and is "familiar with the conditions of the sidewalks[ ]" in the area because he "walk[s] from [his] residence to work often[.]" Consequently, Rago related he is "familiar with the side walk [sic] uplift" at issue, which "has existed in the condition depicted in [Jassim's photographs thereof] the entire time [he] ha[s] lived in the area, until it was ground down" sometime in 2019. While Rago's declaration is relevant to how long the uplift might have existed prior to the accident, nothing therein sheds light on the City's knowledge of it. Therefore, Rago's declaration does not create a triable issue of fact regarding whether the City had actual notice of the uplift.

With respect to his other evidence, Jassim contends "the Google Earth photographs" of the sidewalk where the incident occurred suggest City employees responsible for enforcing the parking meters along the street and maintaining "curb trees and grass" in the area were regularly in the uplift's vicinity. He also contends the Bureau's records reflect "the City had sent

numerous work crews" to perform repairs unrelated to the uplift on the street nearby. According to Jassim, these employees "would likely have seen" the uplift, and therefore his "evidence . . . raised a reasonable inference that the City . . . likely possess[ed] actual notice" of the uplift. We disagree with his argument, as it is based entirely on speculation and conjecture. "'Speculation . . . is not evidence' that can be utilized in opposing a motion for summary judgment. [Citations.]" (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 99; *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1453 ["A triable issue of fact can only be created by a conflict of evidence, not speculation or conjecture. [Citation.]"].)

ii. Constructive Notice

To show Jassim cannot prove it had constructive notice of the uplift, the City relies on the same evidence submitted to establish the uplift was a trivial defect as a matter of law. Specifically, the City contends this evidence shows the uplift was not sufficiently conspicuous to impart constructive notice. It further contends "Jassim's evidentiary submissions and testimony do not support a reasonable inference that [it] had constructive notice." We agree.

Our Supreme Court's decision in *Nicholson v. Los Angeles* (1936) 5 Cal.2d 361 (*Nicholson*) is instructive. There, the plaintiff tripped on a crack in the sidewalk that was "not more, and possibly less, than an inch and a half[ ]" in height. (*Id.* at p. 363.) Our Supreme Court reversed the judgment entered in the plaintiff's favor on her claim under the Public Liability Act of 1923. (*Id.* at pp. 363, 368.) That statute, like the Government Claims Act, permitted plaintiffs to recover for injuries resulting

from a dangerous condition on public property where the municipality had notice of the condition. (See *id.* at p. 363.)

With respect to constructive notice, our Supreme Court stated "there must be shown, in order to charge the city with constructive notice . . . , some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character." (*Nicholson*, *supra*, 5 Cal.2d at p. 364.) Consequently, "[t]he rule . . . is that the existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice." (*Id.* at p. 365.) Applying these principles, our Supreme Court held the crack in the sidewalk was not sufficiently conspicuous to warrant a finding of constructive notice because: (1) the crack was "about an inch and one-half high[ ]"; (2) the plaintiff testified "that from the direction from which she approached the sidewalk appeared to be perfectly level[ ]"; and (3) there was no evidence of any prior accidents or "event[s] which would put the city on inquiry as to the existence of a dangerous break" in the sidewalk. (*Id.* at p. 367.)

The facts in this case are similar to those presented in *Nicholson*. As discussed above, the City's evidence establishes the height of the uplift was no greater than 1.25 inches, and that it did not receive any complaints, service requests, inquiries, or claims for injuries related to the uplift within the five-year period leading up to the incident. Moreover, at his deposition, Jassim testified that although he had walked on the sidewalk where he fell before, he never noticed the uplift. Through this evidence, the City established the uplift was not conspicuous enough to support a finding of constructive notice (see *Nicholson*, *supra*, 5 Cal.2d at

pp. 367-368) and shifted the burden to Jassim to prove the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p).)

Jassim has not satisfied his burden. Though not entirely clear, he appears to rely on the same evidence he submitted to show the City had actual notice. None of this evidence, however, bears on whether the uplift was sufficiently conspicuous to support an inference of constructive notice.

DISPOSITION

The judgments entered in favor of respondents are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.