

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,  
FIRST JUDICIAL DEPARTMENT

Allison Prete et al. v. JJ Hoyt LLC

Prete, 2026 NY Slip Op 00325 (Supreme Court of the State of New York Appellate Division First Judicial Department 2026) · No. Case No. 2024-04546; Appeal No. 5216; Index No. 161724/19 · Decided January 22, 2026

SUMMARY

The New York Appellate Division, First Department reversed summary judgment for JJ Hoyt LLC in a sidewalk-injury action. Although the owner-occupied residential-property exemption barred statutory liability under New York City’s Sidewalk Law, the court held that factual issues remained regarding common-law liability under the special-use exception because the sidewalk was used as a driveway. The court reinstated the complaint and denied defendant’s motion.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                         |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of New York, Appellate Division, First Judicial Department                                                                                                                                                                   |
| WRITING FOR THE COURT | Sallie Manzanet-Daniels, J.P.; Barbara R. Kapnick, J.; Martin Shulman, J.; LlinÉt M. Rosado, J.; Shlomo S. Hagler, J.                                                                                                                                   |
| JURISDICTION          | New York Supreme Court, Appellate Division, First Department                                                                                                                                                                                            |
| DECIDED               | January 22, 2026                                                                                                                                                                                                                                        |
| DOCKET                | Case No. 2024-04546; Appeal No. 5216; Index No. 161724/19                                                                                                                                                                                               |
| DISPOSITION           | reversed                                                                                                                                                                                                                                                |
| PROCEDURAL POSTURE    | Plaintiffs appealed from an order granting defendant's motion for summary judgment dismissing the complaint in a sidewalk-injury action.                                                                                                                |
| STANDARD OF REVIEW    | De novo review of the order granting summary judgment; summary judgment was improper because defendant failed to make a prima facie showing eliminating factual issues concerning whether its special use caused or contributed to the sidewalk defect. |
| PRECEDENTIAL VALUE    | Published appellate decision; precedential within the First Department subject to later appellate treatment.                                                                                                                                            |
| PARTIES               | Allison Prete et al. v. JJ Hoyt LLC                                                                                                                                                                                                                     |

## TOPICS

premises liability   duty of care   negligence   standard of review   appellate procedure

## PRACTICE AREAS

premises liability   personal injury   negligence   real estate   appellate procedure

## QUESTIONS PRESENTED

1. Whether JJ Hoyt LLC was exempt from statutory sidewalk liability under Administrative Code of the City of New York § 7-210(b) because the property was owner-occupied residential real property.
2. Whether the common-law special-use exception imposed a duty only for sidewalk defects caused by or otherwise tied to the owner's special use of the sidewalk as a driveway.
3. Whether JJ Hoyt LLC established entitlement to summary judgment by demonstrating that it neither created the defect nor caused it through its special use of the sidewalk.

## HOLDINGS

1. JJ Hoyt LLC was exempt from statutory sidewalk liability because the premises were purely residential and regularly occupied by its principals without rent.
2. An abutting landowner's duty under the special-use exception extends only to sidewalk defects caused by or otherwise related to the owner's special use; the owner is not liable for defects arising from wholly unrelated causes.
3. JJ Hoyt LLC was not entitled to summary judgment because it failed to establish that it did not create the defect or cause it through use of the sidewalk as a driveway, and conflicting expert evidence presented a triable issue of fact.

## KEY QUOTATIONS

*“Thus, an owner will only be liable for a defect on the abutting sidewalk if it is tied to his special use of the property, and not if it arises from a wholly unrelated cause”* ([\*1])

*“However, while we accept JJ Hoyt's more limited interpretation of the scope of duty under the "special use" doctrine, we still find that it was not entitled to summary judgment, as it did not meet its burden of "establishing that [it] did nothing to either create the defect or cause it through the special use of the sidewalk as a driveway”* ([\*1])

*“It is more properly the jury's function, and not the court's, to weigh this conflicting expert testimony”* ([\*1])

## FACTUAL BACKGROUND

JJ Hoyt LLC owned a four-story residential building in Brooklyn with an adjacent, unattached three-car garage. The sidewalk abutting the premises was used as a driveway by the owners, a tenant, a neighbor, and others to access the garage, which JJ Hoyt used and rented out. Allison Prete was injured when she tripped and fell on the sidewalk, and competing expert opinions addressed whether vehicular traffic associated with the driveway use caused the defect.

