DOCKET NO. CV-21-6115240-S	:	STATE OF CONNECTICUT
SUSAN FANNING	:	SUPERIOR COURT
V.	: :	JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN
TOWN OF BRANFORD, ET AL.	:	APRIL 22, 2024

MEMORANDUM OF DECISION
MOTION FOR SUMMARY JUDGMENT (#149)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action, filed by the plaintiff, Susan Fanning, arises out of an alleged trip and fall that occurred in Branford, Connecticut. In her three-count complaint, the plaintiff alleges the following. On or about January 7, 2021, at approximately 4:30 p.m., the plaintiff was walking to the sidewalk in front of the driveway to 134 Montowese Street. This is a public sidewalk that is heavily traveled and used by pedestrians. While exercising due care during said walk, the plaintiff fell because of the sidewalk's dangerous and defective condition, incurring injuries. Consequently, her injuries were directly and proximately caused by the town of Branford's (defendant) breach of a statutory duty and/or the negligence of BDC Building, LLC (BDC) and Branford Dental Care, L.L.P. (Branford Dental) as these parties were responsible for the maintenance, supervision, and care of the sidewalk in front of the driveway to 134 Montowese Street.[1]

In the first count of the complaint, the sole count directed to the defendant, the plaintiff

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[1]The complaint further alleges that the premises located at 134 Montowese Street, although occupied by Branford Dental, is owned by BDC. Given that Branford Dental was removed from this action (Docket Entry No. 133), and only the defendant filed this motion for summary judgment (Docket Entry No. 149), all references to the defendant are to the town of Branford.

alleges that the sidewalk was within the defendant's territorial limits, and the defendant is liable pursuant to General Statutes § 13a-149[2] in one or more of the following ways: (1) the area was uneven, raised, of varying heights, and in a state of disrepair so that it rendered pedestrian traffic hazardous and dangerous; (2) the uneven and raised condition had existed for an unreasonable period of time, yet no measures had been taken to remedy and correct the same; (3) the sidewalk was not reasonably safe for the uses and purposes intended; (4) the defendant, in the exercise of reasonable care and inspection, should have known of these conditions and remedied the same, yet failed to do so. Additionally, the plaintiff alleges that she provided the defendant with timely notice.

On September 8, 2023, the defendant filed its answer and two special defenses (Docket Entry No. 152). The defendant admits it is a municipal corporation, denies that (a) it owed a statutory duty to the plaintiff or a breach of such a duty was a direct and proximate cause of the plaintiff's alleged injuries, (b) a dangerous and defective condition existed on a sidewalk it had a duty to care for and inspect, and (c) the plaintiff exercised due care, and leaves the plaintiff to her proof on all remaining allegations. The defendant's special defenses allege that the plaintiff fails to state a claim upon which relief may be granted and that any alleged defect was not the sole proximate cause of the plaintiff's injuries. On September 11, 2023, the plaintiff filed a reply (Docket Entry No. 153) and denies every allegation in the special defenses.

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[2]General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road . . . may recover damages from the party bound to keep it in repair. . . . No action for any such injury shall be maintained against any town . . . unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town . . . ."

Also on September 8, 2023, the defendant filed a motion for summary judgment (Docket Entry No. 149) as to count one on the ground that there are no genuine issues of material fact that, as a matter of law, the defendant had no duty to maintain the raised piece of concrete upon which the plaintiff allegedly tripped because the raised piece of concrete was neither part of the sidewalk nor near the traveled path such that it would necessarily obstruct or hinder the use of the sidewalk or within the defendant's right-of-way, the defendant did not have actual or constructive notice of the alleged defect, and there is no evidence to support a claim that the alleged defect was the sole proximate cause of the plaintiff's alleged injuries and damages. In support of the motion, the defendant filed a memorandum of law in support and the following exhibits: (a) a certified copy of transcript excerpts from the plaintiff's deposition (Ex. A), (b) a certified copy of transcript excerpts from John M. Hoefferle's, the defendant's town engineer (town engineer), deposition (Ex. B), (c) an unauthenticated copy of the plaintiff's notice of claim dated January 29, 2021, which includes a photograph of the alleged defect (Ex. C), and (d) a certified copy of transcript excerpts from Ryan Finnegan's, a principal in BDC and practicing dentist at Branford Dental (Dr. Finnegan), deposition (Ex. D).[3]

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[3]Prior to reviewing this evidence, the court must determine if the evidence is admissible. "[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § [17-45], although containing the phrase including but not limited to, contemplates that supporting documents to a motion for summary judgment be made under oath or be otherwise reliable." (Emphasis omitted; internal quotation marks omitted.) *Nash* v. *Stevens*, 144 Conn. App. 1, 15, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013). "[B]efore a document may be considered by the court [in connection with] a motion for summary judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings . . . . Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a

On October 20, 2023, BDC filed an objection to the defendant's motion for summary judgment (Docket Entry No. 156) and the following exhibits: (a) copies of unauthenticated photographs that appear to depict the alleged defect and its surrounding area (Ex. A), (b) a copy of an unauthenticated, redacted BDC business record (Ex. B),[4] (c) copies of unauthenticated photographs that appear to depict an area in front of the apportionment defendants' property[5] (Ex.

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true and accurate representation of what its proponent claims it to be." (Citation omitted; internal quotation marks omitted.) *Bruno* v. *Geller*, 136 Conn. App. 707, 714-15, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012); see Conn. Code Evid. § 9-1 (a), commentary.

Moreover, "a deposition is the written testimony of a witness given in the course of a judicial proceeding." (Internal quotation marks omitted.) *Bruneau* v. *Quick*, 187 Conn. 617, 625, 447 A.2d 742 (1982). "While the plaintiff's deposition testimony is not conclusive as a judicial admission . . . it is sufficient to support entry of summary judgment in the absence of contradictory competent affidavits that establish a genuine issue as to a material fact." (Citation omitted.) *Collum* v. *Chapin*, 40 Conn. App. 449, 450 n.2, 671 A.2d 1329 (1996). Here, the deposition transcripts are certified, but the notice is unauthenticated. Given that no party objected to said notice, the court will consider it as admissible evidence.

[4]As previously noted in footnote three, prior to reviewing this evidence, the court must determine if the evidence is admissible. General Statutes § 52-180 (a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." Our Appellate Court stated that "[t]o qualify a document as a business record, the party offering the evidence must present a witness who testifies that these three requirements have been met." *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 9, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000); see also Conn. Code Evid. § 8-4 (a). Given that BDC has not presented a witness to testify or a signed and sworn affidavit that these three requirements have been met, this court will not consider exhibit B attached to BDC's objection in deciding this motion because it constitutes inadmissible hearsay pursuant to § 52-180 (a). See *New Haven* v. *Pantani*, 89 Conn. App. 675, 679, 874 A.2d 849 (2005); *Crowley* v. *Dudek*, Superior Court, judicial district of Ansonia-Milford, Docket No. 4004360 (November 30, 2007, *Levin, J.*) (holding that uncertified police report unaccompanied by affidavit characterizing as business record is inadmissible).

[5]On September 8, 2021, BDC filed an apportionment complaint alleging that if the plaintiff sustained injuries and losses as alleged, said injuries and losses were directly and

C), (d) an unauthenticated copy of a portion of the defendant's ordinances (Ex. D), (e) a certified copy of transcript excerpts from the town engineer's deposition (Ex. E), (f) a certified copy of transcript excerpts from Dr. Finnegan's deposition (Ex. F), and (g) a certified copy of transcript excerpts from Stephanie Conner Montuori's, a BDC representative, deposition (Ex. G).[6] In its objection, BDC argues that issues of material fact exist as to whether the defendant is responsible

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proximately caused by the negligence and carelessness of Harold D. Levy (Dr. Levy), a medical doctor and the owner of the premises located at 140 Montowese Street, Branford, Connecticut, and Harold Levy, MD, PC (with Dr. Levy, referred to as Levy), a professional corporation located at said address (Docket Entry No. 109). To date, the plaintiff has not pleaded over and added Levy as a defendant in this action.

