NO. 22-719

In the Supreme Court of the United States

JESSICA MACKEY,

Petitioner,

v.

AMERICAN MULTI-CINEMA, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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MARCH 1, 2023 *COUNSEL FOR RESPONDENT*

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COUNTERSTATEMENT OF QUESTION PRESENTED

Courts applying Louisiana law have consistently granted Motions for Summary Judgment determining that deviations of up to one and one-half inches in a sidewalk do not present an unreasonable risk of harm. *See e.g. Boyle v. Board of Sup'rs, Louisiana State University*, 96-1158 (La. 1997); 685 So.2d 1080; *Reed v. Wal-Mart Stores, Inc.*, 97-1174, (La. 3/4/98); 708 So.2d 362; *Chambers v. Village of Moreauville*, 2011-898 (La. 2012); 85 So.3d 593; *Taylor v. Chipotle Mexican Grill, Inc*, 18-238 (La. App. 5 Cir. 12/27/18); 263 So.3d 910; *Shavers v. City of Baton Rouge/East Baton Rouge Parish*, 00-1682 (La. App. 1 Cir. 9/28/01); 807 So.2d 883; *Williams v. Leonard Chabert Medical Center*, 98-2019 (La. App. 1 Cir. 9/26/99); 744 So.2d 206; and *Grote v. Federal Insurance Company*, 2016-0474, (La. App. 1 Cir. 12/22/16); 2016 WL 7407385. Because the granting of summary judgment in this case was proper, this Honorable Court should deny the Petition for Writ of Certiorari.

The Question Presented is:

Whether the grant of a Motion for Summary Judgment, which determined that a sidewalk deviation of 3/4 to 7/8 of an inch does not constitute an unreasonable risk of harm, violates *Eerie*, conflicts with the precedents set by the lower courts or this Court, or deprives Petitioner of her right to trial by jury.

CORPORATE DISCLOSURE STATEMENT

NOW INTO COURT, through undersigned counsel, comes Defendant, American Multi-Cinema, Inc., who provides its Corporate Disclosure Statement pursuant to Sup. Ct. R. 29.6 as follows:

1. American Multi-Cinema, Inc., has as its parent company AMC Entertainment Holdings, Inc.

2. No publicly held corporation owns 10% or more of American Multi-Cinema, Inc. American Multi-Cinema, Inc., is a wholly owned subsidiary of AMC Entertainment Holdings, Inc., which is a publicly traded corporation (NYSE: AMC).

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INTRODUCTION

Petitioner's characterization of the question presented misstates the holding of *Broussard v. State of Louisiana ex rel. Office of State Buildings,* 113 So.3d 175 (La. 2013), which supposedly "disapprov[es] determination of unreasonable risk of harm on summary judgment." Petition ("Pet.") at i. In fact, although the *Broussard* court denied summary judgment on the issue before it, the court also discussed in its decision how the Louisiana Supreme Court properly granted summary judgment on the unreasonable risk of harm question in previous cases, such as *Dauzat v. Curnest Guillot Logging, Inc.*, 995 So.2d 1184 (La. 2008). *Id.* at 190-191. Thus, while there may be no bright-line rule regarding which concrete deviations constitute unreasonable risks of harm as a matter of law, there is certainly no prohibition against a Court granting summary judgment on the question of unreasonable harm.

Petitioner also incorrectly asserts that the United States Fifth Circuit Court of Appeals failed to conduct a risk-utility balancing test in the instant case. Pet.i. The balancing test includes an assessment of the following factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. *Id.* at 184. However, the Fifth Circuit affirmed the district court's opinion, which clearly performed that analysis and referenced

numerous other cases in which that analysis was conducted. Petitioner's Appendix ("App.") at 3a.

Finally, Respondent disagrees with Petitioner's statement that the Fifth Circuit "disregarded multiple precedents of this Court applying Fed. R. Civ. P. 56 to deprive Petitioner of the right to trial by jury under the Seventh Amendment." Pet.i. Indeed, Petitioner provides no specific examples of such precedents, making it impossible to respond in detail.