## PROCEDURAL HISTORY

The Supreme Court, New York County, granted JJ Hoyt LLC's motion for summary judgment dismissing the complaint. The Appellate Division held that JJ Hoyt was exempt from statutory sidewalk liability under the owner-occupied residential-property exception but that plaintiffs' common-law claims presented unresolved factual issues and that defendant failed to establish entitlement to judgment as a matter of law. The order was reversed, the complaint reinstated, and the motion denied.

## DISPOSITION

reversed

## REMAND INSTRUCTIONS

The order was reversed, the complaint reinstated, and defendant's summary judgment motion denied. No further specific remand instructions were stated.

## CASES CITED

- Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008)
- Kalajian v. 320 E. 50th St. Realty Co., 154 A.D.3d 528, 529 (1st Dep't 2017)
- Gallis v. 23-21 33 Rd., LLC, 198 A.D.3d 730, 733 (2d Dep't 2021)
- Hausser v. Giunta, 88 N.Y.2d 449, 452-453 (1996)
- Torres v. City of New York, 32 A.D.3d 347, 348 (1st Dep't 2006)
- Marino v. Parish of Trinity Church, 67 A.D.3d 500, 501 (1st Dep't 2009)
- Kaufman v. Silver, 90 N.Y.2d 204, 207 (1997)
- Robles v. Time Warner Cable Inc., 167 A.D.3d 411, 411 (1st Dep't 2018)
- Fatty v. City of New York, 232 A.D.3d 415, 416 (1st Dep't 2024)
- Trent-Clark v. City of New York, 114 A.D.3d 558, 559 (1st Dep't 2014)
- O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d 428, 429 (1st Dep't 2013)
- Clifford v. Dam, 81 N.Y. 52 (1880)
- Trustees of Vil. of Canandaigua v. Foster, 156 N.Y. 354 (1898)
- Moschillo v. City of New York, 290 A.D.2d 260, 260 (1st Dep't 2002)
- Katz v. City of New York, 18 A.D.3d 818, 819 (2d Dep't 2005)
- Ford v. Campus Realty LLC, 226 A.D.3d 405, 406 (1st Dep't 2024)
- Davidson v. Shubert Org., Inc., 221 A.D.3d 450, 451 (1st Dep't 2023)

## OPINION

MANZANET-DANIELS, J.

Prete v JJ Hoyt LLC ( 2026 NY Slip Op 00325 ) Prete v JJ Hoyt LLC 2026 NY Slip Op 00325  
Decided on January 22, 2026 Appellate Division, First Department Manzanet-Daniels, J.P.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: January 22, 2026 SUPREME COURT, APPELLATE DIVISION First Judicial Department Sallie Manzanet-Daniels Barbara R. Kapnick Martin Shulman LlinÉt M. Rosado Shlomo S. Hagler Index No. 161724/19|Appeal No. 5216|Case No. 2024-04546| [\*1]Allison Prete et al., Plaintiffs-Appellants, v JJ Hoyt LLC, Defendant-Respondent.

Plaintiffs appeal from an order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, which granted defendant JJ Hoyt LLC's motion for summary judgment dismissing the complaint. Sullivan Papain Block McManus Coffinas & Cannavo, P.C., New York (Brian J. Shoot and Vito A. Cannavo of counsel), for appellants. Cuomo LLC, Mineola (Matthew A. Cuomo of counsel), for respondent.

Manzanet-Daniels, J.P. Defendant JJ Hoyt LLC is the owner of a four-story residential building located at 126 Hoyt Street, Brooklyn, New York (the premises). Nonparties Justin Beal and Jane Hait are married and are members of JJ Hoyt, which was formed to legally own the premises. Since 2015, Beal, Hait and their children have resided at the premises, occupying three floors while renting out the ground-floor garden apartment.

