No. 23-CV-522

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

MARY-KATE CASTANIA,
APPELLANT,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

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

BRIEF FOR THE DISTRICT OF COLUMBIA

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6635
richard.love@dc.gov

*Counsel expected to argue

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STATEMENT OF THE ISSUE

In July 2019, appellant Mary-Kate Castania fell off a motorized scooter on a sidewalk in the District of Columbia. She sued the District for negligence. The Superior Court granted summary judgment for the District. The question presented is whether this Court should affirm either because 1) the undisputed evidence shows that the District did not have actual or constructive notice of a dangerous condition at the location or, alternatively, because 2) the purported sidewalk defect was de minimis.

STATEMENT OF THE CASE

In July 2020, Castania filed a negligence complaint against the District, alleging that it failed to maintain its sidewalk in a reasonably safe condition and inspect for and warn of dangerous sidewalk conditions. In February 2023, the court granted summary judgment to the District, finding insufficient evidence "to conclude that the District had actual or constructive notice of a dangerous condition in the sidewalk." Joint Appendix ("JA") 359; *see* JA 355-61. On June 13, 2023, finding no manifest error or misapplication of law, the court denied Castania's motion to alter or amend the judgment. JA 382-86. Castania's appeal was timely filed on June 21.

STATEMENT OF FACTS

1. The Trial Court Grants Summary Judgment To The District.

In July 2020, Castania brought suit against the District. She alleged that she was riding a motorized scooter on the sidewalk in the 1500 block of 9th Street, NW, when "she was caused to fall off the scooter by a dangerous condition in the Sidewalk." JA 13 ¶ 7. Castania did not notice any change in elevation before the accident. JA 27. She suffered bodily injuries and other damages that she alleged were caused by the District's negligence. JA 13 ¶ 9. Specifically, Castania alleged that the District failed to: 1) inspect the sidewalk for dangerous conditions; 2) maintain the sidewalk in a reasonably safe condition; and 3) warn persons of the sidewalk's dangerous condition. JA 14-15. Castania sought five million dollars in damages. JA 15.

After discovery closed, the District moved for summary judgment. The District did not dispute the condition of the sidewalk; it was "approximately 7 feet 4-inches" wide and "divided into three concrete pads." While Castania did not specify the exact point where she hit and fell on the sidewalk, it measured in vertical height between approximately 0.875 and 1.375 inches, likely due to underlying tree root growth. JA 28 ¶¶ 7 & 8; JA 199, 213.[1] The District argued that summary

[1] Another of Castania's experts offered substantially the same measurement of an elevation change between "approximately 0.8 inches" and "approximately 1.5 inches." JA 328.

judgment was warranted on two grounds: 1) the record evidence was insufficient to establish that the District had actual or constructive notice of the purported dangerous defect; and 2) the defect was de minimis as a matter of law. JA 26-35.

The District argued that it undisputedly did not have actual notice of any purportedly dangerous condition. Andrew Kaufman, a supervisory civil engineer in the District's Department of Transportation ("DOT"), testified that the District was "not aware of any complaints, warnings, or other notices concerning the sidewalk" where Castania fell that were "received before July 25, 2019," the date of her fall. JA 182; *see* JA 190 ¶ 5 (District's response to Castania's request for admissions denying prior knowledge of the condition of the sidewalk), 325 (Kaufman's deposition testimony). Castania in response did not challenge the District's lack of actual notice, which is not at issue on appeal. JA 285.

The District further argued that Castania's evidence could not, as a matter of law, sustain her claim that the District had constructive notice. Castania's evidence included 1) a 2014 Google street view image of the sidewalk where Castania fell, JA 30-32; *see* JA 279 (Google image), and 2) two witness affidavits' bare statements that a "raised sidewalk" existed for up to two years prior to Castania's fall, JA 297-99. The District pointed to the inadmissibility of the Google image, which was "small, grainy, no longer available online, and c[ould] [not] be verified as accurately depicting the Subject Location." JA 31; *see* JA 32. And although Castania urged

that the witness affidavits created a genuine dispute of material fact, the affidavits stated only that the sidewalk was "raised," without any further elaboration or specificity regarding the height of the allegedly dangerous defect. JA 286; *see* JA 297, 299 (witness affidavits). Neither witness provided any "information about the height or elevation change of the raised sidewalk at any set point in time." JA 349. Nor did either witness ever "t[ake] any steps to notify the District of any issue that needed to be addressed." JA 350.