[6]As previously noted in footnote three, prior to reviewing this evidence, the court must determine if the evidence is admissible. "The words and acts of a party-opponent are generally admissible against him [or her] under the admission exception [to the hearsay rule]. . . . Under [this exception], evidence must be offered against the party that made the admission." (Citations omitted; internal quotation marks omitted.) *State* v. *Markeveys*, 56 Conn. App. 716, 719, 745 A.2d 212, cert. denied, 252 Conn. 952, 749 A.2d 1203 (2000). The exhibit purports to provide evidence of statements made by the plaintiff regarding where she fell and her inability to start her car. The court will not consider exhibit G attached to BDC's objection in deciding this motion to the extent that it contains inadmissible hearsay because the moving party here is the co-defendant, not the plaintiff. See *Stiewing* v. *Wilbour*, Superior Court, judicial district of Ansonia-Milford at Derby, Docket No. CV-13-6014192-S (February 2, 2015, *Tyma, J.*) (refusing to consider co-defendant's recorded statement as admission of party in part because plaintiff offered it against her fellow co-defendants, not co-defendant who made statement).

Furthermore, BDC's exhibits A, C, and D are unauthenticated copies of photographs that appear to depict the alleged defect, its surrounding area, and an area in front of the apportionment defendants' property and an unauthenticated copy of a portion of the defendant's ordinances. Given that this court has discretion to consider unauthenticated evidence when the opposing party does not object, and the defendant did not object here, this court will consider BDC's exhibits A, C, and D. See *Nash* v. *Stevens*, supra, 144 Conn. App. 15; *Barlow* v. *Palmer*, 96 Conn. App. 88, 92, 898 A.2d 835 (2006); *Grant* v. *Yale University*, Superior Court, judicial district of New Haven, Docket No. CV-99-0430454-S (March 27, 2003, *Licari, J.*) (allowing uncertified copies of letters, portions of collective bargaining agreement, deposition transcript, and uncertified interoffice memorandum because no objection filed); but see *Daniels* v. *Ericson*, Superior Court, judicial district of New London, Docket No. CV-06-5001423-S (July 17, 2007, *Hurley J.T.R.*) (denying consideration of unauthenticated letter because court lacks discretion to consider it once opposing party objected).

for the area where the plaintiff allegedly fell and where exactly the plaintiff allegedly fell.

In response, the defendant filed a reply brief (Docket Entry No. 157) on November 3, 2023, and asserts that BDC does not have standing to object to the defendant's motion for summary judgment because it is not an adverse party pursuant to Practice Book § 17-45 and that BDC failed to raise any genuine issues of material fact.[7] With the court's permission, BDC filed a sur-reply (Docket Entry No. 159) on November 16, 2023, and contends that it has standing to object. Oral argument on these motions was heard remotely on January 2, 2024, and to date, the plaintiff has not filed an objection to the defendant's motion for summary judgment.

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[7]Additionally, the defendant contends that its motion for summary judgment should be granted because the plaintiff did not object to said motion, and she later disclosed the town engineer as an expert. In *Gagnon* v. *Siemiatkoski*, Superior Court, judicial district of New London, Docket No. 514706 (October 22, 1991, *Koletsky, J.*) (5 Conn. L. Rptr. 606, 606), the court underscored that a nonmovant's failure to file documents in opposition to another party's motion for summary judgment is not deemed consent to the motion. Moreover, as noted by our Appellate Court, "[i]t necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 626-27, 57 A.3d 391 (2012). Thus, the plaintiff's failure to object to the defendant's motion for summary judgment does not entitle the defendant to judgment as a matter of law because to rule otherwise would negate the movant's burden. See id.

Regarding BDC's argument concerning the plaintiff's disclosure of the town engineer as an expert, "courts have generally held that a party must raise the issues of law to be addressed by the court in its initial memorandum to the court and will not consider issues of law first raised in a reply brief." *Plank* v. *Wolf's Den Cooperative Playground Assn., Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV-07-5003207-S (July 27, 2009, *Jones, J.*). Nevertheless, the court will not address this argument because it is inadequately briefed. See *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 61-62, 172 A.3d 283 (2017) (noting "[i]t is well settled that [w]e are not required to review claims that are inadequately briefed and that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" [internal quotation marks omitted]).

<u>ANALYSIS</u>

I.

Standard of Review

"The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414, 195 A.3d 664 (2018). "A genuine issue has been variously described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969). "A material fact has been defined . . . as a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002). "The test [for summary judgment] is whether a party would be entitled to a directed verdict on the same facts." (Internal quotation marks omitted.) *Fernandez* v. *Mac Motors, Inc.*, 205 Conn. App. 669, 673, 259 A.3d 1239 (2021). "[A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 752, 660 A.2d 810 (1995).

“The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book [§ 17-45].” (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

The defendant argues there are no genuine issues of material fact that, as a matter of law, the defendant did not have a duty to maintain the raised piece of concrete upon which the plaintiff allegedly tripped because the raised piece of concrete was neither part of the sidewalk nor near the traveled path such that it would necessarily obstruct or hinder the use of the sidewalk or within the defendant’s right-of-way, the defendant did not have actual or constructive notice of the alleged defect, and there is no evidence to support a claim that the alleged defect was the sole proximate cause of the plaintiff’s alleged injuries and damages. Specifically, the defendant

contends that judgment should enter in its favor because § 13a-149 is inapplicable as the alleged defect was clearly within BDC's property and not within the parameters of the sidewalk. Moreover, the defendant asserts that it was not on notice of any defect because no actual defective condition exists on the sidewalk, and the plaintiff has not shown that she used due care and skill prior to tripping on the alleged defect and, therefore, it may not be the sole proximate cause of the plaintiff's alleged injuries. In its reply brief, the defendant challenges BDC's standing to object to its motion for summary judgment because BDC is not an "adverse party" pursuant to Practice Book § 17-45 (b)[8] as it cannot assert a cross-claim against it.

Although the plaintiff, to date, has failed to file any opposition to this motion, BDC raises both procedural and substantive arguments. First, BDC contends that the defendant's motion should not be considered because it is untimely. This court disagrees.[9] Next, BDC argues that

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[8]Practice Book § 17-45 (b) provides: "Unless otherwise ordered by the judicial authority, any adverse party shall file and serve a response to the motion for summary judgment within forty-five days of the filing of the motion, including opposing affidavits and other available documentary evidence."

[9]BDC maintains that the parties' modified scheduling order (Docket Entry No. 141), which was granted by this court on May 22, 2023, set a September 23, 2023 deadline to file, mark ready, and argue any dispositive motions, and that the defendant did not file its motion until September 8, 2023. Consequently, BDC contends that it was mathematically impossible for the defendant's motion to be argued by the deadline. See Practice Book § 17-45 (c) ("[u]nless otherwise ordered by the judicial authority, the moving party shall not claim the motion for summary judgment to the short calendar less than forty-five days after the filing of the motion for summary judgment"). "Courts have allowed motions for summary judgment filed after the scheduling order deadline when there is no prejudice to the opposing party." (Internal quotation marks omitted.) *Olavarria* v. *Sports Haven*, Superior Court, judicial district of New Haven, Docket No. CV-16-6065064-S (September 25, 2018, *Richards, J.*); see *Theodore* v. *Lifeline Systems Co.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6029978-S (August 19, 2014, *Peck J.*) (considering cross motions for summary judgment filed three weeks after scheduling order deadline because "resolution of all the issues raised by way of these motions will not prejudice any party and will no doubt result in a more efficient trial"); but see *Taylor* v. *Barberino*, Superior Court, judicial district of Hartford, Docket No. CV-07-5010769-S (March

there is a genuine issue of material fact regarding where the plaintiff actually fell and who is responsible for the property. Additionally, BDC asserts that if there is a defect, the defendant would have had actual or constructive notice of the defect pursuant to § 216-37[10] and § 216-41[11] of the Branford Ordinances. Finally, BDC notes that the defendant has not ruled out the possibility that it caused, created, or failed to repair the alleged defect identified by the plaintiff considering the raised piece of concrete appears to be the same color and material as the sidewalk. BDC counters the defendant's argument about standing to file an objection in its sur-reply and argues that it has a direct interest in the defendant's motion.