The premises include an adjacent, unattached three-car garage. Plaintiff Allison Prete was injured when she tripped and fell on the sidewalk used by Beal, Hait, the garden apartment tenant and a neighbor as a driveway to access the premises' garage, which JJ Hoyt used and rented out to two others.

Because there remain factual issues with respect to defendant's obligations to plaintiffs under the common law, the order must be reversed. As an initial matter, we agree with Supreme Court's conclusion that defendant is exempt from statutory liability as an owner-occupied residential property.

The relevant statute, Administrative Code of the City of New York § 7-210 (the Sidewalk Law), was enacted in 2003 to shift tort liability for injuries resulting from a defective sidewalk from the City to abutting property owners ( *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]).

However, the Sidewalk Law does not apply to sidewalks abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of the City of NY § 7-210(b)).

To satisfy this exemption, an owner must show that it "regularly occupie[d]" the building ( *Kalajian v 320 E. 50th St. Realty Co.*, 154 AD3d 528, 529 [1st Dept 2017]). Here, the evidence established that the premises are purely residential and that JJ Hoyt's principals regularly reside at the premises without paying rent ( *id.*).

The fact that JJ Hoyt is the legal owner of the premises does not preclude it from being covered by the exemption ( see e.g. *Gallis v 23-21 33 Rd., LLC*, 198 AD3d 730, 733 [2d Dept 2021]). However, despite the absence of statutory liability, Supreme Court failed to consider plaintiffs' common-law claims.

Under the common law, an owner is ordinarily not liable for the repair and maintenance of a municipally-owned sidewalk abutting his property absent three exceptions: (1) "where the sidewalk was constructed in a special manner for the benefit of the abutting owner" ( i.e., for his own "special use"); (2) where the abutting owner "affirmatively caused the defect"; and (3) where "a local ordinance or statute" imposes such a duty ( see e.g. *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *Torres v City of New York*, 32 AD3d 347, 348 [1st Dept 2006]).

Of particular importance to this case is whether defendant is liable under the first exception pertaining to an owner's "special use." The parties agree that the defendant/owner made "special use" of the sidewalk by using it as a driveway ( see e.g. *Marino v Parish of Trinity Church*, 67 AD3d 500, 501 [1st Dept 2009]; *Torres*, 32 AD3d at 348 ). Where the parties disagree is with respect to the scope of duty under the "special use" exception to liability, and whether it contains a causation requirement that is tied to the owner's special use.

We find that it does. The Court of Appeals has set forth that when a landowner uses some portion of an abutting property for its own "special use," it is required to maintain "the used property in a reasonably safe condition to avoid injury to others" ( *Kaufman v Silver*, 90 NY2d 204, 207 [1997]).

The underlying rationale is that where an abutting landowner derives a special benefit from that public property, the person or entity obtaining the benefit is required to maintain it ( *id.*; see also *Robles v Time Warner Cable Inc.*, 167 AD3d 411, 411 [1st Dept 2018]).

In interpreting this precedent, this Court has found that the "special use" exception applies only if the subject area was constructed for the owner's "special use" and the special use caused or gave rise to the relevant defect ( see e.g. *Fatty v City of New York*, 232 AD3d 415, 416 [1st Dept 2024]; see also *Trent-Clark v City of New York*, 114 AD3d 558, 559 [1st Dept 2014] [finding, with respect to the "special use" of a driveway, that there was "no evidence that the defect alleged here was caused by cars driving over the curb for [the owner's] sole commercial benefit"] [emphasis added]; *O'Brien v Prestige Bay Plaza Dev.*

*Corp.*, 103 AD3d 428, 429 [1st Dept 2013]). Thus, an owner will only be liable for a defect on the abutting sidewalk if it is tied to his special use of the property, and not if it arises from a wholly unrelated cause ( *Trent-Clark*, 114 AD3d at 559 ).