The District argued that summary judgment was furthermore warranted because, "[r]egardless of notice, the defect that Castania alleges caused her injuries was de minimis, and the District had no legal duty to repair it." JA 33; *see* JA 34. While Castania maintained that any sidewalk defect greater than 0.25 inches is automatically dangerous, because the District typically repairs any known greater change in elevation, the District argued that any such per se rule is without legal basis. To the contrary, the District pointed to this Court's precedent instructing that "minor sidewalk elevations are not an unusual condition for city sidewalks," and "municipalit[ies] cannot be expected to maintain the surface of its sidewalks free from all inequalities." *See* JA 353; *Proctor v. District of Columbia*, 273 A.2d 656, 658 (D.C. 1971).

In February 2023, the court granted the District's motion for summary judgment. JA 355-61. The court observed that Castania failed to proffer any way

to authenticate the 2014 Google image, taken five years before the incident, as depicting the condition of the sidewalk in 2019. JA 360. It further determined that none of Castania's remaining evidence spoke to actual or constructive notice of something more than a de minimis defect in the sidewalk. JA 360. The measurements of the elevated sidewalk did not bear on the length of time that the allegedly dangerous condition had existed, such that the District should have been on notice. JA 360. Conversely, while the witness statements implicated the length of time an allegedly hazardous condition existed, they did not actually describe or assert that the raised sidewalk constituted a hazard. JA 360. Furthermore, without any "specifics regarding the sidewalk's condition," the court remarked that the defect should be considered de minimis and noted that, under *Briscoe v. District of Columbia*, 62 A.3d 1278 (D.C. 2013), even when the District has "constructive notice of an alleged sidewalk defect," the government "'is entitled to judgment as a matter of law when the alleged defect that caused the plaintiff's injury was insignificant in nature.'" JA 360 (quoting *Briscoe*, 62 A.3d at 1278).

On June 13, 2023, the court denied Castania's motion to alter or amend its judgment. JA 382-86. The court found that Castania did "not identify any new evidence which would warrant [its] reconsideration of" the February order and did not agree that "its reference to *Briscoe* constitute[d] a manifest error of law." JA 386. It did not find that *Briscoe*, which "instructs that minor or insignificant defects

are *de minimis* and do not constitute constructive notice," was misapplied to the facts here. JA 386.

STANDARD OF REVIEW

This Court reviews de novo the trial court's entry of summary judgment. *Fraternal Ord. of Police v. District of Columbia*, 79 A.3d 347, 353 (D.C. 2013). Summary judgment is proper "when there are no genuine issues as to any material facts" and the record shows that "the moving party is entitled to judgment as a matter of law." *Doe v. Safeway, Inc.*, 88 A.3d 131, 132 (D.C. 2014).

SUMMARY OF ARGUMENT

This Court should affirm the Superior Court's grant of summary judgment to the District either because the District lacked constructive notice of a dangerous sidewalk condition, or because the condition was de minimis as a matter of law.

1. Although the District has a duty to exercise reasonable care in the maintenance of its public ways, the mere fact that a pedestrian is injured on a public walkway is insufficient to permit an inference of negligence against the District. Instead, to establish a breach of a duty of care, the pedestrian must prove that the District had actual or constructive notice of a dangerous defect.

The Superior Court here correctly concluded that the District did not have constructive notice of a dangerous defect on the sidewalk where Castania fell off her motorized scooter. Castania does not contend that the District had actual notice and

did not establish a genuine issue of material fact whether the District had constructive notice. While her evidence included two witness statements contending that the sidewalk was "raised" for up to two years, neither witness provided any details regarding the size and height of any elevation change at any point in time. Their testimony is insufficient to establish the existence of a dangerous condition—let alone that it was of such a degree that the District should have been on notice of the condition by the time of Castania's accident.