II.

BDC'S STANDING TO OBJECT

The defendant's position that BDC does not have standing to object to its motion for summary judgment raises a question that has not been addressed by our appellate courts. See *Wiggins* v. *Henry Urena Services, LLC*, Superior Court, judicial district of Fairfield, Docket No.

13, 2013, *Schuman, J.*) (denying cross motion for summary judgment as untimely when it was filed more than three months after scheduling order deadline and three months prior to trial because "the court cannot allow parties to ignore court orders, including scheduling orders, with impunity"). As BDC has not articulated how it would be prejudiced by this court's consideration of the defendant's motion, this court will consider the defendant's motion timely filed.

[10]Branford Ordinance § 216-37 provides: "The Town Engineer or his agent shall designate the required specifications for sidewalks, shall superintend all original construction and repairs and shall act as Sidewalk Inspector and Enforcement Officer." See BDC's Oppn. Mot. Summ. J., Ex. D.

[11]Branford Ordinance § 216-41 (a) provides in relevant part: "Every person owning any land, upon or adjacent to which there is a sidewalk, shall keep such sidewalk at all times in a safe and convenient condition for the use of the public and shall remove therefrom all obstructions in any way endangering or impeding the public travel upon the same. . . . If deemed necessary, any repairs or replacement shall be the responsibility of the Town of Branford. . . ." See BDC's Oppn. Mot. Summ. J., Ex. D.

CV-18-6078768-S (June 26, 2020, *Stevens, J.*) (noting that defendant's position that co-defendant does not have standing to object to its motion for summary judgment has not been addressed by either appellate court). "[T]he status of a 'party' as a co-defendant [does not] preclude it from resisting a motion for summary judgment filed by a co-defendant. . . . On the other hand, the fact that a defendant is a 'party' does not necessarily mean that the defendant has a right to oppose a co-defendant's motion for summary judgment. . . . The question should . . . be resolved by the facts of a particular case as to whether a co-defendant has standing in this situation." (Citations omitted; internal quotation marks omitted.) *Robertson* v. *Delsanto*, Superior Court, judicial district of Hartford, Docket No. CV-98-0578887-S (December 9, 1999, *Teller, J.*) (26 Conn. L. Rptr. 111, 113). Although the trial court decisions are split on this question; compare id. (denying co-defendant's objection because he was not adverse party and lacked standing to oppose summary judgment motion by another defendant without cross-pleadings between them), with *Steele* v. *Johnson*, Superior Court, judicial district of New Britain, Docket No. CV-11-6010212-S (February 5, 2013, *Gleeson, J.*) (allowing co-defendant's objection to defendant's motion for summary judgment because it was exposed to greater liability and was, therefore, adverse); this court has adopted the liberal reading of Practice Book § 17-45 (b). See *Dawson* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-08-5016831-S (October 26, 2009, *Wilson, J.*) ("[w]here a defendant in his motion claims fault does not lie with him or her but with a co-defendant, the latter party certainly has a direct interest in the motion" [internal quotation marks omitted]). As this court previously has adopted a liberal reading of the rule and finds the authorities cited by the defendant unpersuasive, the court agrees that BDC has a direct interest in said motion and will therefore consider its

objection.

III.

GENERAL STATUTES § 13a-149

The plaintiff alleges in the first count of the complaint that the defendant violated § 13a-149. In its motion for summary judgment, the defendant argues that the area where the plaintiff allegedly fell does not fall within the definition of a sidewalk or the traveled path such that the defendant would be subject to § 13a-149, and the alleged defect is not an actual defect. The defendant further argues that it did not have a duty to keep the area where the plaintiff allegedly fell in repair, they did not have actual or constructive notice of the alleged defect, and said defect was not the sole proximate cause of the plaintiff's alleged injuries. BDC disagrees.

"Historically . . . municipalities enjoyed immunity for injuries caused by defective highways under common law, due in good part to the miles of streets and highways under their control. . . . The highway defect statute, § 13a-149, is a legislative exception to the immunity that municipalities enjoyed at common law and, as such, must be strictly construed." (Citation omitted; internal quotation marks omitted.) *Read* v. *Plymouth*, 110 Conn. App. 657, 663, 955 A.2d 1255, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008). "Under § 13a-149, [a]ny person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . . [I]n an action against a municipality for damages resulting from a highway defect, the defective highway statute is the plaintiff's exclusive remedy. . . . Whether a highway is defective may involve issues of fact, but whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . . [A] highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily

obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result . . . . [I]f there is a defective condition that is not in the roadway, it must be so direct a menace to travel over the way and so susceptible to protection and remedial measures which could be reasonably applied within the way that the failure to employ such measures would be regarded as a lack of reasonable repair. . . . The duty of the municipality to use reasonable care for the reasonably prudent traveler . . . extends to pedestrian travel as well as to vehicular traffic. . . . [T]he defect [does not] have to be on the actual traveled portion of the highway. . . . Reasonable latitude is allowed to meet the exigencies of travel." (Citations omitted; internal quotation marks omitted.) *Ferreira* v. *Pringle*, 255 Conn. 330, 341-43, 766 A.2d 400 (2001); see also *Bellman* v. *West Hartford*, 96 Conn. App. 387, 394, 900 A.2d 82 (2006).

Therefore, municipalities, as a matter of law, have a nondelegable duty to maintain their public highways. *Machado* v. *Hartford*, 292 Conn. 364, 370, 972 A.2d 724 (2009). "Primarily, it is the sole duty of the municipality to keep its streets in reasonably safe condition for travel, and not the duty of private persons." *Willoughby* v. *New Haven*, 123 Conn. 446, 451, 197 A. 85 (1937). "To prove liability under the highway defect statute, a plaintiff must prove (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, having actual or constructive knowledge of this defect, failed to remedy it having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been the sole proximate cause of the injuries and damages claimed . . . ." (Internal quotation marks omitted.) *Dobie* v. *New Haven*, 346 Conn. 487, 503-504, 291 A.3d

1014 (2023).

A.

Location of Alleged Defect

"The statutory provisions of § 13a-149 have two components that must be met to trigger its application: (1) the plaintiff must have sustained an injury by means of a defective road or bridge and (2) the party whom the plaintiff is suing must be the party bound to keep [the location where the injury was sustained] in repair." (Internal quotation marks omitted). *Novicki* v. *New Haven*, 47 Conn. App. 734, 739-40, 709 A.2d 2 (1998). Therefore, the court must first decide if the raised piece of concrete that allegedly caused the plaintiff to fall was part of a defective road or bridge. The defendant argues that it is not, and BDC disagrees.

"The word road or highway as used in the highway defect statute has usually been construed to include sidewalks. . . . The term sidewalk is meant to apply to those areas that the public uses for travel. . . . Furthermore, a highway is defective within the meaning of § 13a-149 when it is not reasonably safe for public travel, and the term public travel refers to the normal or reasonably anticipated uses that the public makes of a highway in the ordinary course of travel." (Citations omitted.) Id., 740; *Chuka* v. *Derby*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-06-5002125-S (May 1, 2009, *Cronan, J.*) (47 Conn. L. Rptr. 635, 637) ("Connecticut courts have interpreted the words 'road or bridge' within § 13a-149 to include sidewalks and public walkways").

Where the injury occurs in the vicinity of a highway, but does not occur on the public sidewalk, "[w]hether the place of injury is within the . . . right-of-way line is the threshold inquiry in determining whether the condition complained of falls under § 13a-149." (Internal

quotation marks omitted.) *Ferreira* v. *Pringle*, supra, 255 Conn. 350. That the defect occurs within the right-of-way is, however, not dispositive and does not end the analysis. *Baker* v. *Ives*, 162 Conn. 295, 302 n.3, 294 A.2d 290 (1972); see also *Bellman* v. *West Hartford*, supra, 96 Conn. App. 396 (holding finder of fact should determine whether driveway was open to public and therefore under purview of § 13a-149). "Whether there is a defect in such proximity to the highway so as to be considered *in, upon, or near the traveled path* of the highway must be determined on a case-by-case basis after a proper analysis of its own particular circumstances, and is generally a question of fact for the [finder of fact] . . . ." (Emphasis added; internal quotation marks omitted.) *Baker* v. *Ives*, supra, 300.