In arguing for a broader scope of duty, plaintiffs rely principally on centuries-old cases from the Court of Appeals where causation was not an issue — for example, where the plaintiff tripped and

fell on a foreign object that was installed solely for the defendant's benefit, such as a sidewalk grate or coal hole ( see e.g. *Clifford v Dam*, 81 NY 52 [1880]; *Trustees of Vil. of Canandaigua v Foster*, 156 NY 354 [1898]).

In these cases, causation was congruent with the special use, and thus the Court did not discuss it. [FN1] This is different from a sidewalk abutting an owner's driveway, which could be defective for reasons wholly unrelated to the owner's special use — for example, from protruding tree roots, differential settlement, or water damage.

Thus, under the correct standard, an owner will not be liable for the defects that it did not cause or that are otherwise unrelated to its special use ( *Trent-Clark*, 114 AD3d at 559 ). Plaintiffs' construction and policy arguments do not change this result.

First, plaintiffs argue that defendant's interpretation of the "special use" exception effectively renders it meaningless. As noted above, there are three distinct bases for abutting owner liability at common law: (1) when the owner derives a "special use" from the subject area, (2) when the owner causes the defect, and (3) when a statute otherwise imposes liability.

Plaintiffs contend that if there is a causation element tethered to the special use exception, it would render the exception redundant because a defendant owner will always be liable when he causes the defect (under exception #2), regardless of whether the defect happened to occur within the area of the defendant's special use (under exception #1).

We are not persuaded. This Court has repeatedly found the "special use" and the "cause and create" exceptions to be distinct, finding, for example, that "an abutting landowner will be held liable where the landowner created the defective condition or caused the defect to occur because of some special use" ( *Torres*, 32 AD3d at 348 [emphasis added][internal quotation marks and citations omitted]; *Moschillo v City of New York*, 290 AD2d 260, 260 [1st Dept 2002]).

In fact, plaintiffs acknowledge that there are some instances when the "special use" exception will be broader than the "cause and create" exception. For example, the duty to repair under the special use exception runs with the land, and liability for a defect arising from such use is not dependent upon a finding that the defect arose while the defendant owned the property (see *Katz v City of New York*, 18 AD3d 818, 819 [1st Dept 2005]).

It is thus conceivable that a property owner may be liable for a defect to the sidewalk abutting its property under the "special use" doctrine even where it did not cause the defect. We are also not persuaded by plaintiff's argument that it is fair and reasonable to expect an abutting owner who derives a special benefit from a public sidewalk to shoulder the full responsibility for maintaining that part of the sidewalk ( see *Kaufman*, 90 NY2d at 207 ).

It would be more unfair to saddle a property owner with the general responsibility of maintaining the sidewalk abutting its driveway when its special use did not give rise to the defect. We simply do not agree with plaintiffs that the Court of Appeals intended to impose such a broad duty on homeowners when it first articulated the parameters of the special use doctrine more than a century ago ( see e.g. *Clifford v Dam*, 81 NY 52 [1880]; *Foster*, 156 NY at 359 ).

However, while we accept *JJ Hoyt*'s more limited interpretation of the scope of duty under the "special use" doctrine, we still find that it was not entitled to summary judgment, as it did not meet its burden of "establishing that [it] did nothing to either create the defect or cause it through the special use of the sidewalk as a driveway" ( *Torres*, 32 AD3d at 348; see *Katz*, 18 AD3d at 819 ).

Defendant's summary judgment motion relied on a conclusory affidavit from its retained expert. While defendants concede that the relevant area was used as a driveway, the expert opined that the defect had "nothing to do" with this special use. Acknowledging that "overloading caused by car traffic" could cause damage to concrete, the expert concluded that "if cars driving over the sidewalk had damaged the sidewalk, we would have expected to see cracking in a generally north south orientation" — an opinion that he did not support with empirical data or other evidence.

He also noted that there was "no evidence that the subject fiberboard expansion joint suffered any mechanical damage because of vehicular traffic over the sidewalk," but did not affirmatively establish that vehicular traffic was not the cause of the defect. Again citing nothing, defendant's expert attributed the defect to "differential settlement," "water infiltration" and "normal exposure to the weather" over time.