Furthermore, while expert testimony confirmed the dimensions of the elevation change, the measurements themselves—taken after the fact—do not resolve the issue of *how long* the sidewalk remained in an unsafe condition, even assuming the change in elevation was in fact hazardous. Indeed, this Court has recognized that evidence that a generalized obstruction existed for a period of time, "standing alone[,] cannot establish the indispensable actual or constructive notice of the existence of the *specific* obstruction . . . or its dangerous character." *Aben v. District of Columbia*, 221 F.2d 110, 111 (D.C. Cir. 1955). Nor is there evidence that Castania fell off her motorized scooter in a busy area frequented by District officials, a factor that the Court has recognized could create a disputed fact question as to constructive notice. Moreover, the court did not err in reasonably inferring from the witnesses' failure to notify the District of a need to repair the raised sidewalk that

their statements were insufficient to demonstrate that a dangerous condition of which the District should have known existed.

2. As this Court has instructed time and again, a "municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel." *Proctor*, 273 A.2d at 658. In other words, not every imperfection constitutes a dangerous condition significant enough to trigger a duty of repair. Accordingly, even when the District has notice of an alleged defect, it is entitled to judgment where, like here, the alleged defect causing a plaintiff's injury is nothing more than de minimis.

The Superior Court's decision is in accord with the precedent of this Court, including *Briscoe*, which involved a sidewalk curb variation that was between two and three inches long and one inch deep. Here, Castania fell off her motorized scooter somewhere (she does not specify) where the sidewalk varied in height between 7/8 and 1.5 inches. Castania's attempts to distinguish *Briscoe* and liken her circumstances to other cases involving entirely different types of hazards lack merit. Castania also fails to persuade that the defect is more than de minimis due to the fact that the roadway alongside where she fell is a major thoroughfare, or because, due to obligations under the Americans With Disabilities Act, the District generally repairs sidewalk defects presenting a height difference of more than a quarter of an inch—when it knows about them.

ARGUMENT

I. The Superior Court Properly Granted Summary Judgment To The District.

It is a "well established rule that, 'although the District of Columbia has a duty to maintain its streets in a reasonably safe condition . . . it is not an insurer of safety of those who utilize its streets and sidewalks.'" *Briscoe*, 62 A.3d at 1278 (quoting *Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1322 (D.C. 1994)); *see District of Columbia v. Smith*, 642 A.2d 140, 141 (D.C. 1994) (noting that in a negligence case, "'[t]he mere happening of an accident does not meet [a plaintiff's] burden'" (quoting *District of Columbia v. Cooper*, 445 A.2d 652, 655 (D.C. 1982) (en banc))).

Instead, a "plaintiff must establish that there is a genuine issue of material fact as to whether, *inter alia*, 'her injuries were caused by an unsafe or defective condition . . . of which the District had timely notice, either actual or constructive.'" *Briscoe*, 62 A.3d at 1279 (quoting *Williams v. District of Columbia*, 646 A.2d 962, 963 (D.C. 1992)); *accord District of Columbia v. Woodbury*, 136 U.S. 450, 463-65 (1890). In other words, "the District government is not responsible for the injury that results unless it had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger obviated." *Woodbury*, 136 U.S. at 463; *see Harding v. District of Columbia*, 178 A.2d 920, 921 (D.C. 1962) (The District "is simply bound to exercise due care and diligence to remedy any dangerous condition of which it has timely notice").

Castania has failed to adduce evidence of actual or constructive notice to the District. Nor did the sidewalk present anything more than a de minimis defect. As a result, this Court should affirm the grant of judgment to the District on either of these independent bases.

A. The District did not have constructive notice of a dangerous sidewalk condition.

As an initial matter, Castania never argued before the Superior Court that the District had actual notice of the allegedly dangerous condition of the sidewalk where she fell off her motorized scooter. That is for good reason, given the District's testimony that it never received a complaint about the sidewalk. JA 182, 325; *see* JA 190 ¶ 5. Regardless, she also fails to make the argument on appeal, which is therefore forfeited. *Fells v. Serv. Emp. Int'l Union*¸ 281 A.3d 572, 579 (D.C. 2022) (affirming ruling not challenged in the opening brief).