"[D]efective conditions located near the roadway, but in areas unintended for travel, are not highway defects within the ambit of the highway defect statute. . . . [W]hen the [town] either invites or reasonably should expect the public to use a particular area that is not directly in the roadway but that is a necessary incident to travel on the roadway, a defective condition therein may give rise to a cognizable action under the statute." (Citations omitted.) *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 504-505, 876 A.2d 1148 (2005). "For an area to be open to public use it does not have to be open to everybody all the time. . . . The essential feature of a public use is that it is not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public. It is the indefiniteness or unrestricted quality of potential users that gives a use its public character." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 147 Conn. App. 148, 158, 82 A.3d 647 (2013), aff'd, 315 Conn 606, 109 A.3d 903 (2015); see *Klein* v. *Norwalk*, 499 F. Supp. 2d 113, 115-16 (D. Conn. 2007) (holding parking lot was area pedestrians were expected and anticipated

to traverse and open to public and used to travel to sidewalks and roadways), aff'd, 305 Fed. Appx. 745, 747-48 (2d Cir. 2009) (affirming that municipality invited public to use facility to travel to retail stores, attractions and other businesses, falling within § 13a-149). A number of Superior Court decisions have considered three factors to determine whether a defect was in a public area: "(1) whether it was open to the public at all times; (2) whether it was, like a sidewalk, used in the ordinary course of travel; and (3) whether the alleged defect . . . was proximate enough to a road or highway to bring it within the statute." *Ferrigno* v. *Hamden Volunteer Fire Dept.*, Superior Court, judicial district of New Haven, Docket No. CV-10-6011263-S (May 2, 2012, *Wilson, J.*).

"[O]ur courts have never created a set of specific guidelines for how close the site of an injury must be to the traveled portion of the road or highway so as to be within the confines of § 13a-149. Rather . . . that is a question of fact for the fact finder." (Citation omitted.) *Burton* v. *New Britain*, Superior Court, judicial district of New Britain, Docket No. CV-18-6048265-S (December 11, 2019, *Shortall, J.T.R.*) (denying summary judgment by town where plaintiff fell on public, brick walkway in front of rear entrance to city hall building, some distance from sidewalk that abuts city sidewalk that abuts public road); see *Fox* v. *Metro-North*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-93-0133933-S (October 4, 1994, *Lewis, J.*) (denying summary judgment because evidence submitted by parties does not clearly suggest that area where plaintiff's alleged accident occurred was so far away from road or sidewalk as to justify finding that it was not covered by defective highway statute as matter of law); cf. *Roberts* v. *Bedford Street Properties, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-6002678-S (October 21, 2011, *Adams, J.T.R.*) (granting summary

judgment for town where plaintiff fell on tile entrance ramp near building entrance, not on public brick sidewalk, because although in close proximity, no evidence presented that inclined entranceway is part of public sidewalk, especially when composition of tile and incline itself speak otherwise); but see *Steeg* v. *Stamford*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-88-0092958-S (July 12, 1990, *Lewis, J.*) (2 Conn. L. Rptr. 67, 68) ("[h]owever, where a path is so far removed from the traveled path of the highway . . . the question may be resolved as a matter of law").

Moreover, "[w]hether a condition in a highway constitutes a defect must be determined in each case on its own particular circumstances." (Internal quotation marks omitted.) *Kozlowski* v. *Commissioner of Transportation*, supra, 274 Conn. 503. The specific allegations in the plaintiff's complaint and those that the court can reasonably infer, if true; see *United Oil Co.* v. *Urban Redevelopment Commission*, supra, 158 Conn. 381; support that the plaintiff fell due to a dangerous and defective condition on or near the sidewalk in that she tripped over an uneven, raised piece of concrete that was part of or adjacent to the defendant's sidewalk. The plaintiff alleges that the sidewalk is public, heavily traveled, and was in use by pedestrians. The alleged defect does not appear to be part of the proper sidewalk itself but adjacent to the sidewalk. The question before the court is whether it was open to the public and was in such proximity to the highway so as to be considered in, upon, or near the traveled path of the highway.

The court finds *Baker* v. *Ives*, supra, 162 Conn. 295, instructive. In *Baker*, the court noted that a highway defect does not "have to be on the actual traveled portion of the highway."

Id., 299. The statute analyzed in that case was General Statutes § 13a-144,[12] which has similar language to § 13a-149. See id., 298-99 (articulating that "[§ 13a-144] affords a right of recovery similar to that . . . under [§] 13a-149 and is subject to the same limitations. . . . For this reason, we have applied on occasion the rationale in cases involving statutory suits against municipalities under [§] 13a-149 to actions against the state highway commissioner under [§] 13a-144." [Citations omitted; footnote omitted.]). There, the plaintiff parked her car on a dirt and grass strip, thirty-two feet from the edge of a paved highway and not within the traveled path of the highway but within the state right-of-way between the traveled portion of a state highway and a sidewalk where the public was invited to park. Id., 297. As she left her car and walked to the sidewalk, she fell on ice and snow that had accumulated. Id. The court said that whether a defect is in such close proximity to the highway as to be considered "in, upon, or near the traveled path" is determined on a case-by-case basis. Id., 300. There must be criteria, however, to make the case-by-case determination, and the court went on to say that "under the particular circumstances of this case the proximity of the defect to the traveled portion of the highway in conjunction with the fact that the locus of the fall was in an area where occupants of vehicles were invited by the state to park their cars for the purpose of walking from their cars to the stores in the vicinity warrants the conclusion that this defect was 'in, upon, or near the traveled path' so as to 'obstruct or hinder one in the use of the road for the purpose of traveling thereon'. . . ." Id., 302 n.3. The court further noted that "it was reasonably to be expected that after parking her car the plaintiff

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[12]General Statutes § 13a-144 provides in relevant part: "Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway . . . or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court."

would cross the dirt and grass area to reach the sidewalk. The fact that the defective condition was in an area which an occupant of an automobile was likely, and in fact encouraged, to use is an important consideration." Id., 301-302; *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 38-39, 974 A.2d 820 (2009) (physical obstruction at street level in traveled portion of road triggered highway defect), aff'd, 304 Conn. 298, 39 A.3d 1065 (2012).

Furthermore, the alleged defect must obstruct or hinder one in the use of the sidewalk for the purpose of traveling thereon. In *Comba* v. *Ridgefield*, 177 Conn. 268, 270-72, 413 A.2d 859 (1979), the court held that a tree limb that hung over the traveled portion of the highway and broke off, falling onto the plaintiff's vehicle, was not a defect because it "did not obstruct, hinder or operate as a menace to travel. It was a condition that would cause injury, but that injury could result even to one who was not a traveler on the highway. A person could be injured by a limb; but the use of the highway, as such, would not have led to the injury." See *Cushman* v. *Korta*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5014704-S (June 2, 2010, *Levin, J.*) (finding sidewalk was defective because panel of cement sidewalk was raised higher than adjacent sidewalk panels and brick surface and there was observable difference in elevations of sidewalk panels); see also *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 203, 592 A.2d 912 (1991) (holding malfunctioning traffic light "although not a physical impediment at street level, is . . . a highway defect [under § 13a-149]").