STATEMENT OF THE CASE

Respondents do not substantially disagree with Petitioner's recitation of the facts of the accident itself. Respondent does take issue with Petitioner's characterization of the remaining factual and procedural background, as set forth below.

I. The Sidewalk

Petitioner retained the services of licensed architect, Nicholas Musso, as an expert witness, to opine regarding the condition of the entrance to AMC's Westbank Palace 16 movie theater. In preparation to issue his report, Musso visited the site of the accident twice, took photographs and measurements of the accident site, and interviewed Petitioner. ROA. 171. Notably, Musso conceded that the concrete surface was likely completely level when first poured and that the deviation occurred over time, as is common due to soil subsidence in the region. ROA. 171.

AMC Westbank Palace 16 manager, Louis Russ, testified at his deposition that, at least two to three

times a week, he walked in the area where Petitioner fell and never noticed any deviation. ROA. 196. He estimated that every week, one hundred to two hundred people, and sometimes many more, walked the same area. ROA. 207. Of all the thousands of patrons who traversed the area, Russ knew of not a single trip or fall other than Mackey's incident. ROA. 286. Russ also testified that the area did not pose any sort of issue, defect, or hazard. ROA. 207.

II. Respondent's Motion for Summary Judgment

Respondent filed a Motion for Summary Judgment on the basis that the uneven sidewalk joint did not present an unreasonable risk of harm. ROA. 238. In opposing the Motion, Petitioner only disputed whether the condition was open and obvious. ROA. 239. Mackey did not dispute the utility of the front pad at Respondent, or the exorbitant cost of fixing slightly uneven deviations like the one in question. ROA. 239. Petitioner also did not dispute that hundreds of thousands of patrons walk the same area in a given year and Respondent knew of no other accident occurring at that location. ROA. 239.

After consideration of the parties' memoranda, the record, and the applicable law, the trial court granted Respondent's motion and dismissed Petitioner's claims with prejudice, on the basis that the condition of the sidewalk was not unreasonably dangerous as a matter of law. ROA 371. To prevail in a premises liability action such as this one, a plaintiff must prove: (1) the property that caused the damage was in the defendant's custody; (2) the property contained a defect that was unreasonably dangerous or presented an unreasonable risk of harm to others; (3) the defective condition caused the damage; and (4) the defendant knew or

should have known of the defect. *James v. Hilton New Orleans Corp.*, 2015 WL 4606060, p. *2 (E.D. La. 2015). The second prong is the focus of this appeal.

Applying the law to the undisputed facts of the case, the trial court found that the height deviation over which Petitioner fell was not sufficient to create a genuine issue of material fact as to whether the pavement expansion joint was unreasonably dangerous. ROA. 378. The trial court noted that Louisiana courts recognized that sidewalk expansion joints will have limits of unevenness that are tolerated as a reasonable risk of harm. ROA. 378. Further, the trial court rejected Petitioner's arguments that the height deviation was obscured by rain and dirt because Petitioner never claimed that her view of the expansion joint itself was obscured by either rain or dirt in the first place. This undermines Petitioner's objection that the court only considered Respondent's site photographs, taken under clear skies, rather than Petitioner's, which she alleges shows obscurement by rainfall. ROA. 378.

III. Petitioner's Appeal to the United States Fifth Circuit Court of Appeals

Without the need for oral argument, the Fifth Circuit issued a per curiam opinion affirming the trial court's grant of summary judgment. App.1a. The Court's reasoning was that Petitioner failed to establish that the premises "presented an unreasonable risk of harm" pursuant to La. R. S. § 9:2800.6(B)(1). App.3a. Petitioner was unable to do so because Louisiana courts have held that height deviations much greater than 3/4 to 7/8 of an inch do not present an unreasonable risk of harm. *See Chambers v. Vill. of Moreauville*, 85 So. 3d 593, 598 (La. 2012). Because Petitioner was

unable to establish an issue of material fact, Respondent was entitled to summary judgment.

