

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

HUTCHINSON,

Appellant,

-against-

No. 144

SHERIDAN HILLS HOUSE CORP.,

Respondent.

ZELICHENKO,

Appellant,

-against-

No. 145

ORIENTAL BOULEVARD, LLC,

Respondent.

ADLER,

Appellant,

-against-

No. 146

QPI-VIII, LLC,

Respondent.

20 Eagle Street
Albany, New York 12207
September 17, 2015

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

BRIAN J. ISAAC, ESQ.
POLLACK, POLLACK, ISAAC & DECICCO, LLP
Attorneys for Appellant Hutchinson
225 Broadway
Suite 307
New York, NY 10007

KEVIN J. O'DONNELL, ESQ.
KAUFMAN DOLOWICH & VOLUCK, LLP
Attorneys for Respondent Sheridan
21 Main Street
Suite 251
Hackensack, NJ 07601

DAVID M. SCHWARZ, ESQ.
WINGATE, RUSSOTTI, SHAPIRO & HALPERIN, LLP
Attorneys for Appellant Zelichenko
420 Lexington Avenue
Suite 2750
New York, NY 10170

LISA L. GOKHULSINGH, ESQ.
GANNON, ROSENFARB, BALLETTI & DROSSMAN
Attorneys for Respondent Oriental
100 William Street
7th Floor
New York, NY 10038

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

GEORGETTE HAMBOUSSI, ESQ.
LAW OFFICES OF VEL BELUSHIN, P.C.
Attorneys for Appellant Adler
1712 Kings Highway
Suite 2A
Brooklyn, NY 11229

JOSEPH HOROWITZ, ESQ.
MCGAW, ALVENTOSA & ZAJAC
Attorneys for Respondents QPI
Two Jericho Plaza
Suite 202
Jericho, NY 11753

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 144, Hutchinson v. Sheridan Hill. Good
3 morning.

4 Would you like any rebuttal time, Mr.
5 Isaac?

6 MR. ISAAC: Yes, Your Honor. I'd like
7 three minutes, if I could have it, please.

8 CHIEF JUDGE LIPPMAN: Three minutes. You
9 have it, go ahead.

10 MR. ISAAC: Your Honors, my name is Brian
11 Isaac, and I represent the appellant in this case.
12 Before I start, just one generic word. I think I
13 probably speak for everybody here, but I'll let
14 everyone else speak for themselves. I've done a
15 whole lot of these cases, and I don't know what - - -

16 CHIEF JUDGE LIPPMAN: I'm not surprised,
17 Mr. Isaac. Go ahead.

18 MR. ISAAC: And - - - and you're probably
19 not surprised that I don't know what a trivial defect
20 is or isn't. I - - - I just don't. I know the words
21 - - -

22 CHIEF JUDGE LIPPMAN: You might be
23 surprised; we're not sure we know, either. We'll try
24 to find out. Go ahead.

25 MR. ISAAC: Let - - - let me - - - let me

1 see if I can - - -

2 JUDGE ABDUS-SALAAM: We know it when we see
3 it, Mr. Isaac.

4 CHIEF JUDGE LIPPMAN: Yeah, we know it when
5 we see it, right.

6 MR. ISAAC: Lisa said exactly - - -
7 Jacobellis against Ohio; she told me exactly the same
8 thing before. It's true, but it doesn't really help
9 - - - it really doesn't help you, and we're supposed
10 to help you.

11 CHIEF JUDGE LIPPMAN: Right, tell us, in
12 your particular case with this metal whatever-it-is
13 coming out of the sidewalk, how does this whole
14 concept - - - if there is such a concept, a trivial
15 defect - - - relate to what's a screw, part of a
16 screw, whatever it is? How does it fit into this why
17 we box these three cases, because they're similar
18 issues, at least as to that concept?

19 MR. ISAAC: Yes. I - - - I would suggest
20 to you that having looked at all the cases, my case
21 is a little different.

22 CHIEF JUDGE LIPPMAN: How is it different?

23 MR. ISAAC: Because you're never going to
24 see - - - and at least I've never seen, and I work in
25 New York City - - - I've never seen a pristine

1 sidewalk with that little metal nut sticking up; it's
2 just something I've never seen. I suspect everyone
3 here has been in New York City; I suspect you haven't
4 seen - - - plenty of defects, but not that kind of
5 defect. But let me try to make my argument easier.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. ISAAC: I tried to actually give you a
8 holding, because I knew the cases were bunched, and I
9 did it on page 17 of my brief.

10 CHIEF JUDGE LIPPMAN: Yep.

11 MR. ISAAC: I'm not as good as you are, so
12 forgive me, but this is how I would do it were I a
13 judge on the Court of Appeals.

14 CHIEF JUDGE LIPPMAN: Go ahead.

15 MR. ISAAC: "A defect on a" - - - and I'm
16 quoting, "A defect on a public way is not trivial as
17 a matter of law where it is not to be expected by a
18 pedestrian, not readily seen in the ordinary course,
19 inconsistent with its surroundings, firmly fixed in
20 the ground, and of an abrupt or uneven nature, such
21 that it is capable of catching a pedestrian's shoe,
22 causing him or her to become unbalanced." Now, why
23 does this fit within the Trincere definition of a
24 defect that's not trivial as a matter of law?
25 Simple; it's unexpected, and if you look at this case

1 from the prism of summary judgment jurisprudence - -
2 -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. ISAAC: - - - the defendant's own
5 statements, defendant's own pictures, the defendant's
6 own words support my claim that it's a trap or a
7 snare. What's a trap? Something that's unexpected;
8 something that you can't negotiate; something that
9 comes up without you knowing it.

10 CHIEF JUDGE LIPPMAN: How does - - - how do
11 their own words support your case?

12 MR. ISAAC: Well, let's tal - - - let's
13 talk about their witnesses, and I'll try to give you
14 the page references if I can, also.

15 CHIEF JUDGE LIPPMAN: First of all, tell
16 us, do - - - do you know how big this? You know,
17 there are different things in the record about it.
18 How - - - how big is it, or was it, or what?

19 MR. ISAAC: It's around five-eighths of an
20 inch in diameter, and it looks like it's three-
21 sixteenths of an inch in height. It looks like it's
22 a nut; it looks to me like it's got five or six
23 sides.

24 CHIEF JUDGE LIPPMAN: How do we know what
25 you're just saying is true?

1 MR. ISAAC: Well, from defendant's - - -

2 CHIEF JUDGE LIPPMAN: From what it's - - -

3 MR. ISAAC: The defendant's the one who
4 measured.

5 CHIEF JUDGE LIPPMAN: They're telling you
6 that that's the sizes?

7 MR. ISAAC: Yeah, yeah, and if you want to
8 see the photos - - - they actually put in some great
9 photos - - -

10 CHIEF JUDGE LIPPMAN: Right, we've seen
11 them.

12 MR. ISAAC: - - - 96 to 109, where they
13 measured it with that little MetroCard there. You
14 can see it's a nut; it looks to be clearly visible,
15 okay. Now, one of the reasons that it's - - - it's
16 this snare is because of this contrast. If you're
17 walking on a New York City street, like, say, at 225
18 Broadway where I am between Barclay and Vesey, there
19 are seven million defects. But pedestrians don't see
20 them because pedestrians - - -

21 CHIEF JUDGE LIPPMAN: Is it possible - - -

22 MR. ISAAC: - - - don't look for them.

23 CHIEF JUDGE LIPPMAN: - - - that we haven't
24 noticed that these kinds of things may be - - - when
25 you say you've never seen it, I don't know, I've

1 never seen it either, but maybe it's there and we
2 just don't notice and they're not - - - they're not
3 hazardous to anybody.

4 MR. ISAAC: But they are hazardous because
5 their own witness said it was. It's hazardous if you
6 can't see it and it has the ability to stop you cold,
7 and remember, the second - - -

8 CHIEF JUDGE LIPPMAN: How do we know that
9 it has the ability to stop us cold?

10 MR. ISAAC: If - - -

11 CHIEF JUDGE LIPPMAN: Is it the size of it
12 that - - -

13 MR. ISAAC: It's the size; it's the
14 configuration; it's the fact it's embedded in the
15 ground; it's the fact that you can't avoid it, and
16 you can't see it. They're - - -

17 JUDGE STEIN: You can avoid it. I mean, if
18 - - -

19 CHIEF JUDGE LIPPMAN: If you saw it.

20 MR. ISAAC: If you saw it.

21 JUDGE STEIN: Saw it, yeah, right.

22 MR. ISAAC: Right, and - - - and - - -

23 JUDGE STEIN: But - - - but does
24 foreseeability play any part in this?

25 MR. ISAAC: I - - - I - - - I - - - my

1 answer to that, Judge Stein, is I don't think so.
2 And I think the - - - the easiest way that I can help
3 you to try to understand what seems to be like a
4 mishmash is this. My adversary has accused me of
5 essentially speaking out both sides of my mouth at
6 the same time, not a great thing for an appellate
7 lawyer to do; I don't think I did it. Let me tell
8 you why I didn't.

9 What he says is, listen, plaintiff, you
10 didn't see it, and by the way, all of my witnesses
11 says this is so small and so insignificant that we
12 didn't see it. Therefore, you don't have notice of
13 it. Well, there are a couple of responses to that.
14 The first is since you were the one who did the
15 repair on the sidewalk, if you left it there, notice
16 isn't an issue because it's an affirmatively created
17 condition.