Castania's reliance on constructive notice likewise fails. Br. 5, 8. Constructive notice "can be shown by evidence that a street has remained in an unsafe condition for a sufficient period of time that the District authorities ought to have known of it, had they exercised ordinary care." *Lynn v. District of Columbia*, 734 A.2d 168, 170 (D.C. 1999) (quoting *Wash. Metro. Area Transit Auth. v. Davis*, 606 A.2d 165, 175 (D.C. 1992)). "The relevant circumstances that a court may consider" in the constructive notice inquiry "include such things as the length of time that the defective condition existed, whether the condition was obvious or latent, and

the severity of the dangerous condition." *Briscoe*, 62 A.3d at 1279. However, "the fact that a defect exists is not sufficient in and of itself to provide constructive notice of that defect to the entity that maintains the property." *Wash. Metro. Area Transit Auth. v. Ferguson*, 977 A.2d 375, 378 (D.C. 2009). And "when any evidence from which [a] jur[y] could infer notice is lacking[,] the court disposes of the case as a matter of law." *Miller v. District of Columbia*, 343 A.2d 278, 280 (D.C. 1975).

Here, no jury could conclude that the District had constructive notice based on Castania's evidence. Although Castania's two fact witnesses contended that the sidewalk had been "raised" for up to "approximately 2 years prior to [Castania's] fall," neither witness was able "to provide specifics regarding the sidewalk's condition beyond their lay opinion that a defect existed in the sidewalk." JA 297, 299, 360. Absent any detail regarding the size, height, or elevation change of the sidewalk at any specific point in time, the testimony was insufficient to establish the existence of a dangerous condition—let alone that it was of such a degree that the District should have been on notice of the condition by the time of Castania's accident. In fact, Castania even admitted that she herself did not notice any change in elevation before the accident. JA 83.

Details regarding the change of the sidewalk's condition over the timeline implicated in the affidavits are particularly important here because Castania has alleged that the "defective condition was likely caused by the growth and/or

movement of tree roots." JA 330. Without such detail, Castania cannot demonstrate the alleged "severity or dangerousness of the condition" over time. *Briscoe*, 62 A.3d at 1279. Her evidence sheds no light on how quickly the alleged tree root growth occurred, or at what point it impacted the sidewalk to present a hazard. Furthermore, the "tree uplift problem is a problem that literally occurs all over the city" "every day." JA 319. Because "'[i]t is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition," "[a] municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel.'" *Proctor*, 273 A.2d at 658 (quoting *Whiting v. Nat'l City*, 69 P.2d 990, 991 (Cal. 1937)). Given the nature and frequency of tree uplift problems, the lack of any reported issue with the sidewalk, and the generalized witness testimony about the length of time that a portion of the sidewalk was simply "raised," it cannot be said that the District had "constructive notice of anything beyond a de minimis defect." JA 360; *see Barrett v. Covington & Burling LLP*, 979 A.2d 1239, 1245 (D.C. 2009) (explaining that "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted" (quotation marks and citations omitted)).

Castania suggests that her evidence raised a triable issue of fact when considering the affidavits in tandem with her expert's measurement of the sidewalk's

change in elevation.[2] JA 297 ¶ 7, 299 ¶ 6; *see* Br. 6-7. But neither witness substantiated the expert's measurements or verified that the unevenness remained exactly the same for a period of years. As the Superior Court correctly explained, the measurements were taken after the fact and do not resolve the issue of *how long* the sidewalk remained in an unsafe condition, even assuming the change in elevation was in fact hazardous by the time the accident occurred. *See Lynn*, 734 A.2d at 170 (explaining that constructive notice depends on the existence of an unsafe condition *for a sufficient period of time* to impute notice).