Petitioner takes issue with the Fifth Circuit's statement that she did not challenge the legal rule that such deviations do not create an unreasonable risk of harm. Pet.9. While Petitioner has of course protested the notion of a bright-line rule, she fails to cite any applicable case law that a slight deviation like the one at issue constitutes an unreasonable risk of harm, or that such a determination was inappropriate for summary judgment. Petitioner also asserts generally that a determination of an unreasonable risk of harm is inappropriate for a determination on summary judgment, but that is simply incorrect, as demonstrated by the wealth of jurisprudence previously cited. Pet.9. Petitioner also points to unrelated evidence that she has presented, which she claims was not fairly considered. Pet.9-10. As stated by the Fifth Circuit, this evidence is irrelevant to the unreasonable risk of harm issue. App.3a-4a.

Petitioner then filed a Petition for Panel Rehearing. In furtherance of that Petition, Petitioner submitted a letter under Fed. R. App. P. 28(j), citing to a factually distinguishable case in which the plaintiff tripped over a foreign substance oozing from an expansion joint, rather than a differential in the expansion joint itself. *Abel v. Eastern Royal Kitchen, et al.*, 2022-42 (La. App. 5 Cir. 5/20/22), writ denied, ___ So.3d ___, 2022 WL 4935296, 2022-00966 (La. 10/4/22). In response, Respondents prepared their own letter, citing to a much more factually similar case, in which the plaintiff actually tripped over an expansion joint, and one that created a 1 and 1/2 inch deviation. *Lacaze v. Walmart Stores, Inc.*, 2022 WL 4227240 (M.D. La.

9/13/22). The deviation was in a Walmart parking lot, and in granting summary judgment, the court the court considered the high utility of the crosswalk, the low likelihood and magnitude of harm, the open and obviousness of the condition, and the high cost of repair.

Petitioner provided a response attempting to distinguish *Lacaze* by demonstrating that the height differential was just one factor in the court's risk-utility balancing test, which lead them to grant summary judgment. Ironically, Petitioner's arguments here undermine her primary position on appeal by demonstrating the very thing that she has been arguing against, that a trial court can apply the risk-utility balancing test to an expansion joint and grant summary judgment after determining that it does not pose an unreasonable risk of harm, just as the trial court has done in this case.

Petitioner's request for rehearing was denied and this Petition for Writ of Certiorari followed. App.16a.

REASONS FOR DENYING THE PETITION

I. THE PRESENT CASE IS NOT APPROPRIATE FOR CONSIDERATION BY THIS COURT.

A review of reported decisions on Westlaw reveals only one case in which this Court has reviewed a lower court's grant of a Motion for Summary Judgment involving a slip and fall. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). This Court granted certiorari in *Carnival Cruise Lines, Inc. v. Shute*, to determine the much more worthy question of the validity of a forum selection clause, rather than to evaluate a

lower court's application of a risk-utility balancing test as Petitioner requests here. *Id*. at 589.

A review of the three other reported decisions in which this Court has granted certiorari to a case involving a slip and fall in any capacity reveal that certiorari was granted for more worthy concerns than a disagreement over the lower court's analysis of an unreasonably dangerous condition. *Dolan v. U.S. Postal Service*, 546 U.S. 481, 483 (2006) (certiorari was granted to determine whether a postal carriers negligent placement of mail, leading to a slip and fall, subjected the Government to liability under the Federal Tort Claims Act); *Davis v. Virginian Ry. Co.*, 361 U.S. 354, 388 (1960) (certiorari was granted to ensure uniform administration of the Federal Employer's Liability Act following the lower court's striking of plaintiff's evidence); and *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 648-49 (1977) (certiorari was granted to determine whether a plaintiff could seek reinstatement of the original verdict after accepting a remittitur).