18 JUDGE ABDUS-SALAAM: And - - - and you say
19 that because they - - - they say they didn't do it
20 but some - - - some other entity did the sidewalk and
21 they're not responsible because - - -

22 MR. ISAAC: They - - - they are, though, if
23 they did it for them. That's Wright again - - -
24 that's Wright against Tudor, that's Klemperer, that's
25 - - - I mean, that's black letter precedent, but I

1 don't even want to go there because I don't have to.
2 I want to tell you why I think that analogy is wrong.

3 There is a huge quantum difference between
4 notice that goes to the comparative negligence of a
5 person who traverses a public way and notice that
6 goes to the failure on the part of the defendant's
7 agent to see that which he is expected to see when he
8 is doing an inspection. They are not congruent, they
9 should not be conflated; and were you to do that, in
10 my opinion, you'd be changing 200 years of settled
11 law.

12 Let me give you your cases. This goes back
13 to Clifford against Dam, that's 81 NY; Congreve
14 against Smith, 18 NY; McFarlane's, 247 NY; and - - -
15 and Delaney against Philhern Realty is 290 (sic) NY.
16 What those cases have said is that one who traverses
17 a public way has a right to assume an - - - an - - -
18 assume that it is free from defects and doesn't have
19 to anticipate that's a defect.

20 In 1944, the Second Department took those
21 cases and said that a plaintiff is entitled to a
22 charge to that effect and in 2011, in a case called
23 Normandy against Lowenstein, the First Department
24 came to the same effect when the plaintiff walked out
25 of a restaurant and walked into an open trapdoor.

1 Now - - -

2 JUDGE STEIN: So is this - - - is this
3 strict an absolute liability then?

4 MR. ISAAC: Absolutely not.

5 JUDGE STEIN: Why not?

6 MR. ISAAC: I'm not saying - - - I'm not
7 saying I get summary judgment. They can make all the
8 arguments in the brief that they made to the jury. I
9 may win; I may lose. But I shouldn't be losing - - -

10 JUDGE STEIN: But you're saying
11 foreseeability - - -

12 MR. ISAAC: - - - as a matter of law.

13 JUDGE STEIN: - - - is irrele - - - is
14 irrelevant and - - - and if - - - let's say they
15 didn't create the defect. Let's just say but they -
16 - - but it was - - - they couldn't fin - - - I mean,
17 here, they sent employees out to look for it and they
18 couldn't find it. Why - - - how can we hold - - -

19 MR. ISAAC: Simple.

20 JUDGE STEIN: - - - the defendant liable?

21 MR. ISAAC: They're very - - - they're very
22 simple. Tho - - - the cases that I cited about the
23 pedestrian, all that means - - - and I'm going to try
24 to use a Jacobellis against Ohio analogy here myself,
25 it won't be as good - - - is that when people walk,

1 they don't look down at their feet. It just doesn't
2 happen. You look to the right, you look - - -

3 JUDGE RIVERA: No, they're looking down at
4 their phone.

5 MR. ISAAC: You're looking - - - touche.

6 JUDGE ABDUS-SALAAM: But you said it
7 yourself, Mr. Isaac, sidewalks are not perfect.

8 MR. ISAAC: They are not.

9 JUDGE ABDUS-SALAAM: And - - - and they're
10 not defect free, so should every defect in a sidewalk
11 now become actionable?

12 MR. ISAAC: Absolutely not, and that's not
13 what I'm saying. I'm saying just - - - I'm just
14 trying to win my case. I - - - I know you have it a
15 little bit different than - - - this one is one that
16 I - - - I should be winning because - - -

17 CHIEF JUDGE LIPPMAN: What supports your
18 case? What they've said, in and of itself, supports
19 your case - - -

20 MR. ISAAC: Right.

21 CHIEF JUDGE LIPPMAN: - - - enough to get
22 you to the - - - to the finish line?

23 MR. ISAAC: Yes, and I see my light is on.
24 I know you don't want me - - -

25 CHIEF JUDGE LIPPMAN: Finish the answer to

1 that question.

2 MR. ISAAC: Can I just make one more point?

3 CHIEF JUDGE LIPPMAN: Yes.

4 MR. ISAAC: The - - - if you're looking for
5 something, though, if you're doing an inspection,
6 that's a different story. That's Weigand against
7 United Traction Co., 1917 case from your court. It
8 is - - - the - - - the - - - the statement that one
9 doesn't see what one should see under the
10 circumstances is not exculpatory. It's inculpatory.
11 So if you have two porters - - - and I'm taking this
12 directly from adversary's brief - - - two porters who
13 say they look every day for this - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. ISAAC: - - - sidewalk for defects and
16 this is there, they can be negligent for not seeing
17 or they can be negligent for not looking, or their
18 testimony can't be true.

19 CHIEF JUDGE LIPPMAN: If it's something
20 that they can be negligent for.

21 MR. ISAAC: I would ask you just to look at
22 the photos.

23 CHIEF JUDGE LIPPMAN: Yeah. We've - - -
24 we've seen them.

25 MR. ISAAC: I can see it. If I can see it,

1 then someone who's looking for it should be able to
2 see it too.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 You'll have your - - - your rebuttal.

5 MR. ISAAC: Thank you so much.

6 CHIEF JUDGE LIPPMAN: Let's hear from your
7 adversary.

8 Counsel, what - - - what about the test
9 that your adversary lays out? What would be wrong
10 with that test - - -

11 MR. O'DONNELL: Good afternoon to the
12 court.

13 CHIEF JUDGE LIPPMAN: - - - on trivial
14 defect?

15 MR. O'DONNELL: The - - - that test would,
16 as the court has - - - has suggested, basically open
17 the doors to - - - to cases regarding every sort of
18 every imaginable defect that could possibly exist - -
19 -

20 CHIEF JUDGE LIPPMAN: Well, let - - - let's
21 take your case.

22 MR. O'DONNELL: - - - with respect to a
23 liability.

24 CHIEF JUDGE LIPPMAN: Let's take your case.

25 MR. O'DONNELL: Okay.

1 CHIEF JUDGE LIPPMAN: Let's assume that
2 it's enough to hurt somebody and let's assume that
3 you look for it or your - - - your agent looks for it
4 and - - - and doesn't find it and should. They get
5 to the jury?

6 MR. O'DONNELL: No. They - - - they do
7 not. Absolutely not.

8 CHIEF JUDGE LIPPMAN: Why not?

9 MR. O'DONNELL: The - - - the trivial
10 defect test that this court laid down in Trincere is
11 a two-part test.

12 CHIEF JUDGE LIPPMAN: Yep.

13 MR. O'DONNELL: And the size of the defect
14 is critical. It - - - it may - - - there might not
15 be - - -

16 CHIEF JUDGE LIPPMAN: Let's say - - - let's
17 say the size passes the test, and you go, inspect for
18 it, look for it, don't find it. They get to the
19 jury?

20 MR. O'DONNELL: Absolutely not, Your Honor.
21 Because there's a - - -

22 JUDGE PIGOTT: Absolutely what?

23 MR. O'DONNELL: Absolutely not. There's a
24 - - -

25 JUDGE PIGOTT: All right.

1 CHIEF JUDGE LIPPMAN: Why - - - why not?

2 MR. O'DONNELL: Because there's a second
3 point to the test what ask - - - which asks the court
4 to look at the - - - the circumstances of the
5 surroundings and the time and place of the - - - of
6 the location of the accident. And in this case - - -

7 CHIEF JUDGE LIPPMAN: Location is on a
8 street in the middle of Manhattan, and this can hurt
9 somebody. Let - - - assume it could hurt somebody.
10 You look for it and don't find it. He gets to the
11 jury?

12 MR. O'DONNELL: Absolutely not. That would
13 be fundamentally un - - -

14 CHIEF JUDGE LIPPMAN: What else does it add
15 to this that would make - - - allow him to get to the
16 jury?

17 MR. O'DONNELL: If the - - - if the - - -
18 if it was large enough, which it was not.

19 CHIEF JUDGE LIPPMAN: Let's assume it's
20 large enough. Assume it's large enough that it could
21 hurt somebody.

22 MR. O'DONNELL: Okay, and the circumstances
23 were such that he should - - - that he should not
24 have anticipated it. Argenio was a particular case
25 that - - - that has been cited in the briefs.

1 CHIEF JUDGE LIPPMAN: Okay.

2 JUDGE PIGOTT: What, in your view, is large
3 enough?

4 MR. O'DONNELL: Pardon me?

5 JUDGE PIGOTT: What, in your view, is large
6 enough?

7 MR. O'DONNELL: In - - - in - - - in my
8 view, it would have to be closer to an inch in height
9 and substantially wider. Now - - -

10 JUDGE PIGOTT: So your argument would be if
11 it's three-quarters of an inch and it's in the middle
12 of the sidewalk, as this one was, and you knew it was
13 there and you went out and you measured it and said
14 it's only half an inch, we can leave this, it's no
15 big deal, that there would be no liability if people
16 tripped on it or - - - or anything else?

17 MR. O'DONNELL: If it was only a half of an
18 inch?

19 JUDGE PIGOTT: Right.

20 MR. O'DONNELL: I - - - I think that - - -
21 that would be a different question, for sure. That's
22 - - -

23 JUDGE PIGOTT: No, you said - - - you said
24 if it's a trivial defect, it doesn't make any
25 difference, absolutely not, can't go to a jury.

1 MR. O'DONNELL: Well, I - - - I think that
2 it - - - you know, in this particular case, the
3 trivial defect doctrine and the notice doctrine are -
4 - - are hand-in-hand.