Castania's invitation to gloss over this evidentiary deficit would run contrary to this Court's precedent. Evidence of duration of a generalized obstruction, "standing alone[,] cannot establish the indispensable actual or constructive notice of the existence of the *specific* obstruction . . . or its dangerous character." *Aben*, 221 F.2d at 111. Thus, in *Aben v. District of Columbia*, the District obtained a directed verdict where the only evidence of constructive notice of a dangerous, icy sidewalk patch was weather reports showing unmelted snow and ice in the District over three days. *Id*. Conversely, in *Lynn v. District of Columbia*, this Court sustained a finding of constructive notice of a dangerous, three-inch deficit in elevation between the sidewalk and a treebox where multiple "depositions and affidavits from others"

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[2] In her brief, Castania did not raise any argument regarding the 2014 Google image and, apparently, has abandoned that argument.

confirmed the continued existence of the actual "condition of the sidewalk and treebox." 734 A.2d at 171.

Castania nevertheless contends that an unspecified "raised portion of a sidewalk existing for just more than a month can be [an] unreasonably prolonged" period sufficient to impute constructive notice to the District. Br. 6 (citing *Lynn*, 734 A.2d at 171). But the case on which she relies, *Lynn*, does not stand for that proposition. As discussed, the plaintiff in *Lynn* testified that she fell in a treebox space that was "three inches lower than the adjacent pavement," and had been in that precise condition "for [m]ore than a month and [p]robably for a year." 734 A.2d at 170 (internal quotation marks omitted). But the testimony here is not that the same condition that allegedly caused Castania's fall persisted for a prolonged period. Instead, it is that a "raised" sidewalk, without any further specificity, existed for a period of time before the accident. JA 297, 299.

In any event, the Court in *Lynn* did not rely on the existence of a dangerous condition for one month to conclude that there was a disputed question of fact as to constructive notice. Instead, noting "that the evaluation of the factual circumstances regarding the question of constructive notice varies in each case," the Court heavily relied on the fact that Lynn fell in a busy area where police officers were present "in the immediate vicinity." *Id*. at 171. "If the treebox was as damaged as [Lynn] claimed for as long as she claimed, a fact finder could have inferred that the

police"—in other words, District authorities—"would have seen it and had sufficient notice of the problem to give rise to the District's duty to correct it." *Id*. Here, the area where Castania fell is not alleged to have the same proximity to District officials.

Castania also argues that the District had constructive notice of the condition because it "was present in a location that receives a high volume of pedestrian traffic." Br. 11 (citing *Lynn*, 734 A.2d at 171).[3] But whether the area is highly trafficked is not dispositive of the constructive notice inquiry. *See Briscoe*, 62 A.3d at 1279 (enumerating as "relevant circumstances that a court may consider . . . 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"). And, as noted, Castania offers no evidence that *District officials* frequented the area, unlike the plaintiff in *Lynn*.

Castania also insists that 9th Street is a "major road" "eligible for federal aid"—apparently suggesting that it would have received disproportionate attention from District officials. Br. 11. But Castania unreasonably elevates the significance of eligibility for aid, as "all the major roads in D.C." are deemed "important road[s]"

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[3] Although this argument appears in the portion of Castania's brief regarding de minimis defects, it is framed as an argument regarding constructive notice. It is unclear how the traffic on a sidewalk could affect whether a physical defect is de minimis.

that the federal government is "willing to help [D.C.] maintain." JA 320. Her reasoning would expose the District to liability for a defect on most of its roads, again contravening the recognition that the District is not an insurer of pedestrian safety. Furthermore, Castania fell on the sidewalk, not the road, making the road's status irrelevant.[4]

Finally, Castania argues that the trial court "conflate[d] actual notice with constructive notice" because it took note of the witnesses' failure to report the sidewalk's condition. Br. 8. Not so. Beyond noting the affidavits' obvious lack of detail, the court reasonably inferred lack of constructive notice of a dangerous condition from the witnesses' failure to make any effort to facilitate a repair of the raised sidewalk. JA 360.[5] That is entirely within the purview of the trial court as factfinder. *See Evans v. United States*, 122 A.3d 876, 887 (D.C. 2015) (explaining that a fact finder "is entitled to draw a vast range of reasonable inferences from evidence"). Nevertheless, the fact that the District never received a report of a

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[4] In addition, although there was evidence that there was a restaurant and art gallery on the block where Castania fell, JA 297, 299, the only evidence of other neighboring establishments and adjacent bus routes, or other evidence of an allegedly highly trafficked area, is unsworn argument from counsel, which is inadmissible for purposes of summary judgment. *Maupin v. Haylock*, 931 A.2d 1039, 1042 (D.C. 2007) (recognizing that unsworn testimony "is insufficient to defeat a motion for summary judgment"); *see* Br. 12.