The court also finds *Skoglund* v. *Salvation Army, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-10-6002756-S (July 10, 2012, *Roche, J.*) instructive. In this case, the plaintiff filed an action against the city of Torrington, as the entity that was responsible for maintenance of the sidewalk where she allegedly fell. Id. The plaintiff allegedly tripped and fell

on a brick that was raised and tilted above the surface of the sidewalk, which was located at the base of a tree within the sidewalk area. Id. She alleged that the sidewalk was defective as a result of the uneven surface created by the raised brick. Id. The city moved for summary judgment on the ground that there was no genuine issue of material fact that the plaintiff could not establish a highway defect claim because the defect complained of (1) was not a defect within the statutory meaning because it was not located on the portion of the sidewalk intended for public travel, and (2) was not the sole proximate cause of the plaintiff's injuries. Id. The plaintiff countered that there was evidence that the brick formation was part of the sidewalk intended for travel as the bricks were installed to be flush with the surrounding portion of the sidewalk, and there was evidence that the brick formation was used by pedestrians parking their cars along the curb abutting the sidewalk. Id. The court held that there were genuine issues of material fact whether the brick formation constitutes a defect within the meaning of the statute because (1) the plaintiff's professional engineer expert averred that the brick surface installed around the tree was intended for public travel and was part of the sidewalk; (2) portions of the depositions of the city's officials testified that cars park along the abutting street and people exiting their cars step up onto the sidewalk; and (3) the city's engineer testified that the brick formation was not constructed as part of a walking area but was part of the construction of the sidewalk. Id. Consequently, the court held that the city had not met its burden because a jury could reasonably find that because the brick formation is located on a sidewalk and was installed to be flush with the sidewalk, it is reasonable to anticipate that the public would encounter it in travel. Id. "Thus, it is up to the trier of fact to determine whether the brick formation constitutes a defect." Id.; see *Hodge* v. *Old Saybrook*, Superior Court, judicial district of Middlesex, Docket

No. CV-99-0088746-S (December 20, 2001, *Shapiro, J.*) (finding facts alleged gave rise to highway defect claim where plaintiff tripped on raised lip in concrete sidewalk and fell when she exited car at school because sidewalk and adjacent driveway were open for public use and were used by the public); see also *Beeman* v. *Stratford*, 157 Conn. App. 528, 543, 116 A.3d 855 (2015) (affirming jury's determination that one-inch difference in elevation between two pieces of concrete constituted highway defect).

Here, in support of the defendant's argument that the defect was not on the sidewalk but on the adjacent property and, therefore, that the statute does not apply, the defendant provides the plaintiff's deposition testimony wherein she explained that: she had gone to see Dr. Finnegan, her dentist; she left his building through the side door went down a couple of stairs, and walked up the left-hand side of the driveway; and when she went to turn onto the sidewalk, her left foot "hit the raised bit of concrete," and she "went flying into the sidewalk." Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 46:14-22; 53:19-54:05. Her car was parked on the street to the left of the driveway. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 54:13-17. She clarified that she tripped over "a little raised piece of concrete," and not over a concrete gap. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 41:09-11. She also testified that she had been going to see Dr. Finnegan for eighteen years, and she usually parked on the side of the street, crossed over the grass, got on the pavement, and walked to the side entrance. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 41:03-08.

The defendant's town engineer testified that: the subject piece of concrete is adjacent to the grass of 134 Montowese Street; such piece of concrete is not within the defendant's five-foot walkway, which is identified by the joints in the sidewalk; and that the defendant only keeps in repair the sidewalk. Def.'s Mot. Summ. J., Ex. B, Town Engineer Dep. 25:02-23; 26:20-27:09;

53:06-25; 59:23-60:11. The defendant's town engineer also testified that the sidewalk is a "public travel way." Def.'s Mot. Summ. J., Ex. B, Town Engineer Dep. 25:13-23; 53:06-25.

The defendant also provides a picture of the alleged defect. Def.'s Mot. Summ. J., Ex. C. In that picture, it is clear to the court that the raised piece of concrete is not within the proper sidewalk but, rather, closely abuts and is immediately adjacent to the sidewalk, is flush along the sidewalk, and looks to consist of the same material as the sidewalk itself. See Def.'s Mot. Summ. J., Ex. C. The pictures presented by BDC of the alleged defect are in color and even more clearly demonstrate that the raised concrete portion is the same material and color as the rest of the sidewalk. See BDC's Oppn. Mot. Summ. J., Ex. A.

In the present case, the evidence presented by the defendant supports that the sidewalk was adjacent to the street, that the defendant was responsible for the sidewalk itself, and it was open to the public and used by the public when they parked their cars on the street. See *Baker* v. *Ives*, supra, 162 Conn. 301-302 and n.3; *Novicki* v. *New Haven*, supra, 47 Conn. App. 740; *Klein* v. *Norwalk*, supra, 499 F. Supp. 2d 115-16. The defendant's evidence also supports that the alleged defect is in close proximity to the sidewalk as it immediately abuts the proper sidewalk and, therefore, is "in, upon, or near the traveled path." See *Ferreira* v. *Pringle*, supra, 255 Conn. 341-43; *Baker* v. *Ives*, supra, 300-303. There was no evidence presented to suggest that the raised piece of concrete was not in a public area that was open to the public at all times, was not used like a sidewalk in the ordinary course of travel, and was not proximate enough to a road or highway to bring it within the statute. See *Ferrigno* v. *Hamden Volunteer Fire Dept.*, supra, Superior Court, Docket No. CV-10-6011263-S. In addition, unlike *Comba* v. *Ridgefield*, supra, 177 Conn. 270-72, the alleged defect is something that would only impact someone who was a

traveler in, upon, or near this traveled path. The alleged defect could hinder the use of the sidewalk and create a menace, especially because the raised concrete appears to be an extension of the sidewalk in color and material and is flush to the sidewalk on one end and, therefore, one walking upon it would not notice the elevation difference, even though it appears susceptible to reasonable remedial measures. See *Ferreira* v. *Pringle*, supra, 341-43; *Baker* v. *Ives*, supra, 302 n.3; *Skoglund* v. *Salvation Army, Inc.*, supra, Superior Court, Docket No. CV-10-6002756-S. Thus, pursuant to the undisputed facts, as a matter of law, the raised piece of concrete is in, upon, or near the traveled path and falls under the highway defect statute.[13]

The court must next determine whether the defendant is bound to keep this area in repair. See *Bartlett* v. *Metropolitan District Commission*, 125 Conn. App. 149, 158, 7 A.3d 414 (2010), cert. denied, 300 Conn. 913, 13 A.3d 1101 (2011) ("[o]nce the condition has been classified as a highway defect, the court's subject matter jurisdiction is tied to the determination of which entity had the duty to maintain the property at the precise location of the plaintiff's fall" [internal quotation marks omitted]).

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[13]BDC attempts to raise a genuine issue of material fact regarding the exact location of where the plaintiff fell and suggests that the plaintiff fell in front of 140 Montowese Street, Branford, Connecticut, owned by Levy. In order to support this issue, BDC relies on its exhibits B, C, and G. As previously provided in footnotes four and six, the court will not consider exhibits B and G as they constitute inadmissible hearsay and/or lack the proper foundation for review. Furthermore, the allegations in the complaint and the statutory notice provided to the defendant; Def.'s Mot. Summ. J., Ex. C; clearly indicate that the plaintiff is alleging that she fell in front of 134 Montowese Street, Branford, Connecticut. See *Ferreira* v. *Pringle*, supra, 255 Conn. 345 ("[f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case" [internal quotation marks omitted]). On the basis of the admissible evidence before the court, the court concludes that there is no genuine issue of material fact that the plaintiff allegedly fell in front of 134 Montowese Street.

B.

Duty to Keep in Repair

The defendant argues that it did not have a duty to keep the area where the alleged defect is located in repair because the area is owned or controlled by BDC and/or falls within the state's right-of-way. As this court previously determined, the evidence supports that the alleged defect is in, upon, or near the traveled path. Although the location of a given right-of-way is a key factor in determining who is responsible for repairs of that area, it alone is not sufficient to establish that the same party has a duty to maintain it. See *Ferreira* v. *Pringle*, supra, 225 Conn. 350; *Baker* v. *Ives*, supra, 162 Conn. 302 n.3.