5 JUDGE PIGOTT: Well, I'm asking you that
6 because if - - - the way you seem to be saying it is
7 if it's a trivial defect, in your view - - - which in
8 your view is three-quarters of an inch - - - you can
9 leave - - - you can leave things like this out on
10 your sidewalk and say we can put twenty of them out
11 there, they're all trivial, and therefore, we have no
12 liability and let's have fun and see who steps on
13 them.

14 MR. O'DONNELL: Well - - -

15 JUDGE FAHEY: Well, it seems you got - - -
16 you got a - - - a two-part test to me here. Let's
17 assume there's constructive notice, that the porters
18 were shoveling the sidewalk, and they didn't see it;
19 they should have - - - should have seen it. So
20 assume there's constructive notice. But that's not
21 really your motion. Your motion is it's a trivial
22 defect, right?

23 MR. O'DONNELL: Well, my - - - my - - - my
24 motion is both notice and defect, Your Honor.

25 JUDGE FAHEY: Okay, well, I'm not giving

1 you notice.

2 MR. O'DONNELL: Okay.

3 JUDGE FAHEY: So I - - - I think - - - I
4 think you're wrong about notice.

5 MR. O'DONNELL: Okay.

6 JUDGE FAHEY: But - - - but - - - but let's
7 go to the second part of it, which is the more
8 difficult part for the plaintiff, I think. You have
9 both the size of the defect, which is the triviality
10 of it, and then its trap- or snare-like
11 characteristics. It seems to me that - - - that - -
12 - that's where you are. Now, the Trin - - - Trincere
13 case was a half-an-inch elevation in the cement slab,
14 so we've already said that that's trivial, so any - -
15 - anything smaller than that is trivial. And so this
16 may be trivial, but it still could have the
17 characteris - - - characteristics of a - - - of a
18 shar - - - of a - - - of a trap or a snare.

19 MR. O'DONNELL: Well - - -

20 JUDGE FAHEY: And that's where you get into
21 a problem. I think that's the toughest part of your
22 case is because it's out in the middle of a - - - a
23 sidewalk; it's the kind of thing where, my God,
24 you're in Manhattan; there could be 100,000 people
25 who will walk by that thing in a day. So - - -

1 MR. O'DONNELL: Well, Gaud - - - the - - -
2 the court in Gaud v. Markham described what a trap or
3 a snare was, or at least gave the court some guidance
4 as to what to look for when trying to find out if an
5 object does constitute a trap or a snare. And it
6 says you look to the location, whether there's
7 adverse weather conditions or adverse lighting
8 conditions. Now - - -

9 JUDGE FAHEY: But they've also said things
10 like sharp edges and uneven surfaces, and that would
11 benefit you, then, wouldn't it, because this is a
12 round object?

13 MR. O'DONNELL: This is - - - this is a
14 round object. I submit to the court it's not a nut;
15 it appears to me - - - I've been to the location
16 myself, it appears to me - - -

17 JUDGE FAHEY: But it's - - - it's - - -
18 this is not one of those things where you have to
19 click off a - - - a four-part test and meet each
20 part. We have to look at them and kind of say it - -
21 - it's more of a feel than - - - than - - - than a
22 perfectly mathematical objective test.

23 MR. O'DONNELL: Understood.

24 JUDGE FAHEY: Yeah.

25 JUDGE STEIN: Does it depend upon our

1 plaintiff also? Here we have a plaintiff that - - -
2 that was familiar with this area?

3 MR. O'DONNELL: Abs - - - absolutely.

4 JUDGE STEIN: A bright and sunny day, I
5 mean, all - - - all of these things figure into it,
6 right?

7 MR. O'DONNELL: They - - - they all do,
8 absolutely. And this was his street; he had walked
9 by this particular location hundreds - - - hundreds
10 of times before.

11 JUDGE STEIN: Is he going to - - -

12 CHIEF JUDGE LIPPMAN: So if he trips and -
13 - - and hurts himself no - - - no recourse?

14 MR. O'DONNELL: Not if the defect is
15 trivial.

16 CHIEF JUDGE LIPPMAN: Because you're saying
17 it's a little too small? Gee, he's been in this area
18 before; he should have seen it or looked at it if
19 it's there? What - - - what's - - - what's the
20 recourse? If - - - isn't it - - - isn't it a weird -
21 - - your adversary was saying it's kind of a weird
22 thing that he's never seen and maybe the court may
23 never have seen. Isn't the fact that it's kind of a
24 weird thing go towards at least exploring further
25 what went on here at a trial?

1 MR. O'DONNELL: I - - - I disagree, Your
2 Honor, and I'd just submit that it's the test - - -

3 CHIEF JUDGE LIPPMAN: The unusual thing
4 coming out of the ground. I - - - let - - - let's
5 assume there's some characteristics enough that would
6 be designed, some kind of snare or whatever you want
7 to call it; I trip and fall on it. We just say as a
8 matter of law it can't be - - - huh-uh, it's a half
9 an inch or three-quarters of an inch instead of an
10 inch or three-quarters of an inch, therefore - - -
11 yeah, it's - - - it's funny that it's there but not
12 our fault, even though someone may have, you know,
13 put this there - - - I assume by accident - - - who's
14 your agent?

15 MR. O'DONNELL: Well, the other cases that
16 also, you know, interpret the trivial defect doctrine
17 in the First Department and the Second Department
18 involving uneven cell - - - cellar grates and raised
19 projections of drainage ditches and things like that,
20 they're all very - - - they're all very analogous in
21 that sense where they - - - where they would not be
22 anticipated and even if the plaintiff were looking
23 for it, would have difficulty locating them.

24 JUDGE STEIN: Do - - - do - - - do you
25 think that there is a - - - a bright-line rule, as

1 your adversary suggests, that we can - - - that we
2 can define once and for all what is trivial as a
3 matter of law?

4 MR. O'DONNELL: Unfortunately, I do not
5 think there is such a rule, Your Honor. I think you
6 have to look at the facts and circumstances. I think
7 - - -

8 CHIEF JUDGE LIPPMAN: So it's case-by-case?

9 MR. O'DONNELL: I think Trincere really
10 lays it down, and it - - - it's - - - it's worked for
11 about twenty years now, and I think it'll continue to
12 serve that function into the future.

13 CHIEF JUDGE LIPPMAN: Well, we have three
14 cases on today that might lead one to believe we
15 don't know what it is.

16 JUDGE ABDUS-SALAAM: Counsel, could you - -
17 - you mentioned earlier that the defect and the
18 notice go hand-in-hand or the - - - you know, the
19 triviality and the notice go hand-in-hand. Could you
20 explain what you meant by that statement?

21 MR. O'DONNELL: I - - - what I meant by
22 that, Your Honor, is it's really a matter of fairness
23 here, you know, for my client. This is a - - - an
24 object that we had no idea existed. We do our due
25 diligence every day. We clean the sidewalk, we

1 shovel it from snow, and nobody was ever aware that -
2 - - that it existed, and that's because of the nature
3 of the object was - - - was so small that it could
4 not be readily observed. And as my - - - the record
5 - - -

6 JUDGE ABDUS-SALAAM: So if it's - - - if
7 it's too small, then you have no notice; is that what
8 you're saying?

9 MR. O'DONNELL: And it's trivial. They - -
10 - exactly.

11 JUDGE PIGOTT: No, but you - - - I think
12 you need both. In - - - in other words, it's
13 trivial. The idea isn't, I know that it's there but
14 I'm - - - I'm deciding it's trivial and so I don't -
15 - - you know, now that I've said, that I don't have
16 to worry about it. It seems to me it's more that it
17 just doesn't deserve your attention, and if it
18 doesn't deserve your attention, when something
19 happens, you say geez, but for that, I wouldn't have
20 known.

21 MR. O'DONNELL: Well, I don't think that it
22 doesn't deserve our attention. I think that once
23 it's brought to - - - to our attention, we should
24 certainly - - -

25 JUDGE PIGOTT: Right.

1 MR. O'DONNELL: - - - do something to
2 rectify it.

3 CHIEF JUDGE LIPPMAN: But it's not your
4 fault is what you're saying?

5 JUDGE ABDUS-SALAAM: And that's what you
6 did here?

7 MR. O'DONNELL: No, it's certainly not.
8 No, it's - - - it's not our fault.

9 JUDGE ABDUS-SALAAM: Essentially, is - - -
10 is that what you did here?

11 MR. O'DONNELL: It's - - - because it would
12 not be fair for us to be held liable for a defect
13 like this which we could not have known about.

14 JUDGE ABDUS-SALAAM: Well, is that what you
15 did here? Because I think plaintiff's expert went
16 there couple years after the accident and said that
17 this had been filed down to the sidewalk?

18 MR. O'DONNELL: That's correct, Judge.

19 JUDGE ABDUS-SALAAM: Yeah.

20 MR. O'DONNELL: It had been removed.

21 JUDGE ABDUS-SALAAM: So once you got notice
22 of it, you dealt with it - - -

23 MR. O'DONNELL: That's correct.

24 JUDGE ABDUS-SALAAM: - - - is what you're
25 saying?

1 MR. O'DONNELL: That's correct.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. O'DONNELL: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks.

5 Rebuttal, counsel.

6 MR. ISAAC: Your Honors, I'm going to try
7 to go fast because I went over a little bit. I - - -
8 before you decide the case, I'd just like you to take
9 a look at an Appellate Division case which deals with
10 some of these issues. It's called Cronson; it's
11 cited in my brief, C-R-O-N-S-O-N, against Town of
12 North Hempstead; the cite is 245 A.D.2d 331. It's a
13 Second Department case. Doesn't deal with trivial
14 defect; it deals with primary assumption of risk
15 where there was a person playing on a tennis court,
16 and there was a defect that was readily apparent, and
17 in addition to moving for summary judgment on primary
18 assumption of risk, perfectly li - - - perfect claim
19 under Morgan, Maddox, Fell, the rest of them. The
20 person - - - the - - - the person in charge also said
21 that it was pristine; no - - - no defect at all. And
22 victory was snatched away because the Second
23 Department said well, if one person says it's there
24 and then another person says it's not there, you have
25 a question of fact.