We find this to be insufficient. Even if defendant had met its prima facie burden, which it did not, the plaintiff's expert affidavit arguably created an issue of fact. Plaintiff's expert, an engineer, noted that the location of the defect in the driveway was at the precise point where the driveway was weakest, and thus most at risk to being undermined by passage of vehicular traffic.

It is more properly the jury's function, and not the court's, to weigh this conflicting expert testimony ( see e.g. *Ford v Campus Realty LLC*, 226 AD3d 405, 406 [1st Dept 2024]). Under the circumstances, summary judgment was inappropriate ( *Davidson v Shubert Org., Inc.*, 221 AD3d 450, 451 [1st Dept 2023]).

Accordingly, the order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, which granted defendant *JJ Hoyt LLC*'s motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the complaint reinstated, and the motion denied. Order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, reversed, on the law, without costs, the complaint reinstated, and the motion denied.

Opinion by Manzanet-Daniels, J.P. All concur. Manzanet-Daniels, J.P., Kapnick, Shulman, Rosado, Hagler, JJ. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: January 22, 2026

Footnotes Footnote 1: For example, a defect tied to a grate installed solely for an owner's benefit will always arise from the owner's special use of that grate, because otherwise the grate would not be present on the sidewalk.

MANZANET-DANIELS, J.

Prete v JJ Hoyt LLC (2026 NY Slip Op 00325) Prete v JJ Hoyt LLC 2026 NY Slip Op 00325 Decided on January 22, 2026 Appellate Division, First Department Manzanet-Daniels, J.P. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: January 22, 2026 SUPREME COURT, APPELLATE DIVISION First Judicial Department Sallie Manzanet-Daniels Barbara R. Kapnick Martin Shulman LlinÉt M. Rosado Shlomo S. Hagler Index No. 161724/19|Appeal No. 5216|Case No. 2024-04546| [\*1]Allison Prete et al., Plaintiffs-Appellants, v JJ Hoyt LLC, Defendant-Respondent.

Plaintiffs appeal from an order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, which granted defendant JJ Hoyt LLC's motion for summary judgment dismissing the complaint. Sullivan Papain Block McManus Coffinas & Cannavo, P.C., New York (Brian J. Shoot and Vito A. Cannavo of counsel), for appellants. Cuomo LLC, Mineola (Matthew A. Cuomo of counsel), for respondent.

Manzanet-Daniels, J.P. Defendant JJ Hoyt LLC is the owner of a four-story residential building located at 126 Hoyt Street, Brooklyn, New York (the premises). Nonparties Justin Beal and Jane Hait are married and are members of JJ Hoyt, which was formed to legally own the premises. Since 2015, Beal, Hait and their children have resided at the premises, occupying three floors while renting out the ground-floor garden apartment.

The premises include an adjacent, unattached three-car garage. Plaintiff Allison Prete was injured when she tripped and fell on the sidewalk used by Beal, Hait, the garden apartment tenant and a neighbor as a driveway to access the premises' garage, which JJ Hoyt used and rented out to two others.

Because there remain factual issues with respect to defendant's obligations to plaintiffs under the common law, the order must be reversed. As an initial matter, we agree with Supreme Court's conclusion that defendant is exempt from statutory liability as an owner-occupied residential property.

The relevant statute, Administrative Code of the City of New York § 7-210 (the Sidewalk Law), was enacted in 2003 to shift tort liability for injuries resulting from a defective sidewalk from the



City to abutting property owners ( *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]).

However, the Sidewalk Law does not apply to sidewalks abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of the City of NY § 7-210(b)).

To satisfy this exemption, an owner must show that it "regularly occupie[d]" the building ( *Kalajian v 320 E. 50th St. Realty Co.*, 154 AD3d 528, 529 [1st Dept 2017]). Here, the evidence established that the premises are purely residential and that JJ Hoyt's principals regularly reside at the premises without paying rent ( *id.*).