As stated in Supreme Court Rule 10, review on a grant of certiorari is not a right, but a matter of judicial discretion, and a petition for a writ of certiorari will only be granted for compelling reasons. Though not controlling or fully measuring the Court's discretion, the Rule offers the following reasons why a writ should be granted to review the decision of a United States court of appeals:

1) the court has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

2) the court has decided an important federal question in a way that conflicts with a decision by a state court of last resort;

3) the court has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power; or

4) the court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

Simply put, this case in no way presents the unique or novel issues that would warrant this Court's intervention. Petitioner cannot reasonably argue that any of these requirements are met here, or that there is any other compelling reason why certiorari should be granted here. The government-maintained website for the United States Courts estimates that of the more than 7,000 cases the Court is asked to review each year, it accepts only 100 to 150.[1] There is no compelling reason why the instant case should be one of the very few heard by this Court.

II. THE COURTS WERE ENTITLED TO REACH THE ISSUE OF UNREASONABLE RISK OF HARM DURING THE SUMMARY JUDGMENT STAGE.

The Fifth Circuit affirmed the trial court's grant of summary judgment on the issue of whether the

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[1] https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1

deviation presented an unreasonable risk of harm. Contrary to Petitioner's suggestion, this ruling at the summary judgment stage is permissible under Louisiana law. Indeed, many courts examining the issue during the summary judgment stage reached the exact same conclusion.

As noted above, the Fifth Circuit's opinion cited *Buchanan*, which considered several of these opinions. App.3a. *Chambers v. Vill. of Moreauville*, found that that "Louisiana jurisprudence has consistently held that a one-and-one half inch deviation does not generally present an unreasonable risk of harm." 834 Fed. Appx. 58 (5th Cir. 2020). *Reed v. Walmart Stores, Inc.*, held that a height variance of one-fourth to one-half inch between concrete blocks in a parking lot did not present an unreasonable risk of harm. 708 So.2d 362, 365-66 (La. 1998). *Boyle v. Bd. of Sup'rs, La. State Univ.*, held that a depression of up to one inch in a sidewalk did not pose unreasonable risk of harm. 685 So.2d 1080, 1082-84 (La. 1997). *Leonard v. Par. of Jefferson*, held that a sidewalk height differential of one inch to one-and-one-third inch did not present unreasonable risk of harm. 902 So.2d 502, 505 (La. App. 5th Cir. 2005). Finally, *White v. City of Alexandria* held that a variance of one-half to two inches on a sidewalk did not present unforeseeable risk of harm. 43 So.2d 618, 619-20 (1949).

Petitioner may argue that the above cases were all decided prior to *Broussard*. 113 So.3d 175. However, *Buchanan* was decided well after *Broussard* as were a number of cases with similar outcomes cited by Respondent in their Appellate Brief. 834 Fed App'x 58. Following the Supreme Court of Louisiana's rulings in *Boyle* and *Reed*, as well as in *Broussard*, the Louisiana

Fifth Circuit Court of Appeal adopted the *Boyle* risk-utility test for determining whether a defect presents an unreasonable risk of harm. *See Taylor v. Chipotle Mexican Grill, Inc*, 18-238 (La. App. 5 Cir. 12/27/18); 263 So.3d 910. In *Taylor v. Chipotle Mexican Grill*, the Fifth Circuit seemingly placed great weight on the fact that the defect complained of was smaller than the defect complained of in *Boyle*. 18-238, p. 9 (La. App. 5 Cir. 12/27/18); 263 So.3d 910, 917. The court also succinctly analyzed the *Boyle* risk-utility test and affirmed the trial court's granting of the defendant's summary judgment:

> The law is clear that expansion joints enjoy a positive utility in concrete paved parking lots, and that pedestrians cannot expect pristine and perfectly level surfaces in a paved parking lot, and that the vertical difference between the concrete slab and expansion joint in this case, 33/64 of an inch +/- 1/8 of an inch (accepting Ms. Taylor's expert's measurements for the sake of argument), is one that has been recognized by the Supreme Court in *Boyle* as not posing an unreasonable risk of harm to pedestrians. These factors, combined with a lack of accidents at this location, support the trial court's judgment.

Taylor, 263 So.3d at 917.