1 My point here is very simple. It is
2 hazardous, it is a trap, it is a snare if it's there
3 and their people don't see it if they're inspecting
4 it every single day. I just checked - - -

5 JUDGE STEIN: But - - - but are you saying
6 that everything that could possibly cause someone to
7 trip would then be - - -

8 MR. ISAAC: I - - - I'm not - - -

9 JUDGE STEIN: - - - be able to go a jury?

10 MR. ISAAC: Judge Stein, I am not asking
11 you to overrule Trincere. There will be cases that
12 the court's going to find that defects are trivial.
13 The reason that this one isn't is because it is so
14 unexpected. A trivial defect, I think, when you even
15 go back to Loughran and Jaybro was something - - -
16 and as Judge Lippman said, isn't - - - and Judge
17 Pigott - - - isn't really deserving of any treatment.
18 You know, you're not going to have perfect sidewalks
19 in New York. There's going to be some bumps; there's
20 going to be some elevations; there's going to be some
21 gaps.

22 JUDGE STEIN: But what makes this so
23 unexpected?

24 MR. ISAAC: Because you can't see that nut;
25 that nut is solidified in the ground. It is so

1 inconsistent with the rest of the sidewalk that
2 nobody - - -

3 JUDGE ABDUS-SALAAM: There's so many other
4 defects that are so solidified in the ground. We're
5 talking the Bronx; everybody says it's Manhattan, but
6 we're talking the Bronx.

7 MR. ISAAC: Oh - - - oh, absolutely.

8 JUDGE ABDUS-SALAAM: But it's als - - -
9 everywhere, there are just so many little things in
10 the ground, a little tree - - - you know, the - - -
11 the root from a tree or something like that. I mean,
12 there's - - -

13 MR. ISAAC: But you know - - - you know,
14 Judge Abdus-Salaam, everybody forgets the second line
15 in the Trincere decision - - - I'm not going to
16 forget it because it would be malpractice for me to
17 do so - - - where you - - - you said absolutely
18 clearly that as a general rule - - - because we have
19 a Constitutional right to a jury trial in New York -
20 - - the issue is generally one of fact. So when you
21 say to me well, we have a lot of defects, yeah, we
22 do, and it's generally a question of fact.

23 And as a policy matter - - - I should have
24 said this before; I apologize - - - this is not a big
25 policy issue anymore, because remember, practically

1 every municipality has a prior written notice rule.
2 The City has a prior written notice rule. The big
3 problem here was the City of New York, twenty billion
4 miles of roadway, what do you want us to do, look at
5 a two-inch slab in a tertiary road in Staten Island
6 that we're never going to see? It's not a problem
7 anymore. 7-210 is good so the City's not liable for
8 sidewalk defects anymore, only in one-, two-, or
9 three-family homes that are owner-occupied, and
10 according to First Department precedent, which I
11 believe is correct, even in that situation, you still
12 have to have prior written notice and Big Apple
13 Pothole Commission's out of business.

14 So this is something that you're going to
15 be imposing liability on property owners to look at a
16 hundred yards of their property - - - a hundred yards
17 of their property, and say if there's a defect there,
18 fix it. That to me is not a big deal.

19 JUDGE RIVERA: That does - - - is that what
20 matters, how much property you have to watch over?

21 MR. ISAAC: It doesn't, but there - - -
22 there is - - - there is - - - listen, I would wish -
23 - -

24 CHIEF JUDGE LIPPMAN: You're saying that a
25 - - - that a reasonable framework is something you're

1 going to hold someone - - -

2 MR. ISAAC: Yes.

3 CHIEF JUDGE LIPPMAN: - - - responsible for
4 as opposed to a municipality that has hundreds,
5 thousands - - -

6 MR. ISAAC: Correct. And - - - and - - -

7 CHIEF JUDGE LIPPMAN: - - - of miles. So -
8 - - so with a - - - a private person, that is some
9 kind of rational - - -

10 MR. ISAAC: It - - - it keeps it without
11 bounds. And, you know, Judge Rivera, I have to tell
12 you the truth. Obviously, trivial defect in its
13 original incarnation dealt with municipalities. That
14 I think is out in 2015 where it wasn't in 1930, 1945.

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. ISAAC: And 1980.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. ISAAC: I'll go, and I'll sit down and
19 let everybody else talk to you. Thank you.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 counsel.

22 All right. Let's go to Zelichenko.

23 MR. SCHWARZ: My case, as you know, doesn't
24 involving a tripping hazard in the sidewalk. My case
25 involves a missing piece of a step.

1 CHIEF JUDGE LIPPMAN: Right. It's the
2 second step from the bottom; is that what it is?

3 MR. SCHWARZ: Yes. Yes, and there are
4 pictures - - -

5 CHIEF JUDGE LIPPMAN: Was it a violation of
6 the Administrative Code?

7 MR. SCHWARZ: Yes, and - - - and the - - -

8 CHIEF JUDGE LIPPMAN: In what sense? Go
9 ahead.

10 MR. SCHWARZ: And the Multiple Dwelling Law
11 also. It says - - -

12 CHIEF JUDGE LIPPMAN: What does the code
13 say?

14 MR. SCHWARZ: It says that tread depths
15 have to be uniform, and when there's a chunk like
16 this missing, the depth from the front to the back is
17 not uniform. And our guy has a - - -

18 CHIEF JUDGE LIPPMAN: How big - - - does it
19 matter how big it is that's missing?

20 MR. SCHWARZ: Well, in this case there's a
21 difference of fact, by the way. The defendant's
22 expert said it was a half an inch in depth back from
23 the front to the back, and my expert said it was one
24 inch, and that doubles the size. And this is weight-
25 bearing surface; this is not something over which

1 someone can really stub their toe or stumble. And
2 the expectation of someone on stairs - - - marble
3 stairs in an apartment house, terrazzo stairs in an
4 apartment house, in a nice area of Brooklyn - - - he
5 doesn't expect the steps not to support his weight at
6 the time.

7 CHIEF JUDGE LIPPMAN: Counsel, so one
8 second. Do you want rebuttal time?

9 MR. SCHWARZ: Oh, yes, please. Can I have
10 three minutes also?

11 CHIEF JUDGE LIPPMAN: Three minutes. Keep
12 going. Sorry we distracted.

13 MR. SCHWARZ: And as - - - as Mr. Isaac
14 said, the trivial defect was born because - - - well,
15 let's look at Esther Trincere. In 1991, Esther
16 Trincere slips and - - - trips over slightly more
17 than a half-inch, and the Second Department cites
18 fifteen cases and says we're going to adopt a
19 mechanistic rule. And then the case in 1997 comes
20 before this court, and this court, says mechanistic
21 rule, no; you've got to consider more than the
22 height, the depth, the - - - the width; you've got to
23 consider other factors. And I submit that the
24 Trincere case - - -

25 JUDGE ABDUS-SALAAM: Is there a notice

1 issue here, counsel? Is there a notice issue in this
2 case at all?

3 MR. SCHWARZ: I think not. The super, who
4 lived at the stairs, at the top of this set of
5 stairs, testified he went up and down it a hundred
6 times a day. He was shown a photograph - - - and
7 there are several photographs in the record; there's
8 no issue with the existence of this chunk, right.
9 It's there and nobody really - - - you know, while it
10 may not be measured to the millimeter, it's clearly
11 there. And he was shown it and he said, I never saw
12 that; it's not a problem. My expert said that it had
13 to be there, because it had been worn. So I don't
14 think that notice is an issue, or - - - and the lower
15 - - - and the - - - the Appellate Division didn't
16 reach notice; the Appellate - - - the Second
17 Department just said trivial as a matter of law. The
18 lower court said issue of fact as to notice. And - -
19 -

20 JUDGE STEIN: Do you have to reach notice
21 if it's trivial as a matter of law?

22 MR. SCHWARZ: If it's trivial as a matter
23 of law, you stop. No question.

24 JUDGE STEIN: Okay.

25 MR. SCHWARZ: However, you - - - I was just

1 asked by Her Honor about - - -

2 JUDGE STEIN: Sorry, go ahead.

3 MR. SCHWARZ: - - - notice, and the answer
4 is I think notice is an issue of fact. I don't think
5 the defendant proved beyond a doubt that there was no
6 notice. So I don't think notice is a factor for this
7 court to consider in this particular case, because
8 it's not applicable.

9 JUDGE FAHEY: So you - - - your client - -
10 -

11 MR. SCHWARZ: I think it's a give - - -

12 JUDGE FAHEY: - - - your client wasn't a
13 resident of the building, was he? Wasn't he somebody
14 coming in looking for an apartment?

15 MR. SCHWARZ: That's right. He went to see
16 the - - - the name of a - - - you know, there's a
17 registered agent in every - - -

18 JUDGE FAHEY: Right, right.

19 MR. SCHWARZ: - - - multiple dwelling in
20 New York.

21 JUDGE FAHEY: Okay.

22 MR. SCHWARZ: He was looking for a
23 telephone number to call.

24 JUDGE FAHEY: No, I know; I got that.
25 Okay.

1 MR. SCHWARZ: Yeah, he was a stranger to
2 the premises. And - - -

3 JUDGE FAHEY: So it wasn't like - - -
4 wasn't like your case where - - - where he had gone -
5 - - he had walked over the same area maybe a hundred
6 times?