[5] Castania also emphasizes the District's choice not to depose either witness, but that choice is not surprising given the absence of any detail in the affidavits they crafted. Br. 7.

problem with the sidewalk at issue here seriously undercuts the notion that the dangerous condition existed for a sufficient period that the District should have known about it in the exercise of reasonable care. JA 319; *see* JA 321, 325.

B. The common sidewalk elevation change was de minimis as a matter of law.

This Court can independently affirm on the basis that the raised sidewalk presented a de minimis defect. "Even if the District has notice of an alleged defect, it is entitled to judgment as a matter of law when the alleged defect that caused the plaintiff's injury was insignificant in nature." *Briscoe*, 62 A.3d at 1278; *see District of Columbia v. Freeman*, 477 A.2d 713, 718-19 (D.C. 1984) (emphasizing that the "existence of prior notice" is insufficient absent evidence that the defect is "in fact unreasonably dangerous"). Furthermore, "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 (quoting *Proctor*, 273 A.2d at 658). "A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel." *Proctor*, 273 A.2d at 658 (quoting *Whiting*, 69 P.2d at 991). Accordingly, not every imperfection on a public sidewalk or road constitutes a defective condition significant enough to trigger a duty of repair.

This Court's precedent compels the conclusion that the raised sidewalk here presented a de minimis defect. For example, in *Briscoe*, the Court affirmed a grant of summary judgment for the District where a pedestrian tripped on a curb with an indentation that was two to three inches long and one inch deep. 62 A.3d at 1277. The Court reasoned that the "missing chunk from the curb is the kind of thing . . . that is all over the place," and determined that a photograph of the sidewalk's actual condition belied Briscoe's claim that there was a dangerous defect. *Id*. at 1279 (quotation marks omitted). In concluding that the defect was "insignificant" as a matter of law, the Court emphasized that "[m]inor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby," and it rejected a contrary rule that would "otherwise" result in a municipality always being "held liable upon a showing of a trivial defect." *Briscoe*, 62 A.3d at 1278 (quoting *Whiting*, 69 P.2d at 991).

Similarly, in *Proctor* the Court affirmed a judgment notwithstanding the verdict where a pedestrian tripped on a brick elevated ¼ inch above the brick sidewalk, finding "from the minor nature of that protrusion, [that] the evidence is not sufficient to support a finding of negligence." 273 A.2d at 659. In reaching its decision, the Court referenced several other cases where courts reversed judgments for pedestrians who tripped and fell over de minimis sidewalk defects, including a "sidewalk expansion joint which arose one-half inch above the sidewalk surface," a

"raised sidewalk block which differed in elevation between one-half to three-quarters of an inch from the adjacent sidewalk block," and a 7/8 inch "variation in the adjoining blocks of the sidewalk." *Id*. at 658-59; *see Williams*, 646 A.2d at 963 (finding that a ½ inch gap between the median strip and surrounding curb was a de minimis defect).

The alleged sidewalk defect here—which at its highest point was approximately 1.5 inches and only 7/8 inch at other points—is comparable to the defects found to be de minimis in *Briscoe* and *Proctor*. Furthermore, as in *Briscoe*, the tree uplift that elevated a portion of the sidewalk in the area where Castania fell was "a problem that occurs literally all over the city," "every day." JA 319. Additionally, a photo taken at the time of the incident does not show an obvious and dangerous defect. *See* JA 199.

Castania seeks to distinguish *Briscoe* because the one-inch-deep defect "was on a curb," not an elevated sidewalk panel. Br. 10. But this minor factual difference is immaterial; "*Briscoe* instructs that minor or insignificant defects," such as that at issue here, "are de minimis." JA 386. Again, the Court in *Briscoe* recognized "that it is impossible to maintain a sidewalk in a perfect condition" and that "[m]inor defects are bound to exist." 62 A.3d at 1278 (quotation marks and citation omitted). Tree uplift problems are ubiquitous, and exposing the District to liability for the minor elevation change that problem caused here is inconsistent with this Court's

recognition that the District "is not an insurer of safety of those who utilize its streets and sidewalks." *Id*. (internal quotation marks omitted).