Similarly, *Grote v. Federal Insurance Company*, which was decided following *Broussard*, held that a one-and-one-half inch deviation does not present an unreasonable risk of harm. 2016-0474, p. 8 (La. App. 1 Cir. 12/22/16); 2016 WL 7407385 (affirming trial court's granting of Defendants' summary judgment and holding that elevation in sidewalk between one inch and

one-and-one-fourth inch is not an unreasonable risk of harm). As did *Lacaze*, which was cited in Respondent's Fed. R. App. P. 28(j) letter to the Fifth Circuit described in more detail above. 2022 WL 4227240.

More importantly, whether a case was decided before or after *Broussard* is of no consequence because that decision made no substantive change to the law relevant to this analysis. 113 So.3d 175. Petitioner seems to contradict her entire argument by correctly stating in her Petition that *Broussard* does not preclude or even limit summary judgment on the determination of an unreasonably dangerous condition:

> [t]he Louisiana Supreme Court held that any reading of *Broussard* that would limit "summary judgment practice involving issues of unreasonable risk of harm is a misinterpretation of the *Broussard* case." *Allen v. Lockwood*, 156 So.3d 650, 652 (La. 2015). The Court made clear "our jurisprudence does not preclude the granting of a motion for summary judgment in cases where the plaintiff is unable to produce factual support for his or her claim that a complained- of condition or things is unreasonably dangerous." *Id*. at 653.

Pet.20.

Petitioner attempts to distinguish her case from those granting summary judgment simply by asserting that she "has produced, substantial factual support demonstrating the uneven concrete at AMC's movie's theater was unreasonably dangerous," without going into further detail. Pet.20.

In reality, Petitioner has failed to support her claim that the complained-of condition was unreasonably dangerous, as recognized by the trial court, and by the Fifth Circuit in a per curiam opinion without the need for oral argument. 156 So.3d 650. Because of this, summary judgment was appropriate, which is of course not surprising as it is clearly supported by the jurisprudence. What is surprising is that Petitioner admits that *Broussard* does not preclude summary judgment when the opposite contention appears to be a pillar of her argument in favor of granting certiorari. Pet.20.

III. THE COURTS CONDUCTED A SUFFICIENT RISK-UTILITY BALANCING TEST.

Petitioner strenuously argues that the Fifth Circuit failed to conduct the require risk-utility balancing test before affirming the trial court's grant of summary judgment. However, the opinion clearly cites to a previous Fifth Circuit decision that conducted this analysis, and analyzed the numerous Louisiana decisions finding that deviations in side-walk joints measuring up to one and a half inches do not generally present an unreasonable risk of harm. *Buchanan v. Wal-Mart Stores*, Inc., 834 F. App'x 58, 62 (5th Cir. 2020). Petitioner cannot conclude the Fifth Circuit skipped the requisite analysis simply because the Court did not discuss the analysis step-by-step within the opinion.

Petitioner also make much of a single line from the opinion in which the Fifth Circuit references the "legal rule" that deviations such as the one in question do not constitute unreasonable risks of harm. App.3a. This was not the Fifth Circuit's pronouncement of a legal conclusion; it was merely a reference the multi-

tude of decisions that have found deviations of less than one inch do not constitute an unreasonably dangerous condition.

Even if the Fifth Circuit did not conduct an exhaustive balancing analysis, that does not constitute reversible error because many prior decisions have already performed that analysis for deviations far greater than the one involved in this case. Therefore, there is less need for an overly detailed risk-utility balancing test as all expansion joints essentially share the same four factors: (1) their social utility, which is significant; (2) the likelihood and magnitude of harm, which is low; (3) the cost and feasibility of repair, which would be astronomical to correct every height deviation in these walkways considering the natural subsidence of the soil; and (4) the nature of a plaintiff's activities in traversing them. App.10a.