7 MR. SCHWARZ: Correct.

8 JUDGE FAHEY: That's not what happened
9 here.

10 MR. SCHWARZ: That - - - that's absolutely
11 correct.

12 JUDGE FAHEY: All right.

13 MR. SCHWARZ: This man was not familiar
14 with it, and there's a difference between steps and
15 sidewalks, forgetting the fact that the steps are not
16 subject to the forces of nature. I mean, it - - - it
17 - - - the Appellate Division in Trincere, the Second
18 Department, said we can't expect the - - - a
19 municipality to have noticed this defect. That
20 doesn't apply here to stairs. There was seventeen-
21 and-a-half square feet of stairs. In my motion for
22 leave to come here, I pointed out that the Department
23 of Transportation of the City of New York says on its
24 Web site that there are 12,000 linear miles of
25 sidewalk in the City of New York. If you multiply

1 12,000 times 5,280 feet in a mile times - - - just
2 pick ten foot, just because it's a round number - - -
3 there's 500 - - - 633 million square feet of sidewalk
4 to inspect. Here there was seventeen-and-a-half
5 square feet of - - - of tread to inspect in a
6 multiple dwelling where the super lived at the top.

7 JUDGE STEIN: Well, they've got a whole
8 building. I mean to be fair, that's not - - - that's
9 not the only thing they have to focus on there.

10 MR. SCHWARZ: But again, that's still
11 different than the City of New York.

12 JUDGE STEIN: Right.

13 MR. SCHWARZ: You know, you - - - we
14 couldn't walk, in our lifetime, every inch of the - -
15 - of the steps of this - - - of the - - - of the
16 sidewalk of the City of New York. But I could, in a
17 day, in an hour, walk up and down the halls and up
18 and down the stairs.

19 CHIEF JUDGE LIPPMAN: So their - - - their
20 - - - they have, as their responsibility, to be
21 checking these stairs to make sure they comply with
22 code and that there's nothing dangerous there?

23 MR. SCHWARZ: Yeah, I think so. Yes. I
24 absolutely do.

25 CHIEF JUDGE LIPPMAN: Assuming it's a - - -

1 it's a reasonable, relatively finite - - -

2 MR. SCHWARZ: I - - - I think it's a
3 reasonable burden. I absolutely do. I thin - - -
4 and also, I think I pointed out that there were many
5 states, there are seventeen - - - there are fifteen
6 states that send everything to a jury; they're listed
7 in - - - in ALR. I know for sure, I read the Alabama
8 case that says there is no trivial defect doctrine in
9 Alabama. Also, I pointed out that in Illinois and
10 Ohio, they have, by judicial fiat, said the trivial
11 defect option does not apply to private indoor
12 premises.

13 CHIEF JUDGE LIPPMAN: So there's no such
14 thing - - - or you don't think there should be such a
15 thing - - -

16 MR. SCHWARZ: I think - - -

17 CHIEF JUDGE LIPPMAN: - - - as a trivial
18 defect - - -

19 MR. SCHWARZ: Again - - -

20 CHIEF JUDGE LIPPMAN: - - - in the context
21 of your case?

22 MR. SCHWARZ: Well, that's radical. I
23 would be happy - - - you asked Mr. Isaac - - -

24 JUDGE RIVERA: Did you make that below?
25 Did you make that argument below?

1 MR. SCHWARZ: Oh, yeah. I did. I - - - I
2 would be happy if this court would add some factors
3 to make Trincere a little more solid, because the way
4 I look at it - - - and I read 120 cases and analyzed
5 them in my motion for leave to come here - - - and
6 Trincere is uniformly cited, uniformly quoted, but
7 when the Appellate Division Second Department just
8 says well, yeah, these are the factors for us to
9 consider, but it's trivial as a matter of law,
10 they're not applying it right. They should consider
11 what's the reasonable expectation of the person. Is
12 it steps, is it subject to the forces of nature?

13 CHIEF JUDGE LIPPMAN: You would - - - you
14 would - - - you would like us to set out a more
15 definitive rule that would - - - or - - -

16 MR. SCHWARZ: I'm sorry?

17 CHIEF JUDGE LIPPMAN: You would like us to
18 set out a more definitive rule, or is your position,
19 as you were indicating earlier - - -

20 MR. SCHWARZ: Well, if I - - - if I had - -
21 -

22 CHIEF JUDGE LIPPMAN: - - - you just have
23 to take it case-by-case?

24 MR. SCHWARZ: - - - a wish, you would adopt
25 the law - - - you would adopt the same reasoning as

1 Illinois and Ohio and say no trivial defect, indoor
2 defects. People tell me that's not likely.

3 JUDGE RIVERA: And what - - - what would -
4 - -

5 MR. SCHWARZ: I can pray that it is, but -
6 - -

7 JUDGE RIVERA: What would be the measure of
8 reasonableness? You said there's a reasonable
9 expectation.

10 MR. SCHWARZ: Well, I think - - -

11 JUDGE RIVERA: What would be the measure of
12 reasonableness?

13 MR. SCHWARZ: - - - as Mr. Is - - -

14 JUDGE RIVERA: Would that - - - would that
15 vary based on the space or the weather? What - - -
16 what - - - what would affect that?

17 MR. SCHWARZ: All of these factors. I
18 mean, you know, the - - - the fact that the stairs -
19 - - stairs - - -

20 JUDGE RIVERA: Is it subjective or
21 objective?

22 MR. SCHWARZ: Well, it's subjective. I
23 mean it has to be, I think. So - - -

24 CHIEF JUDGE LIPPMAN: Inside is different
25 than outside?

1 MR. SCHWARZ: Sure. And stairs - - - don't
2 you have a greater potential if you get - - - fall
3 down a flight of stairs to suffer a - - - a worse
4 injury than on a level sidewalk? I mean, not that
5 you haven't seen horrible injuries on a - - -

6 JUDGE RIVERA: Trincere does mention
7 elevation, or do you think that's referring to
8 something else?

9 MR. SCHWARZ: I think - - - I think that
10 the fact that stairs can be more dangerous and the
11 fact that stairs are the subject of all these
12 regulations via the Multiple - - -

13 JUDGE RIVERA: The multiple elevations?

14 MR. SCHWARZ: Yeah, Multiple Dwelling Law
15 says tread depths uniform, riser heights uniform.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.
17 You'll have your rebuttal.

18 MR. SCHWARZ: Thank you.

19 CHIEF JUDGE LIPPMAN: Let's hear from your
20 adversary.

21 MS. GOKHULSINGH: Good afternoon, Lisa
22 Gokhulsingh for 301 Oriental Boulevard.

23 CHIEF JUDGE LIPPMAN: Counsel, isn't this a
24 almost obviously dangerous situation? Using the word
25 "trivial" in certain contexts makes some sense. What

1 about in this context where you have a little piece
2 of the stair? Isn't that, by any common sense
3 standard, dangerous?

4 MS. GOKHULSINGH: I don't believe that this
5 one was dangerous.

6 CHIEF JUDGE LIPPMAN: Why not?

7 MS. GOKHULSINGH: In part because of the -
8 - - the nature of the defect as well as the location.
9 I think it'd be - - -

10 CHIEF JUDGE LIPPMAN: Tell us the nature
11 and the - - - and the location, why it's not
12 dangerous.

13 MS. GOKHULSINGH: So when you look at the
14 Trincere case in terms of its width and depth, it was
15 three-and-a-half inches wide; its depth was, from
16 front to back, half-an-inch.

17 CHIEF JUDGE LIPPMAN: So - - -

18 MS. GOKHULSINGH: As measured.

19 CHIEF JUDGE LIPPMAN: - - - if it was five-
20 and-a-half inches wide - - -

21 MS. GOKHULSINGH: Three-and-a-half.

22 CHIEF JUDGE LIPPMAN: I'm saying if - - -

23 MS. GOKHULSINGH: Oh.

24 CHIEF JUDGE LIPPMAN: - - - it was five-
25 and-a-half, then it would be dangerous?

1 MS. GOKHULSINGH: Well, I think - - -

2 CHIEF JUDGE LIPPMAN: Where do you - - -
3 where do you draw the line?

4 MS. GOKHULSINGH: I think it would also
5 depend on, as this court said in Trincere, the other
6 factors, you know, whether it was an irregular type
7 of defect, whether it was - - -

8 CHIEF JUDGE LIPPMAN: Was it an irregular
9 type of defect?

10 MS. GOKHULSINGH: It wasn't; it was
11 actually smooth. And in fact, the plaintiff's expert
12 added in opposition that it was completely smooth.
13 This - - -

14 CHIEF JUDGE LIPPMAN: It's a smooth defect,
15 meaning what? That there's a chunk missing, but it's
16 smooth?

17 MS. GOKHULSINGH: But it's smooth; it has
18 been worn down so that you don't catch your foot on
19 it. There's no - - -

20 CHIEF JUDGE LIPPMAN: You don't catch - - -
21 as a matter of law, you don't catch your foot on it?

22 MS. GOKHULSINGH: Well, one of the - - -
23 one of the factors that I would say in - - - if this
24 court is considering, for example, modifying Trincere
25 - - - one of the things that I would think is an

1 important factor is usage. So in the sidewalk case,
2 in my case, and in the third case, as well, if you
3 have a building that has been operating for many,
4 many years and no one has complained about this
5 condition, no one has fallen - - -

6 CHIEF JUDGE LIPPMAN: How long did this
7 particular condition, in your view, exist?

8 MS. GOKHULSINGH: It's unclear, because no
9 one - - - the super had been there - - -

10 CHIEF JUDGE LIPPMAN: So if it's unclear,
11 how can you make the argument that if there've been -
12 - - if people have gone up and down for twenty years
13 - - -

14 MS. GOKHULSINGH: Correct.

15 CHIEF JUDGE LIPPMAN: - - - but this thing
16 just appeared in the last three weeks - - -

17 MS. GOKHULSINGH: Of course. Of course.
18 Well, the plaintiff's expert indicated that because
19 it was smooth, the edges were smooth, that it had
20 been there for some appreciable amount of time; that
21 it had smoothed over the years, essentially. So you
22 have a sidewalk case where thousands of people are
23 walking on the sidewalk, no one gets injured except
24 the plaintiff, you know, in this one odd occurrence
25 two years in.