Castania also argues that the Superior Court ignored testimony from the District's DOT witness, Kaufmann, who acknowledged that "[i]f the District knew there was a height difference of greater than a quarter of an inch" it would have repaired it. JA 318; *see* Br. 13. In the first instance, Kaufman's testimony describes a District procedure, which like other internal directives, agency manuals, and protocols, cannot by itself establish a duty or standard of care. *See, e.g.*, *Phillips v. District of Columbia*, 714 A.2d 768, 774 (D.C. 1998) (affirming the trial judge's holding that an internal agency "directive is not a standard [of care] and may not be relied upon as such" (internal quotation marks omitted, brackets in original)). Moreover, as Kaufmann also explained, the District's position developed in response to an entirely distinct legal obligation—the Americans with Disabilities Act—because such a change in elevation would be "a barrier for a person with a disability." JA 318-19. But this suit does not seek ADA compliance. Rather, in this negligence suit, Castania would fault the District for being proactive in repairing de minimis defects known to it, as opposed to waiting until a known defect is dangerous before making a repair.

Finally, Castania argues that the change in the elevation of the sidewalk here was equal to or greater than defects that the Court has found were not de minimis.

Br. 13. She relies on *Washington Gas Light Co. v. Jones*, 332 A.2d 358 (D.C. 1975), where the Court found that a gas box that protruded 1/2 to 3/4 of an inch above the surface of the street was not a trivial defect. *Id*. at 360. And she cites to *Klein v. District of Columbia*, 409 F.2d 164 (D.C. Cir. 1969), which also involved a fall caused by a foreign object—an elevator shaft door handle—that protruded 3/4 of an inch above the pavement's surface. *Id*. at 167-68.

Both of these cases are different in the critical respect that the alleged defect was the protrusion of an unexpected foreign object. By contrast, this case involves a minor change in the elevation of a portion of a sidewalk, which is a daily "problem that occurs literally all over the city." JA 319. Indeed, in finding a dangerous condition in *Jones*, the Court specifically differentiated between "an inconsequential unevenness which is common to most brick sidewalks," and "a foreign object (i.e., gas box) protruding in a crosswalk." 332 A.2d at 360.

The last case that Castania cites, *District of Columbia v. Cooper*, 445 A.2d 652 (D.C. 1982), is also distinguishable. *Cooper* involved a visitor who fell on a walkway undergoing repairs, "where the bricks had been removed and replaced with material largely composed of dirt, sand, and little rocks." *Id*. at 653. That is, the defect was more than "a mere minor differential in the elevation of bricks in a brick sidewalk." *Id*. at 656. Instead, the evidence of negligence concerned "an area of known irregularity in a walkway, where the jury reasonably could infer that the

temporary walkway area was predominantly sand, where there was no alternate route of travel, where remedial action was under way, without any notice or warning to that effect." *Id*. None of those factors are present here. Instead, the alleged defect that Castania asserts caused her to fall off her motorized scooter is a minor differential in the elevation of a portion of a sidewalk, "a very prevalent condition" that urban residents know is likely to occur in city sidewalks. *Proctor*, 273 A.2d at 658. That defect was de minimis, as the photographs in the summary judgment record underscore. *See, e.g.*, JA 199-201.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

/s/ Richard S. Love
RICHARD S. LOVE
Senior Assistant Attorney General
Bar Number 340455
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6635
(202) 730-0491 (fax)
richard.love@dc.gov

February 2024

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Richard S. Love
Signature

23-CV-522
Case Number(s)

/s/ Richard S. Love
Name

February 2, 2024
Date

Richard.Love@DC.Gov
Email Address

CERTIFICATE OF SERVICE

I certify that on February 2, 2024, this brief was served through this Court's electronic filing system to:

Adam R. Leighton
Steven Saltzburg
Hans P. Riede

/s/ Richard S. Love
RICHARD S. LOVE