It has long been established that municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition. *Robinson* v. *Cianfarani*, 314 Conn. 521, 525, 107 A.3d 375 (2014). General Statutes § 13a-99 provides in relevant part that "[t]owns shall, within their respective limits, build and repair all necessary highways and bridges . . . except when such duty belongs to some particular person. . . ." When a sidewalk "along a public street in a city [has] been constructed and thrown open for public use, and used in connection with the rest of the street, [it] must, as a part of the street, [be maintained by the city, and kept in such repair] as to be reasonably safe and convenient for . . . travelers . . . ." *Manchester* v. *Hartford*, 30 Conn. 118, 121 (1861). Thus, "[a]n abutting landowner, in the absence of statute or ordinance, ordinarily is under no duty to keep the public sidewalk in front of his property in a reasonably safe condition for travel." *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989); see *McFarlaine* v. *Mickens*, 177 Conn. App. 83, 93, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

With that said, there are two exceptions: "First, municipalities, in limited circumstances, can confer liability onto the abutting landowner through a charter provision, statute, or ordinance. . . . Second, landowners may be liable for injuries caused by defects they created by their own actions." (Citation omitted; footnote omitted.) *McFarlaine* v. *Mickens*, supra, 177 Conn. App. 94. Specifically, our courts have long recognized "an exception to the general rule, in that the abutting landowners can be liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by positive acts of the [landowners]." *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 358-59, 660 A.2d 877 (1995).

Regarding the first exception, "[i]n 1981, the legislature enacted General Statutes § 7-163a,[14] which not only permits a town to adopt an ordinance that requires abutting landowners to remove snow and ice on public sidewalks, but also empowers the town to shift liability to the abutting landowner for injuries caused by a violation of the ordinance." *Dreher* v. *Joseph*, 60 Conn. App. 257, 261-62, 759 A.2d 114 (2000). As articulated by our Supreme Court, "[a]butting owners have only been held liable for injuries from defective sidewalks where under charter provisions they were not only charged with the duty of keeping sidewalks in repair but also expressly made liable for injuries occasioned by defective condition thereof." *Willoughby* v. *New*

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[14]General Statutes § 7-163a provides in relevant part: "(a) Any town, city, borough . . . may, by ordinance, adopt the provisions of this section. (b) Notwithstanding the provisions of section 13a-149 or any other general statute or special act, such town, city, borough . . . shall not be liable to any person injured in person or property caused by the presence of ice or snow on a public sidewalk unless such municipality is the owner or person in possession and control of land abutting such sidewalk, other than land used as a highway or street, provided such municipality shall be liable for its affirmative acts with respect to such sidewalk. (c) (1) The owner or person in possession and control of land abutting a public sidewalk shall have the same duty of care with respect to the presence of ice or snow on such sidewalk toward the portion of the sidewalk abutting his property as the municipality . . . and shall be liable to persons injured in person or property where a breach of said duty is the proximate cause of said injury. . . ."

Haven, supra, 123 Conn. 454; see *Robinson* v. *Cianfarani*, supra, 314 Conn. 527-29 (holding that defendant private landowners were not liable for injuries sustained by plaintiff as result of their failure to remove snow and ice from public sidewalk abutting their property because relevant town ordinance did not expressly shift liability for said failure from municipality to defendants even though it imposed penalty on defendants for such failure); *Gribko* v. *Albert*, Superior Court, judicial district of New Haven, Docket No. CV-15-6055579-S (January 20, 2016, *Frechette, J.*) (61 Conn. L. Rptr. 659, 661-62) (noting that "case law requires expressly adopting the provisions of [§] 7–163a in order to relieve a municipality of the duty to keep a sidewalk clear of snow and ice" and holding that defendant municipality shifted liability to abutting landowner because it expressly adopted said statute in town code); see also BDC's Oppn. Mot. Summ. J., Ex. D, Branford Ordinance § 216-42 (e) (defendant's snow and ice removal ordinance).

In *Dreher* v. *Joseph*, supra, 60 Conn. App. 259, "the plaintiff slipped and fell on a raised and uneven portion of the public sidewalk adjacent to a building owned by the defendant," a private landowner. "On appeal, the plaintiff [claimed] that the court improperly concluded as a matter of law that absent a statute or ordinance to the contrary, the state does not recognize a cause of action against abutting landowners for injuries caused by defective public sidewalks." Id., 258. Specifically, the plaintiff claimed that section 21 of the charter of the borough of Jewett City rendered abutting landowners liable for injuries caused by defective public sidewalks. Id., 260. As stated by the court: "Section 21 of the charter provides that [e]very person owning land within the [b]orough upon or adjacent to which is or may be a sidewalk paved, concreted, constructed or worked, shall at all times keep such sidewalk in a safe, convenient condition for

the use of the public and shall forthwith repair all defects which may occur in said sidewalk and at all times remove therefrom and keep the same free from all obstructions which in any way would impede public travel upon said sidewalk." (Internal quotation marks omitted.) Id., 260-61. Accordingly, our Appellate Court noted that while section 21 of the charter of the borough of Jewett City charges an abutting landowner with a duty to keep an adjacent sidewalk in repair, this section does not confer liability on said landowner for injuries caused by an abutting sidewalk's defective condition because the shifting of said liability must be explicitly stated. Id., 261; see *Willoughby* v. *New Haven*, supra, 123 Conn. 454; BDC's Oppn. Mot. Summ. J., Ex. D, Branford Ordinance § 216-41. With that said, even if section 21 of the charter of the borough of Jewett City expressly conferred liability on an abutting landowner for injuries caused by an adjacent sidewalk's defective condition, the court stated that *"[w]e are not aware . . . of any statutory counterpart that specifically enables a municipality to shift liability for raised or uneven sidewalks to abutting landowners*." (Emphasis added.) *Dreher* v. *Joseph*, supra, 262. Thus, the court held that the trial court properly granted the defendant's motion for summary judgment because the defendant was not liable for injuries sustained due to the raised and uneven portion of the sidewalk. Id., 263.

In *Dawson* v. *New Haven*, supra, Superior Court, Docket No. CV-08-5016831-S, the plaintiff allegedly fell on the perpendicular sidewalk leading from the curb of a public road to the public sidewalk that runs parallel to the road and in front of a building. The city conceded that the walkway fell within its right-of-way, but insisted that the walkway was private, not public, and the landowner had a duty to repair it. Id. There was conflicting testimony provided regarding who installed the walkway—either the developer who built the premises or the city.

Id. There was evidence presented by the city engineer that the city neither installed the walkway as it was 2 1/4 inches lower than the public sidewalk and was a different texture of concrete nor maintained the walkway, but also evidence that the city had the authority to remove the walkway. Id. Furthermore, there was no evidence presented by the landowner that the city performed maintenance on that area. Id. The court held: "In short, the evidence is in conflict as to which defendant had the duty to keep in repair the area where the plaintiff fell." Id.; cf. *Coughlin* v. *Waterbury*, 61 Conn App. 310, 315, 763 A.2d 1058 (2001) (finding genuine issue of material fact exists as to whether city or board of education had duty to maintain driveway connected to public sidewalk). Therefore, the court denied both the city's and the landowner's motions for summary judgment as there was a genuine issue of material fact as to whether the walkway was part of the public sidewalk or a private walkway. *Dawson* v. *New Haven*, supra.

Here, the town engineer clearly testified as to the general parameters of the sidewalk in which the defendant needed to keep in repair—five-foot walkway, identified by the joints in the sidewalk. Def.'s Mot. Summ. J., Ex. B, Town Engineer Dep. 26:20-27:09; 59:23-60:11. As previously discussed, the raised piece of concrete is in, upon, or near the traveled path and, therefore, the defendant's responsibility may go beyond those parameters. Although the town engineer testified in his deposition that the alleged defect falls within the state's right-of-way rather than the defendant's right-of-way, and that the adjacent landowner was the responsible party for any repairs, his later testimony wavered, stating "[i]t's possible" that the raised piece of concrete was in the state's right-of-way. See Def.'s Mot. Summ. J., Ex. B, Town Engineer Dep. 25:06-23; 53:06-25; BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 44:05-14; 52:08-24. This belief, however, was based on the town engineer's general knowledge of the defendant,

and he did not know how far the right-of-way extended and did not know the property lines for BDC. BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 44:05-17; 52:03-07. The town engineer testified that the defendant usually will not inspect a sidewalk unless there is a known complaint. BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 37:11-23. Moreover, the town engineer indicated that he did not know where the raised piece of concrete came from, he did not have a record showing a prior walkway but noted that his records were limited, and that the defendant does work outside the normal parameters of the defendant's right-of-way when its necessary for construction of a public sidewalk and might extend beyond the limits of a proposed repair or sidewalk installation "if they needed a little extra to get the forms in to pour the concrete." BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 28:07-20; 61:02-14. Furthermore, the town engineer opined that the raised piece of concrete looked like it may have been a sidewalk previously that led to a building. BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 70:13-22.