1 CHIEF JUDGE LIPPMAN: But again, where do
2 you draw the - - - is it a month that it became
3 smooth; is it three months that it became smooth; is
4 it three days? When - - - when is it your
5 responsibility?

6 MS. GOKHULSINGH: Well, I believe that - -
7 - that notice and triviality go together, and so to
8 that end, if you have a condition that develops - - -
9 you know, in 2007, for example, in the Hutchinson
10 case, you have the sidewalk going in in 2007, and we
11 know that for sure. And you don't have any accidents
12 until 2009; that's two entire years. Well, is there
13 notice of a dangerous condition if no one has fallen
14 and thousands of people have traversed? And it's the
15 same thing in my case you have - - -

16 JUDGE ABDUS-SALAAM: Is that - - - is that
17 the test, counsel, that you have to know the
18 condition is dangerous, not that you have to know
19 it's there?

20 MS. GOKHULSINGH: Well, I think - - -

21 JUDGE ABDUS-SALAAM: For example, here the
22 super says that he saw this every day, but he didn't
23 think it was dangerous so he never - - -

24 MS. GOKHULSINGH: That's correct.

25 JUDGE ABDUS-SALAAM: - - - reported it to

1 the - - - the company. So - - -

2 MS. GOKHULSINGH: Right.

3 JUDGE ABDUS-SALAAM: - - - are you saying
4 you have - - - the notice has to be that the
5 condition is dangerous, not that it - - - it - - - it
6 exists?

7 MS. GOKHULSINGH: It - - - absolutely. It
8 has to be that there is some condition that would
9 cause an accident. I mean, if we're talking about
10 the reasonable man standard, that's really what it
11 goes to is - - -

12 JUDGE STEIN: Well, doesn't the expert here
13 say - - -

14 MS. GOKHULSINGH: - - - it reasonable.

15 JUDGE STEIN: - - - that this is such a
16 condition?

17 MS. GOKHULSINGH: My expert says that - - -

18 JUDGE STEIN: No, no, the plaintiff's
19 expert. We're talking about whether there's a
20 question of fact here.

21 MS. GOKHULSINGH: Right. Well, the
22 plaintiff's expert - - - I mean setting aside the
23 fact that they didn't go to the site, didn't look at
24 the site, the - - - our expert said that there was
25 ten inches of tread on which the plaintiff could have

1 stood.

2 JUDGE STEIN: Well, I know what your expert
3 said. I - - - I'm just saying - - -

4 MS. GOKHULSINGH: Yeah.

5 JUDGE STEIN: - - - and you may be right.
6 Their expert may be less credible than your expert,
7 but credibility is - - - you know, is - - - is always
8 a - - - a jury question.

9 MS. GOKHULSINGH: Right. Well, but their
10 expert - - - I think the problem is that he also
11 assumes in evidence that the plaintiff stepped on it
12 in no particular manner, in which the plaintiff
13 didn't testify to. So it - - - so there - - -

14 JUDGE FAHEY: But there's a - - -

15 MS. GOKHULSINGH: - - - there are a number
16 of problems.

17 JUDGE FAHEY: It seems that there's a line
18 of cases in the Second Department that defects on the
19 nose tread of stairs are - - - are inherently
20 trivial.

21 MS. GOKHULSINGH: That's correct.

22 JUDGE FAHEY: Which is different than some
23 of the other departments, which is probably one of
24 the reasons why this case ended up here, this
25 particular case ended up here. And, you know, in

1 looking at the photographs and you're looking at a
2 foot, it's hard to - - - for me to conceive how the
3 average person wouldn't be stepping near the nose
4 tread, you know, where the - - - the stair comes to
5 an end, when they're stepping down. And I - - - of
6 course it could happen, but it seems like the
7 quintessential question of fact then. And - - - and
8 the decision here in the Second Department was made
9 as a matter of law. So on what basis, would you say,
10 they were able to make that determination as a matter
11 of law and not on a question of fact?

12 MS. GOKHULSINGH: I think that they were
13 able to use the plaintiff's deposition testimony as
14 well as the photographs, so they looked at the size,
15 the location, the width. They also considered
16 plaintiff's testimony in terms of the lighting, that
17 the lighting was adequate, that the building was
18 otherwise properly maintained.

19 JUDGE FAHEY: Um-hum.

20 MS. GOKHULSINGH: They looked at Mr.
21 Alvarez's testimony that, you know, he probably had
22 seen it; he walks these stairs every day.

23 CHIEF JUDGE LIPPMAN: Does it matter if
24 it's a code violation?

25 MS. GOKHULSINGH: Well, it wasn't a code

1 violation, because this wasn't an Administrative Code
2 27-375 staircase, which is an exit staircase, under
3 this court's decision in Cusumano.

4 CHIEF JUDGE LIPPMAN: Does it matter if it
5 could be a violation of law?

6 MS. GOKHULSINGH: It would matter, as it
7 would, for example, if it was a 7-210 violation and
8 it was, you know, more than a half an inch. Then it
9 would be a different case, obviously, because then
10 you can define it as a defect. But in this case,
11 that's not - - - that's not the case because there
12 isn't a provision that says this is defective or not
13 defective; this, you know, criteria must be examined
14 or not examined.

15 JUDGE RIVERA: What - - - what about your
16 adversary's point that it - - - it's one thing to
17 have the exact same kind of defect on a flat sidewalk
18 but it's another thing for this to be a defect on the
19 staircase and that that is what should have been
20 given further consideration here?

21 MS. GOKHULSINGH: Well, I think that the
22 part of the staircase where - - - for which there are
23 no defects is the tread, and that is where - - - the
24 Second Department has consistently said that is where
25 we anticipate that someone will be putting their foot

1 when they're walking down the stairs. You don't
2 really anticipate that someone is going to be putting
3 their foot on the nosing or on the very edge of the
4 step, and that's where this minor defect, this
5 gradual defect, was.

6 JUDGE RIVERA: Does it matter what location
7 - - - other than that, does it matter if it's at the
8 center of the step, to the left or right, and if
9 there are, you know, handlebars, whatever you want to
10 call it - - -

11 MS. GOKHULSINGH: Yeah, I mean there - - -
12 there - - -

13 JUDGE RIVERA: - - - a bannister on the
14 side?

15 MS. GOKHULSINGH: Yeah, there's at least
16 one case that basically says that, that in - - - in
17 essence, if it's right underneath the handrail where
18 no one is probably walking, then in that situation,
19 obviously, it's a trivial defect. But if you have
20 this situation, as - - - as I mentioned before, you
21 have traffic walking in this particular location and
22 no one else has had an accident.

23 JUDGE PIGOTT: I don't understand that.
24 You - - - you - - - you said that your client knew
25 that there was this defect, and you said he knew and

1 he - - - and - - - and - - - and you said and all
2 kinds of people are using them and there's no
3 accident. And then you said well, nobody expects
4 people to be stepping on the nose part of the thing
5 that you - - - they expect them to be on the tread.
6 All of that seems inconsistent to me.

7 MS. GOKHULSINGH: What Mr. Alvarez said is
8 that he - - - looking at the photographs, he did not
9 consider that to be a defective condition, and he had
10 not - - -

11 JUDGE PIGOTT: Well, I assume it is because
12 it's not - - - I mean, it's defective.

13 MS. GOKHULSINGH: Well, he had not received
14 any complaints about it, there were no code
15 violations pertaining to it, and there'd been - - -
16 you know, because there had been no accidents - - -

17 JUDGE ABDUS-SALAAM: Well, counsel, if
18 there's a - - -

19 MS. GOKHULSINGH: - - - in all of these
20 years.

21 JUDGE ABDUS-SALAAM: If - - - if there were
22 - - -

23 MS. GOKHULSINGH: There was no defect.

24 JUDGE ABDUS-SALAAM: Counsel, if there were
25 at the bottom of the stair one of these missing tiles

1 or a hole here and Mr. Alvarez didn't think it was
2 dangerous, would that make it trivial?

3 MS. GOKHULSINGH: No, I - - - that would be
4 - - - that would be different. I think, again, you
5 would have to go back to the Trincere case and you
6 would have to look at the test; does it meet the
7 criteria of Trincere? Mr. Alvarez's testimony is not
8 the be-all-and-end-all of this case. It is - - -

9 JUDGE PIGOTT: Well, you were - - - you
10 were saying - - - well, okay, never mind.

11 MS. GOKHULSINGH: It - - - it's just - - -
12 it's one of the factors that the Second Department
13 was able to consider, what is the defect and, you
14 know, what was the - - - what was the reasonable care
15 being taken? What did Mr. Alvarez think of this
16 condition of - - -

17 JUDGE PIGOTT: He - - - but in his opinion,
18 it was a not defect?

19 MS. GOKHULSINGH: In his opinion it was not
20 a defect.

21 JUDGE PIGOTT: And in your opinion people
22 were going up and down the stairs all the time and
23 nobody fell.

24 MS. GOKHULSINGH: That's correct.

25 JUDGE PIGOTT: And then you said, but

1 nobody expects anybody to step on the nose of the
2 thing; they expect them to step on the tread part.