IV. PETITIONER HAS NO BASIS FOR HER CLAIMS THAT HER EVIDENCE WAS NOT CONSIDERED.

Petitioner alleges that the Fifth Circuit did not fulfill its duty to review the entire record, specifically her evidence. Pet.22. In support of her argument, Petitioner cites to *Reeves v. Sanderson Plumbing Products, Inc.*, which in relevant part simply states that the entire record, rather than just the evidence of the non-moving party, must be considered on appeal. 530 U.S. 133, 150 (2000). Nowhere does *Reeves* state that a reviewing court must not only review, but also discuss each piece of evidence in the record. *Id.*

The extreme extent of Petitioner's argument is perhaps best summed up by her statement that "[i]f the Fifth Circuit's opinion does not demonstrate how the 'undiscussed' evidence was considered, then there

is no way the evidence was credited by the court in favor of Petitioner as required by this Court's summary judgment precedents." Pet.23-24. Petitioner's contention that the Fifth Circuit must address each single piece of evidence in turn in its opinion is impractical and wholly unsupported by the law. In fact, despite Petitioner's assertions, this Court only requires that key evidence be properly acknowledged by the trial court. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014).

Petitioner lists the evidence she contends that was not acknowledged by the Fifth Circuit, without addressing the significance of any of the evidence or stating the genuine issues of material fact that they raised. Pet.22. Petitioner first cites the report of her expert, Nicholas Musso. *Id*. Though Petitioner mentions several contentions contained in Musso's report, such as the width measurements of the deviation, the deteriorated caulking, and the wet and rainy conditions, her argument still rests on allegations that the uneven concrete created an unreasonable risk of harm. *Id*. As discussed above, the trial court in this claim, the Fifth Circuit, and Louisiana courts in general, have held that an uneven surface with a height differential such as the subject sidewalk does not create an unreasonable risk of harm. Thus, the other evidence she discussed in Musso's report is irrelevant even to her own argument.

Petitioner next makes much of the Fifth Circuit's decision to note a picture of the alleged deviation that was produced by Respondent rather than Petitioner. Pet.26. Petitioner argues that the Respondent's photograph depicts sunny conditions, rather than the rainy conditions that existed at the time of her fall, and the rain could have obscured her view of the expansion

joint. *Id*. Petitioner states, "the sole photo credited by the Fifth Circuit in granting summary judgment could paint a skewed picture on whether the condition was dangerous." Pet.26. However, the fact that the Fifth Circuit referenced one photograph over another does not mean that they only considered the Respondent's photograph. Nowhere does the Fifth Circuit state that this was the only photograph they reviewed or that they based their opinion on the depiction in the photograph. Also, Petitioner admitted under oath that her view of the joint was unobscured, so this after-the-fact argument about an obscured view is rejected by Petitioner's own deposition testimony. App.14a.

V. THE CASES PETITIONER CITES IN SUPPORT OF HER ARGUMENTS ARE EASILY DISTINGUISHABLE.

Petitioner laments what she perceives as a failure by the Fifth Circuit and the trial court to consider what she deems factually similar cases. Pet.26-27. Petitioner makes this argument while ignoring all the factually similar cases cited by Respondent, the Fifth Circuit, and the trial court which do not support her position.

Petitioner first cites *Gomes v. Harrah, Inc.* 2017 WL 6508107 (E.D. La. 2017). First, unlike the present matter, in *Gomes*, the plaintiff insisted "she did not trip, rather, she stepped into the depressed spot, lost her balance, and fell." *Id*. at *1. Second, while the height differential only measured a depth of less than one-half inch, the plaintiff argued that the "sidewalk depression was large enough for her to fit her foot into". *Id*. at *1-2. It appears that no evidence was presented regarding the width or length of the alleged defect. *See id*. Third, the alleged defect was a depressed brick(s) and did not involve an expansion joint in a concrete

walkway. *Id*. at *5, n. 1. Fourth, there was absolutely no discussion regarding the utility of the complained of condition or the cost of preventing the harm. *See id*. The court then held that "based on the record presented," defendant was not entitled to summary judgment. *Id*. at *5. The *Gomes* decision does not hold that a height differential of less than one-half inch presents an unreasonable risk of harm and does not even discuss an expansion joint. *See id*.

Petitioner concedes that *Gomes* is distinguishable from the instant matter, but maintains that the "main take-away" is that the determination of an unreasonable risk of harm should be left to the trier of fact, and that if an Motion for Summary Judgment can be denied when the deviation in question is less than 1/2 inch then it should certainly be denied when the deviation is between 3/4 to 7/8 of an inch. Pet.27-28. Yet again, Petitioner's argument ignores the jurisprudence finding that summary judgment is appropriate for the same issue.