In the present case, like *Dawson* v. *New Haven*, supra, Superior Court, Docket No. CV-08-5016831-S, the defendant cannot show that there are no genuine issues of material fact. The town engineer's testimony neither supports that the raised piece of concrete was definitively in the state's right-of-way nor that the defendant did not create the defect itself when installing the sidewalk or repairing/removing an older sidewalk/walkway. The defendant fails to provide any evidence to support that a charter provision, statute, or ordinance conferred liability to an abutting landowner to maintain or repair this type of defect or that an abutting landowner created the alleged defect by their own actions. Therefore, the defendant has not met its burden of showing the absence of any genuine issue of material fact as to whether it had a duty to maintain

the alleged defect and, therefore, it is up to the trier of fact to determine whether the defendant had said duty. See *Burt* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. CV-13-6020773-S (November 9, 2016, *Brazzel-Massaro, J.*) (holding defendant municipality did not meet its burden of showing absence of any genuine issue of material fact as to whether it had duty to maintain defective curb box because it did not provide any authority or evidence that it was not responsible for maintenance of curb boxes or not liable for injuries caused by defective curb boxes).

C.

Actual or Constructive Notice

The defendant argues that they did not have actual or constructive notice of the alleged defect and, therefore, cannot be held liable under the highway defect statute. BDC disagrees. As stated by our Supreme Court, "[t]he notice, actual or implied, of a highway defect causing injuries which a municipality must receive as a condition precedent [to] liability for those injuries, is notice of the defect itself which occasioned the injury, and not merely of conditions naturally productive of that defect and subsequently in fact producing it. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient." (Emphasis in original; internal quotation marks omitted.) *Prato* v. *New Haven*, 246 Conn. 638, 642, 717 A.2d 1216 (1998).

In *Aaronson* v. *New Haven*, 94 Conn. 690, 692, 110 A. 872 (1920), a silent policeman was placed in a roadway to regulate traffic. On a multitude of occasions, the silent policeman had toppled over into the travel lanes. Id., 693. One evening, it was dislodged and rolled into a travel lane at approximately 6:30 p.m. Id. Although someone notified the city police by 7 p.m.,

the silent policeman remained in the travel lane until 7:30 p.m., when the plaintiff struck it with his car. Id. Our Supreme Court held that the city could be held liable because its officials had actual notice of the highway defect and ample time to remedy it. Id. The court's decision rested on the one-half hour lapse between the notice and the accident and not on the fact that the silent policeman had toppled over in the past and had the propensity to topple over in the future. Id., 695-97.

Regarding actual notice, the defendant's town engineer testified that he was not aware of any reports made to the defendant concerning the alleged defect prior to the plaintiff's fall. See Def.'s Mot. Summ. J., Ex. B, Town Engineer Dep. 18:10-18. Dr. Finnegan also testified that neither he nor any of his employees, to his knowledge, reported the alleged defect to the defendant prior to the plaintiff's fall. See Def.'s Mot. Summ. J., Ex. D, Finnegan Dep. 33:07-21. Although BDC argues that the defendant had actual notice of the alleged defect due to its ordinances, BDC produced no evidence or case law to support that the ordinance alone is enough to equate to actual notice.[15] The defendant has therefore met its burden that no genuine issue of

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[15]The defendant argues that BDC's objection should not be considered because on page five of BDC's objection to the defendant's motion for summary judgment, BDC states: "*While BDC agrees that no defect existed in the area the [p]laintiff claims she fell*, if it did, the [defendant] would have had notice of it pursuant to its [o]rdinances." (Emphasis added.) BDC's Oppn. Mot. Summ. J., pg. 5. "Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . They excuse the other party from the necessity of presenting evidence on the fact admitted and are conclusive on the party making them. . . . The statement relied on as a binding admission [however] must be clear, deliberate and unequivocal. . . . Whether a party's statement is a judicial admission or an evidentiary admission is a factual determination to be made by the trial court. . . . While both types are admissible, their legal effect is markedly different; judicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier. . . . In contrast with a judicial admission, which prohibits any further dispute of a party's factual allegation contained in its pleadings on which the case is tried, [a]n evidential admission is subject to explanation by the party making it so that the trier may properly evaluate

material fact exists that it did not have actual notice. See *Aaronson* v. *New Haven*, supra, 94 Conn. 695-97.

Regarding constructive notice, "to charge a defendant with constructive notice it is incumbent on the plaintiff to establish that the defect had been there a sufficient length of time and was of such a dangerous character that the defendant by the exercise of reasonable care could and should have discovered and remedied it." (Internal quotation marks omitted.) *Tirendi* v. *Waterbury*, 128 Conn. 464, 468, 23 A.2d 919 (1942). "[T]he test for constructive notice is whether the defect . . . would have been discovered had the defendant exercised reasonable supervision over its streets and sidewalks *as a whole*. Therefore, the duty imposed on the defendant is to exercise reasonable supervision over its streets and sidewalks as a whole, and not to inspect any particular portion of the sidewalks or roads." (Emphasis in original.) *DeMatteo* v.

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it. . . . Thus, an evidential admission, while relevant as proof of the matter stated . . . [is] not conclusive. . . . Because the probative value of an admission depends on the surrounding circumstances, it raises a question for the trier of fact. . . . The trier of fact is free to give as much weight to such an admission as, in the trier's judgment, it merits, and need not believe the arguments made regarding the statement by one side or the other." (Internal quotation marks omitted.) *Bowen* v. *Serksnas*, 121 Conn. App. 503, 518 n.12, 997 A.2d 573 (2010). As underscored by our Appellate Court, a statement made in a pretrial brief can constitute a judicial admission; *Wallace* v. *Caring Solutions, LLC*, 213 Conn. App. 605, 632, 278 A.3d 586 (2022) ("[T]he statements in the present case on which the plaintiff relies were made in the defendant's pretrial brief, not in a pleading. . . . We agree that it is possible that in certain circumstances an attorney's unequivocal representations of facts on behalf of his client can constitute a judicial admission."); which is only binding on the party who made it. *Solomon* v. *Connecticut Medical Examining Board*, 85 Conn. App. 854, 866, 859 A.2d 932 (2004), cert. denied, 273 Conn. 906, 868 A.2d 748 (2005). When analyzing an argumentative statement in a pretrial brief, it "should be considered in the context of other positions and representations the party or its counsel has made to the court." *Wallace* v. *Caring Solutions, LLC*, supra, 213 Conn. App. 632. When BDC's statement is examined, in the context of the objection as a whole, it is not clear, deliberate and unequivocal as BDC was also arguing that the plaintiff fell at a different location than alleged. See *Bowen* v. *Serksnas*, supra, 518. Thus, BDC's statement was argumentative in nature and constitutes, at most, an evidentiary admission for the trier of fact. See id., 518 n.12 (finding evidentiary admissions are nonconclusive and questions for trier of fact).

New Haven, 90 Conn. App. 305, 310, 876 A.2d 1246, cert. denied, 275 Conn. 931, 883 A.2d 1242 (2005). The court must consider whether the defect was palpably dangerous given its location and the extent of the use of the public area; *Tirendi* v. *Waterbury*, supra, 128 Conn. 469-70; as a municipality's "duty to make a reasonable inspection depends upon the nature of the defect and the length of time it existed." (Internal quotation marks omitted.) *Prato* v. *New Haven*, supra, 246 Conn. 645-46 (noting that "[u]nder negligence principles, municipalities must use reasonable care in discovering the existence of a defect, and negligent ignorance of a defect may support a finding that the municipality should have discovered the defect"). Ultimately, "[w]hether or not the defect had existed for a length of time sufficient to constitute constructive notice is a question of fact for the jury and unless the period of time is such that but one conclusion could be found, its determination should be left to the trier." *Baker* v. *Ives*, supra, 162 Conn. 307.