3 MS. GOKHULSINGH: Well, people were,
4 obviously, stepping on the nose because it was worn,
5 but there had been no accidents there.

6 JUDGE PIGOTT: Okay.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MS. GOKHULSINGH: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks, counsel.

10 Let's have rebuttal.

11 Counsel.

12 MR. SCHWARZ: I don't know if Your Honors
13 can see this, but if this is looking down at the
14 tread, this is the chunk that's missing. This is a
15 jagged edge; it's this face which would, of course,
16 followed the contour of this that was smooth, but
17 this was jagged. Second, there's a case by the name
18 of Orlick and Granit Hotel that stands for the
19 proposition that proof that there were no prior
20 accidents, proof there were no prior complaints,
21 isn't proof as a matter of law that a condition is
22 not dangerous. It may be a factor for a jury to
23 consider, but it doesn't entitle someone to summary
24 judgment.

25 Second of all, her - - - my adversary's

1 comment that 27-32 - - -

2 JUDGE ABDUS-SALAAM: Well, that - - -
3 counsel, that would be true if - - - if this is
4 really a trivial defect or that it was - - - if it
5 was a quarter-inch by a quarter-inch, even with this
6 maybe jagged edge.

7 MR. SCHWARZ: But it's not. It - - - it
8 didn't support my man's weight. My man has rods,
9 plates, and screws; he has comminuted spiral
10 fractures, open reduction, internal fixation. This
11 is not a trivial injury.

12 JUDGE ABDUS-SALAAM: Well, my understanding
13 of how this accident occurred was he didn't step down
14 on that nosing, he - - - his - - -

15 MR. SCHWARZ: Well - - -

16 JUDGE ABDUS-SALAAM: - - - his leg went - -
17 -

18 MR. SCHWARZ: - - - the other side's expert
19 says it's not trivial because he could step over it.
20 But that doesn't - - - that means if it is - - - it -
21 - -

22 JUDGE ABDUS-SALAAM: Did he step on it?

23 MR. SCHWARZ: - - - oh, it's not dangerous
24 because he could step over it. That means it's
25 dangerous when he doesn't step over it.

1 JUDGE ABDUS-SALAAM: Right, does - - -

2 MR. SCHWARZ: The Grosswork (ph.) - - -

3 JUDGE ABDUS-SALAAM: Did he step on it, is
4 that what you're saying? Did - - - I'm - - - I'm not
5 clear how the accident occurred. Did he step on it
6 or - - -

7 MR. SCHWARZ: The accident happens when a
8 man puts his foot down on this step where there is no
9 step, and it doesn't support his weight, and he goes
10 down and his foot twists - - -

11 CHIEF JUDGE LIPPMAN: Is that what happened
12 here?

13 MR. SCHWARZ: - - - and then his heel gets
14 caught.

15 CHIEF JUDGE LIPPMAN: Is that what you are
16 presenting as happening here?

17 MR. SCHWARZ: Yes, that's what the
18 plaintiff's testimony was.

19 JUDGE FAHEY: So just - - - just to follow
20 up. He stepped on the tread where the defect was
21 located?

22 MR. SCHWARZ: Yes - - - well, it's in the
23 nosing, though. There's no question that the - - -

24 JUDGE FAHEY: I understand that.

25 MR. SCHWARZ: Okay.

1 JUDGE FAHEY: But that's the tread he
2 stepped on.

3 MR. SCHWARZ: Yes.

4 JUDGE FAHEY: The photographs we have, we
5 have a photograph with - - - it shows the defect and
6 then there's a foot above it. It's in the record.

7 MR. SCHWARZ: Yeah.

8 JUDGE FAHEY: He actually stepped on that?

9 MR. SCHWARZ: Yeah.

10 JUDGE FAHEY: He didn't try to step over
11 it?

12 MR. SCHWARZ: No, he stepped where there
13 was no - - - and in fact, there's a circle around the
14 part that's missing and that - - -

15 JUDGE FAHEY: I see. Thank you.

16 MR. SCHWARZ: Now, this Grossworth case to
17 which you alluded, which is a Second Department case,
18 I analyze that in my brief, and - - - and it was my
19 opinion, and I hope the - - - the court shares it is
20 that there was erroneous reasoning there. They
21 accepted an opinion of a super in that case that the
22 man didn't step - - - or - - - or that the nosing is
23 not to be stepped on. My expert says it is, and I
24 think it's pretty well-settled law that witnesses can
25 testify to facts but their opinions are not

1 admissible.

2 Mr. Alvarez is merely a lay witness. He
3 can't - - - you wouldn't hear him testify as to his
4 opinion were this case to be tried in front of you.
5 All the more true on a motion for summary judgment.

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 Thanks.

8 MR. SCHWARZ: Thank you.

9 CHIEF JUDGE LIPPMAN: We'll take now 146,
10 Adler.

11 MS. HAMBOUSSI: May it please the court,
12 Your Honors, I'm Georgette Hamboussi. I represent
13 the appellant in this case. I'm also asking for
14 three minutes rebuttal time.

15 Your Honor, our case - - -

16 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

17 MS. HAMBOUSSI: - - - is further down the
18 line. It deals with a step, but here the court
19 summarily and mistakenly decided that it - - - it was
20 trivial based on photographs alone.

21 CHIEF JUDGE LIPPMAN: That's with - - -

22 JUDGE STEIN: What about her testimony?

23 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

24 MS. HAMBOUSSI: The simply testimony that
25 the - - - that the plaintiff stated was when she was

1 shown these three horrible pictures, really - - -
2 does it represent the step where you fell; yes. Does
3 it represent the clump that you fell on? She said
4 yes.

5 JUDGE STEIN: What about the fact that she
6 had traversed these stairs many, many times; she was
7 very familiar with it; she, you know - - -

8 MS. HAMBOUSSI: Well, here's where we - - -

9 JUDGE STEIN: The light, there was no
10 problem with the lighting. All - - - all of these
11 things don't - - - aren't these related to the
12 Trincere factors?

13 MS. HAMBOUSSI: Well, here is where we get
14 to the trivial; your - - - your Trincere says that
15 you should look at all the circumstances surrounding
16 the accident, okay? And in one other case
17 Parkchester - - - Tineo v. Parkchester says, and the
18 defendants claim, that it wasn't a trivial accident
19 or - - - or a trivial defect because it wasn't
20 camouflaged or hidden, and here in this case it was
21 completely a trap because it was painted over. She
22 described it as a crumpled piece of paper in the
23 middle of a step and that that was painted over. So
24 here we have a defect that is not only the size of a
25 ruler, a one-foot - - - you know, twelve inches, or

1 thirty centimeters long, but also something that is
2 in the middle of a narrow stairway that she
3 absolutely - - - and most people would absolutely - -
4 - step on in the center of the step.

5 CHIEF JUDGE LIPPMAN: A photo can be
6 enough, right, to - - - to - - -

7 MS. HAMBOUSSI: Well - - -

8 CHIEF JUDGE LIPPMAN: - - - make something
9 a matter of law?

10 MS. HAMBOUSSI: - - - Your Honor, a photo
11 can be and may be used; the court has said that
12 plenty of times. But it must be used together with
13 all the circumstances of the - - - the defect, the -
14 - - the depth, the elevation, the width, and the surr
15 - - - surrounding circumstances of how the plaintiff
16 got injured.

17 Here we have a major defect in the middle
18 of the step that was camouflaged, painted over, so is
19 it a trap or a nuisance if the court were to find it
20 trivial? It does have the same characteristics of a
21 trap or nuisance as said in Argenio. It's an uneven
22 surface, and like I said, painted over, which makes
23 it even harder to see.

24 JUDGE FAHEY: And is there anywhere in the
25 record where the dimensions of the defect are set

1 out?

2 MS. HAMBOUSSI: There were no - - - nowhere
3 in the records where the dimensions were set out as
4 to height.

5 JUDGE FAHEY: By either party, either by
6 you or - - -

7 MS. HAMBOUSSI: By - - -

8 JUDGE FAHEY: - - - by the defense?

9 MS. HAMBOUSSI: By either party.

10 JUDGE FAHEY: I see.

11 MS. HAMBOUSSI: And I think the court also
12 erred in the fact that they - - - they just took
13 those pictures alone and didn't look at the rest of
14 her testimony where she said that despite - - - you -
15 - - we - - - first of all, they don't even get to the
16 analysis of constructive notice, right, where there
17 has to be some proof provided by the defendant that
18 they inspected the area in some time - - - and - - -
19 and records of the inspection or testimony in some
20 time relative to the accident. Here they produced -
21 - -

22 JUDGE STEIN: But if - - - but if it's
23 trivial as a matter of law, do - - - do we have to
24 get to the notice question?

25 MS. HAMBOUSSI: The court has held that if

1 it's trivial as a matter of law, then they can
2 dispose it summarily. But like I said, all the cases
3 that were discussed here - - - and the court is clear
4 when it says that. It says that when you're looking
5 at whether something is trivial or not, and the
6 Trincere case says this too, generally it's something
7 to go to the jury, and it's surrounding the peculiar
8 circumstances of every accident.