Petitioner then lists several other cases that she claims should have been considered, some of which are so easily distinguishable that even a review of parentheticals offered by Petitioner clearly demonstrate how they are irrelevant to the instant matter. Pet.28-29. In *Prince v. Rouse's Enterprises, LLC*, there was a dispute of fact as to whether the plaintiff tripped over an expansion joint or a pothole. 305 So.3d 1078, 1082-83 (La. App. 5th Cir. 2020). Further, the defendants did not present any evidence regarding the size of the deviation. *Id.* at 1083.

In *Cline v. Cheema*, the deviation was located at a "natural point of ingress and egress" at the defendant's store and expert testimony indicated that it would

only cost about $300.00 to repair. 85 So.3d 260, 265 (La. App. 4th Cir. 2012). This of course stands in sharp contrast to the cost of repairing all possible defects in sidewalks at Respondent's locations, as Respondent is responsible for approximately 1,574,081 square feet of paved surface area throughout Louisiana and the cost of repairing a single cement slab is $1,500.00. ROA. 82-85.

In *Buchignani v. Lafayette Ins. Co.*, both the trial court and the appellate court distinguished the facts from other cases in which a similar deviation was not found to be an unreasonable risk of harm, on the basis that the deviation they were considering was located at the top of a flight of stairs, which rendered it unreasonably dangerous, a fact not present here. 938 So.2d 1198, 1204-05 (La. App. 2nd Cir. 2006). In *McAdams v. Willis Knighton Medical Center*, the deviation was present at the main entrance to a hospital, where the court noted that there was a much higher likelihood that less sure-footed people, in poor health may be traversing the area rendering it a greater risk of harm, a fact also not present here. 862 So.2d 1186, 1191-92 (La. App. 2nd Cir. 2003). Finally, Petitioner cites *Joseph v. City of New Orleans*, a case involving a deviation of 3.5 to 3.9 inches, at least four times greater than the deviation measured here. 842 So.2d 420, 422 (La. App. 4th Cir, 2003).

Some of the cases cited by Petitioner involve only one factual difference, however these differences were explicitly cited by the reviewing courts as the reason why the deviation could be considered as posing an unreasonable risk of harm. Petitioner attempts to substitute these factually distinguishable cases for the much more similar cases which have already been

cited by the trial court and Fifth Circuit in dismissing Petitioner's claim.

VI. PETITIONER HAS NO EVIDENCE THAT HER APPEAL WAS NOT FAIRLY CONSIDERED.

Petitioner argues that her appeal cleared the first two "hurdles" by first being designated for oral argument by staff attorney, followed by the decision being affirmed by an initiating judge. Pet.31. Petitioner implies her claim was more worthy of reversal as those selected for oral argument are those "that present difficult or new issues." *Id*. Petitioner then notes that oral argument panel determined that oral argument was no longer required but implies this was an unfair decision rather than a repudiation of her implication that her case presented a difficult or new issue. Pet. 31-32. Following Petitioner's own logic, if a staff attorney's selection of an appeal for oral argument implies that it presents a difficult or new issue, then the more senior oral argument panel's decision that oral argument is not necessary must then mean that the case does not present a difficult or new issue.

Petitioner's final argument is simply one more unsupported attempt to raise an issue with a decision properly rendered at the trial court level and affirmed by the Fifth Circuit.

CONCLUSION

The Fifth Circuit's decision mirrored similar cases decided by Louisiana courts finding that a slight deviation in a side-walk expansion joint does not generally constitute an unreasonable risk of harm. In reaching this decision, the court did not reach an improper legal conclusion, did not fail to credit Petitioner's evidence, and did not improperly weigh evidence submitted by Respondent. Petitioner has failed to offer a supported argument as to why the Fifth Circuit's decision was incorrect, much less offer a compelling reason why certiorari should be granted here. For these reasons, it is respectfully submitted that this Court should deny Petitioner's writ for certiorari.

Respectfully submitted,

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