In the present case, the plaintiff alleges that the defective area was in a state of disrepair and existed for an unreasonable period of time, yet no measures had been taken to remedy and correct the same, and the defendant, in the exercise of reasonable care and inspection, should have known of these conditions and remedied the same. As noted previously, the town engineer testified that the defendant usually will not inspect a sidewalk unless there is a known complaint. BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 37:11-23; see also Branford Ordinance § 216-37 (stating that town engineer shall superintend all construction of and repair to sidewalks and "shall act as [s]idewalk [i]nspector and [e]nforcement [o]fficer"). Additionally, the town engineer indicated that he did not know where the raised piece of concrete came from, he did not have a record showing a prior walkway but noted that his records were limited. BDC's Oppn.

Mot. Summ. J., Ex. E, Town Engineer Dep. 28:07-20. Furthermore, the town engineer opined that the raised piece of concrete looked like it may have been a sidewalk previously that led to a building. BDC's Oppn. Mot. Summ. J., Ex. E, Town Engineer Dep. 70:13-22. Given that the defendant failed to provide evidence showing that it adequately inspected its sidewalks as a whole; *DeMatteo* v. *New Haven*, supra, 90 Conn. App. 310; it is unclear how long the alleged defect existed prior to the plaintiff's fall or if the defendant created the alleged defect during installation of the sidewalk. Therefore, whether the defendant had constructive notice of the alleged defect in this action is a question of fact for the trier. See *Baker* v. *Ives*, supra, 162 Conn. 307; *Perrotti* v. *Bennett*, 94 Conn. 533, 539, 109 A. 890 (1920) (discussing municipality's liability for injury from municipal improvement on highway and holding that "[i]f the plan be defective from the beginning, or if its defect originate shortly after the completion of the improvement, and injury be ultimately necessarily the inevitable or probable result, the municipality will be liable"); *DeMatteo* v. *New Haven*, supra, 90 Conn. App. 310; *Snyder* v. *Orange*, Superior Court, judicial district of Ansonia-Milford at Derby, Docket No. CV-08-5005247-S (August 18, 2009, *Tyma, J.*) (denying summary judgment because "[i]t is for the jury to review and consider the photographs submitted . . . along with other evidence, in order to determine whether the defendant had at least constructive notice of the alleged defect, if not actual notice"). Accordingly, a genuine issue of material fact exists as to whether the defendant had constructive notice of the alleged defect.

D.

Proximate Cause

The defendant argues that the plaintiff cannot prove that the alleged defect was the sole proximate cause of her injuries. Although the defendant correctly notes that the plaintiff ultimately bears the burden of proving that the alleged defect was the sole proximate cause of her injuries, the defendant, as the party moving for summary judgment, has the burden of showing the absence of any genuine issue to all material facts. *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 332 Conn. 101.

As recognized by our Appellate Court, "[t]here is no presumption under . . . § 13a–149 that the named plaintiff was exercising due care at the time of the injury." *McGloin* v. *Southington*, 15 Conn. App. 668, 675, 546 A.2d 906, cert. denied, 209 Conn. 813, 550 A.2d 1083 (1988). "To recover under § 13a-149, a plaintiff must prove, inter alia, that the defect was the sole proximate cause of her injuries." *Nicefaro* v. *New Haven*, 116 Conn. App. 610, 620, 976 A.2d 75, cert. denied, 293 Conn. 937, 981 A.2d 1079 (2009). "The question of proximate causation generally belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Internal quotation marks omitted.) *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 321-22, 852 A.2d 703 (2004). "[The] question of proximate cause is so fundamentally one of fact and inference, that, even where . . . there is no serious dispute about the material facts, it should be left to the jury if it is open to a reasonable

difference of opinion." *Edgecomb* v. *Great Atlantic & Pacific Tea Co.*, 127 Conn. 488, 492, 18 A.2d 364 (1941).

"Because a plaintiff seeking recovery under § 13a-149 must prove that the defect was the sole proximate cause of her injuries, it follows that the plaintiff must demonstrate freedom from contributory negligence. . . . To do so, a plaintiff must have suffered injury while using the defective highway with due care and skill." (Citations omitted; internal quotation marks omitted.) *Nicefaro* v. *New Haven*, supra, 116 Conn. App. 621. "In order to find contributory negligence . . . the court must conclude that the plaintiff did not use reasonable care. . . . Whether care is reasonable depends upon the dangers that a reasonable person would perceive in those circumstances. It is common sense that the more dangerous the circumstances, the greater the care that ought to be exercised." (Internal quotation marks omitted.) *Abate* v. *New Britain*, Superior Court, judicial district of New Britain, Docket No. CV-07-5004438-S (February 18, 2009, *Cohn, J.*). Although "the burden rests with the plaintiff in an action brought under § 13a-149 to demonstrate freedom from contributory negligence"; *Nikiel* v. *Turner*, 119 Conn. App. 724, 728, 989 A.2d 1088 (2010); the question of contributory negligence is one of fact for the trier's determination. *Cote* v. *Hartford*, 128 Conn. 483, 487, 23 A.2d 868 (1942).

"Travelers who leave the way provided for them and attempt to cross a plot devoted to ornamentation may not assume that it is free of obstructions as they may do in the use of the traveled portion of the highway. They must exercise due care to discover obstructions since they cannot assume that they do not exist." *Corcoran* v. *New Haven*, 108 Conn. 63, 67-68, 142 A. 569 (1928) (holding it was fact for jury to determine whether plaintiff made reasonable use of her senses when she crossed from curb to sidewalk by passing over grass plot, rather than by using

walk provided, and tripped on wire in grass); see *Skoglund* v. *Salvation Army, Inc.*, supra, Superior Court, Docket No. CV-10-6002756-S (finding whether plaintiff made reasonable use of her senses when walking over brick formation as shortcut, and could have seen defect if she was looking down, was question for trier of fact); cf. *Marrero* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-14-6046158-S (April 3, 2017, *Ecker, J.*) (entering judgment in favor of city because defect was not sole proximate cause when plaintiff was in rush, chose to "jaywalk," did not look down at sidewalk, and was loaded down with bags of groceries); *Coogan* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-04-5000190-S (May 25, 2006, *Blue, J.*) (entering judgment in favor of city because defect was not sole proximate when accident occurred on bright, sunny day, plaintiff was wearing sunglasses, and elevation in sidewalk was open and obvious); *Beers* v. *Hartford*, Superior Court, judicial district of Hartford, Docket No. CV-96-0564842-S (June 30, 1997, *Aurigemma, J.*) (entering judgment in favor of city because defect was not sole proximate cause when plaintiff was familiar with sidewalk as she regularly walked it, she was walking two dogs, she failed to wear her glasses, and elevation disparity was visible).

Here, the defendant presents evidence through the plaintiff's deposition testimony that on the day she allegedly fell, there was no snow on the ground, it was light outside, and the weather was mild. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 46:23-47:12. She also testified that she was familiar with the area, had not been given medication by the dentist, was not experiencing side effects from medications taken that day, and was not walking fast. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 41:03-15; 47:13-23; 53:03-12; 54:06-09. She testified, however, that she did not know if she was looking down or looking straight ahead before she tripped. Def.'s Mot. Summ. J., Ex.

A, Pl. Dep., 54:10-12. Rather than providing evidence to support that the plaintiff was not exercising due care and skill prior to tripping on the alleged defect, such as rushing to get to her next location, carrying items, or not wearing her glasses, the defendant requests that this court assume such negligence. It is improper for the court to do so in this pretrial context. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 332 Conn. 101.

Moreover, it is unclear at this time if the plaintiff was looking down or straight ahead. Def.'s Mot. Summ. J., Ex. A, Pl. Dep., 54:10-12. Accordingly, the defendant has not met its burden of showing the absence of any genuine issue of material fact as to whether the alleged defect was the sole proximate cause of the plaintiff's injuries and this question should be left to the trier of fact. *Corcoran* v. *New Haven*, supra, 108 Conn. 67-68; *Skoglund* v. *Salvation Army, Inc.*, supra, Superior Court, Docket No. CV-10-6002756-S.

CONCLUSION

For the foregoing reasons, the court denies the defendant's motion for summary judgment on the first count of the complaint.

Juris No. 421279

Wilson, J.