The fact that JJ Hoyt is the legal owner of the premises does not preclude it from being covered by the exemption ( see e.g. *Gallis v 23-21 33 Rd., LLC*, 198 AD3d 730, 733 [2d Dept 2021]). However, despite the absence of statutory liability, Supreme Court failed to consider plaintiffs' common-law claims.

Under the common law, an owner is ordinarily not liable for the repair and maintenance of a municipally-owned sidewalk abutting his property absent three exceptions: (1) "where the sidewalk was constructed in a special manner for the benefit of the abutting owner" ( i.e., for his own "special use"); (2) where the abutting owner "affirmatively caused the defect"; and (3) where "a local ordinance or statute" imposes such a duty ( see e.g. *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *Torres v City of New York*, 32 AD3d 347, 348 [1st Dept 2006]).

Of particular importance to this case is whether defendant is liable under the first exception pertaining to an owner's "special use." The parties agree that the defendant/owner made "special use" of the sidewalk by using it as a driveway ( see e.g. *Marino v Parish of Trinity Church*, 67 AD3d 500, 501 [1st Dept 2009]; *Torres*, 32 AD3d at 348). Where the parties disagree is with respect to the scope of duty under the "special use" exception to liability, and whether it contains a causation requirement that is tied to the owner's special use.

We find that it does. The Court of Appeals has set forth that when a landowner uses some portion of an abutting property for its own "special use," it is required to maintain "the used property in a reasonably safe condition to avoid injury to others" ( *Kaufman v Silver*, 90 NY2d 204, 207 [1997]).

The underlying rationale is that where an abutting landowner derives a special benefit from that public property, the person or entity obtaining the benefit is required to maintain it ( *id.*; see also *Robles v Time Warner Cable Inc.*, 167 AD3d 411, 411 [1st Dept 2018]).

In interpreting this precedent, this Court has found that the "special use" exception applies only if the subject area was constructed for the owner's "special use" and the special use caused or gave rise to the relevant defect ( see e.g. *Fatty v City of New York*, 232 AD3d 415, 416 [1st Dept 2024];

see also *Trent-Clark v City of New York*, 114 AD3d 558, 559 [1st Dept 2014] [finding, with respect to the "special use" of a driveway, that there was "no evidence that the defect alleged here was caused by cars driving over the curb for [the owner's] sole commercial benefit"] [emphasis added]; *O'Brien v Prestige Bay Plaza Dev.*

*Corp.*, 103 AD3d 428, 429 [1st Dept 2013]). Thus, an owner will only be liable for a defect on the abutting sidewalk if it is tied to his special use of the property, and not if it arises from a wholly unrelated cause ( *Trent-Clark*, 114 AD3d at 559).

In arguing for a broader scope of duty, plaintiffs rely principally on centuries-old cases from the Court of Appeals where causation was not an issue — for example, where the plaintiff tripped and fell on a foreign object that was installed solely for the defendant's benefit, such as a sidewalk grate or coal hole ( see e.g. *Clifford v Dam*, 81 NY 52 [1880]; *Trustees of Vil. of Canandaigua v Foster*, 156 NY 354 [1898]).

In these cases, causation was congruent with the special use, and thus the Court did not discuss it. [FN1] This is different from a sidewalk abutting an owner's driveway, which could be defective for reasons wholly unrelated to the owner's special use — for example, from protruding tree roots, differential settlement, or water damage.

Thus, under the correct standard, an owner will not be liable for the defects that it did not cause or that are otherwise unrelated to its special use ( *Trent-Clark*, 114 AD3d at 559). Plaintiffs' construction and policy arguments do not change this result.

First, plaintiffs argue that defendant's interpretation of the "special use" exception effectively renders it meaningless. As noted above, there are three distinct bases for abutting owner liability at common law: (1) when the owner derives a "special use" from the subject area, (2) when the owner causes the defect, and (3) when a statute otherwise imposes liability.

Plaintiffs contend that if there is a causation element tethered to the special use exception, it would render the exception redundant because a defendant owner will always be liable when he causes the defect (under exception #2), regardless of whether the defect happened to occur within the area of the defendant's special use (under exception #1).

We are not persuaded. This Court has repeatedly found the "special use" and the "cause and create" exceptions to be distinct, finding, for example, that "an abutting landowner will be held liable where the landowner created the defective condition or caused the defect to occur because of some special use" ( *Torres*, 32 AD3d at 348 [emphasis added][internal quotation marks and citations omitted]; *Moschillo v City of New York*, 290 AD2d 260, 260 [1st Dept 2002]).

In fact, plaintiffs acknowledge that there are some instances when the "special use" exception will be broader than the "cause and create" exception. For example, the duty to repair under the special

use exception runs with the land, and liability for a defect arising from such use is not dependent upon a finding that the defect arose while the defendant owned the property (see *Katz v City of New York*, 18 AD3d 818, 819 [1st Dept 2005]).

It is thus conceivable that a property owner may be liable for a defect to the sidewalk abutting its property under the "special use" doctrine even where it did not cause the defect. We are also not persuaded by plaintiff's argument that it is fair and reasonable to expect an abutting owner who derives a special benefit from a public sidewalk to shoulder the full responsibility for maintaining that part of the sidewalk ( see *Kaufman*, 90 NY2d at 207).

It would be more unfair to saddle a property owner with the general responsibility of maintaining the sidewalk abutting its driveway when its special use did not give rise to the defect. We simply do not agree with plaintiffs that the Court of Appeals intended to impose such a broad duty on homeowners when it first articulated the parameters of the special use doctrine more than a century ago ( see e.g. *Clifford v Dam*, 81 NY 52 [1880]; *Foster*, 156 NY at 359).

However, while we accept *JJ Hoyt's* more limited interpretation of the scope of duty under the "special use" doctrine, we still find that it was not entitled to summary judgment, as it did not meet its burden of "establishing that [it] did nothing to either create the defect or cause it through the special use of the sidewalk as a driveway" ( *Torres*, 32 AD3d at 348; see *Katz*, 18 AD3d at 819).

Defendant's summary judgment motion relied on a conclusory affidavit from its retained expert. While defendants concede that the relevant area was used as a driveway, the expert opined that the defect had "nothing to do" with this special use. Acknowledging that "overloading caused by car traffic" could cause damage to concrete, the expert concluded that "if cars driving over the sidewalk had damaged the sidewalk, we would have expected to see cracking in a generally north south orientation" — an opinion that he did not support with empirical data or other evidence.

He also noted that there was "no evidence that the subject fiberboard expansion joint suffered any mechanical damage because of vehicular traffic over the sidewalk," but did not affirmatively establish that vehicular traffic was not the cause of the defect. Again citing nothing, defendant's expert attributed the defect to "differential settlement," "water infiltration" and "normal exposure to the weather" over time.

We find this to be insufficient. Even if defendant had met its prima facie burden, which it did not, the plaintiff's expert affidavit arguably created an issue of fact. Plaintiff's expert, an engineer, noted that the location of the defect in the driveway was at the precise point where the driveway was weakest, and thus most at risk to being undermined by passage of vehicular traffic.

It is more properly the jury's function, and not the court's, to weigh this conflicting expert testimony ( see e.g. *Ford v Campus Realty LLC*, 226 AD3d 405, 406 [1st Dept 2024]). Under the

circumstances, summary judgment was inappropriate ( Davidson v Shubert Org., Inc., 221 AD3d 450, 451 [1st Dept 2023]).

Accordingly, the order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, which granted defendant JJ Hoyt LLC's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the complaint reinstated, and the motion denied. Order of the Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 16, 2024, reversed, on the law, without costs, the complaint reinstated, and the motion denied.

Opinion by Manzanet-Daniels, J.P. All concur. Manzanet-Daniels, J.P., Kapnick, Shulman, Rosado, Hagler, JJ. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: January 22, 2026  
Footnotes Footnote 1: For example, a defect tied to a grate installed solely for an owner's benefit will always arise from the owner's special use of that grate, because otherwise the grate would not be present on the sidewalk.