9 JUDGE STEIN: I'm - - - I'm just - - - I'm
10 interested in what you - - - you said that the court
11 didn't look at the rest of her testimony. What - - -
12 what - - - what was it that you think the court
13 missed here?

14 MS. HAMBOUSSI: Her testimony where she
15 says that - - - just they don't - - - they don't
16 consider the fact that she mentions that it was
17 camouflaged, that it was painted over.

18 JUDGE STEIN: That wasn't reflected in the
19 decision?

20 MS. HAMBOUSSI: That wasn't reflected in
21 the dec - - - in the decision at all. They never
22 said, oh, that this consists - - - they just say it's
23 trivial - - -

24 JUDGE STEIN: But you can see that when you
25 look at the photograph.

1 MS. HAMBOUSSI: You can see it. In fact,
2 she says the stairway was all painted battleship gray
3 and so was that step, and it was recently painted,
4 according to the testimony of the superintendent that
5 was - - -

6 JUDGE STEIN: But is that one factor alone
7 enough to make it nontrivial?

8 MS. HAMBOUSSI: Well, that's the thing; the
9 court has never addressed whether or not something -
10 - - for instance, a step that was painted over. So
11 here we have a cement clump, and it's painted over.
12 They do say that considering all the factors, you
13 must look at whether or not there is - - - whether or
14 not you can reasonably see the defect or one could
15 reasonably see the defect and - - -

16 JUDGE STEIN: So your - - - your position
17 would be is if there - - - if one factor exists, then
18 it - - - it can't be trivial as a matter of law; it
19 must be a question of fact for the jury?

20 MS. HAMBOUSSI: Yes, because in the case of
21 Argenio - - - and there's other cases, too, that talk
22 about sharp and jagged edges, enough to catch the
23 heel of, you know, one's - - - one's foot or trap the
24 toe - - - I'm sorry, a sandal. And in the case of
25 Tineo v. Parkchester, the plaintiff couldn't even

1 identify where exactly they fell, but there was one
2 crack in the sidewalk, and they said that because the
3 elevation was pointed or jagged, that was enough.

4 In this case here we have not only the
5 defect being not flat but - - - unelevated, we also
6 have the fact that it was painted over, and I believe
7 that should definitely be an issue the court could
8 look at or should look at when deciding whether
9 something is not only - - - if it passes the trivial
10 test but whether it's something that con - - - is
11 considered a trap or a hazard to the plaintiff. And
12 here - - -

13 JUDGE STEIN: But isn't that just one of
14 the factors? I mean, is - - - isn't the point of
15 Trincere that - - - that there is no one
16 determinative factor that - - - that decides whether
17 it's trivial or not trivial; that we have to look at
18 all the circumstances, and that sometimes when we do
19 that, it can be trivial as a matter of law?

20 MS. HAMBOUSSI: Sure, but here - - - and -
21 - - and they tell you look at the width; look at the
22 depth; look at the elevation; look at whether or not
23 this is a - - - the irregularity of the defect, and
24 here, not only do you have that it's painted over and
25 that we know that it's - - - bit - - - a bit bigger

1 than the size of a standard ruler, which is one foot,
2 but also that where it stands on a step, that
3 elevation in the middle of the stairs, which - - -
4 the plaintiff described the hallway to be a small
5 hallway. And the hallway itself would lead you for
6 you to believe that if holding that bannister, you're
7 going to step into where the middle of the step - - -
8 I mean, that's the purpose of the step.

9 And if you look at the pictures as well,
10 it's not only that it's in the middle of the step,
11 but the - - - the length of it takes up the whole
12 entire length of the step, so it's not something that
13 the plaintiff could have even stepped over. It's
14 something that almost is set up to be a trap, a
15 nuisance, or a snare.

16 CHIEF JUDGE LIPPMAN: Okay. Thanks,
17 counsel.

18 MS. HAMBOUSSI: Thank you.

19 CHIEF JUDGE LIPPMAN: Reb - - - counsel.

20 MR. HOROWITZ: May it please the court,
21 Joseph Horowitz for the defendants in this case.
22 This was not camouflaged. Despite plaintiff's
23 accusation, she admitted in her deposition - - - it's
24 in the record page 107, 108 - - - she noticed the
25 condition previously, she didn't know how long it was

1 there for. She knew it was there. This isn't
2 something that was camouflaged.

3 In addition, look at - - - looking at the
4 picture of the defect, page 191 of the record, this
5 doesn't cover the entirety of the stair; it's in the
6 middle of the stair. There's the picture; the
7 picture speaks for itself.

8 JUDGE PIGOTT: Yeah, but I think what the
9 judge at the nisi prius court said that there was no
10 testimony from the owner; it - - - all it was was an
11 attorney's affidavit and a picture. We nev - - - we
12 - - - we never heard from the defendant.

13 MR. HOROWITZ: Okay. Well, that - - -
14 again, that goes to the notice question, something
15 that we've all been discussing this whole afternoon.
16 The issue here is that you have the photographs, you
17 have the plaintiff's testimony.

18 JUDGE PIGOTT: Yeah, but I think one of the
19 points is - - - and reason why there's three of
20 these, is to be - - - we're worried that the
21 Appellate Divisions are - - - are just blowing these
22 off, if I can use a vernacular. And the idea that a
23 lawyer says here's a picture, I win, can trouble, you
24 know, a - - - a judge.

25 MR. HOROWITZ: I would be troubled by that

1 too, but this isn't what's going on here. I mean,
2 what you have here is you have a picture, you have
3 plaintiff's testimony, you have the entirety of the
4 circumstance. If you have - - - you have the - - -

5 JUDGE FAHEY: Well, let - - - let me ask
6 you - - - this is the same I asked - - - question I
7 asked the other side. You got a photograph and a
8 lawyer's affidavit, did you have anybody measure it?

9 MR. HOROWITZ: No, and neither did
10 plaintiff.

11 JUDGE PIGOTT: Well, it's your burden.

12 JUDGE FAHEY: The burden is yours, as Judge
13 Pigott just said right now.

14 MR. HOROWITZ: There is, and - - - and - -
15 - and I - - -

16 JUDGE FAHEY: And so - - - so the answer to
17 that is no, you didn't have anybody measure it, but
18 if it covers most of the stairs, it's certainly more
19 than a half an inch.

20 MR. HOROWITZ: Okay. The - - - the - - -
21 the length - - - again, it's - - - it's not covered -
22 - - it's - - - it's not - - - it's not measured, but
23 what we have here is a situation where there are
24 numerous cases in the Appellate Divisions indicating
25 that even without measurements - - - even without

1 measurements, if the photographs and the deposition
2 testimony taken together reflect that this is a
3 gradual shallow defect without any - - - without any
4 sharp edges - - -

5 JUDGE PIGOTT: You see, "gradual, shallow,
6 without any sharp" sound very subjective, wouldn't
7 you agree?

8 MR. HOROWITZ: It does, but again, this is
9 something where if you look at it and you see it,
10 there's no defective condition here. There's
11 something in the middle of the stairway. This - - -

12 CHIEF JUDGE LIPPMAN: What is it? What do
13 you describe it as?

14 MR. HOROWITZ: Well, in - - -

15 CHIEF JUDGE LIPPMAN: You agree it's a
16 clump? What is it?

17 MR. HOROWITZ: You know, I - - - I would -
18 - - I would - - - okay, I would adopt plaintiff's own
19 description of it; if you want to call it a clump,
20 that's fine. It was her conjecture that it was
21 something painted over. Again, no - - - nothing - -
22 - nothing - - -

23 JUDGE PIGOTT: Was it painted over?

24 MR. HOROWITZ: Was it painted over?

25 Possibly, I guess.

1 JUDGE PIGOTT: Where's the owner?

2 MR. HOROWITZ: Where's - - -

3 JUDGE PIGOTT: Where's - - - where's the
4 superintendent; where's somebody saying - - -

5 MR. HOROWITZ: Super - - - the super's
6 testimony is in the - - - in the record.

7 JUDGE PIGOTT: Well, no, you - - - yours
8 was an attorney's affidavit and a picture, as I
9 understand. That's what the Supreme Court said, a
10 bare allegations by - - - by an attorney with a
11 picture is not enough; didn't they say that?

12 MR. HOROWITZ: Right, and - - - but we do
13 have the test - - - the - - - the testimony of the
14 superintendent. And I - - - I agree with you that,
15 again, a bare affirmation clearly would not be
16 enough. But again, that's not what we're dealing
17 with here. We're dealing with a situation where we
18 have the testimony of the plaintiff, the picture
19 reflecting a condition that doesn't have any sharp or
20 jagged - - - jagged edges. And - - -

21 JUDGE ABDUS-SALAAM: But it's - - - it's
22 raised. It looks - - - from the photo that I'm
23 looking at, counsel, it looks like this thing is
24 raised and - - - and your adversary keeps saying it's
25 over a foot long. I - - - I see a ruler here.

1 MR. HOROWITZ: Right.

2 JUDGE ABDUS-SALAAM: I don't know that it's
3 a foot long, but it's certainly pretty long. I - - -
4 I mean, it takes up almost the whole ruler.

5 MR. HOROWITZ: Right, and if you look at
6 the other picture on page 191, you can see the entire
7 stairway and the - - - and the - - - the - - - the
8 fact that there is, if anything, an appreciable
9 height difference; it's a - - - it's a miniscule
10 mass, maybe we'll call it that. It's a miniscule
11 mass that we have on the stair over here. Maybe
12 that's a good way of - - - of - - - of defining it.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.
14 Anything else?

15 MR. HOROWITZ: Unle - - - unless there are
16 any further questions. Thank you.

17 CHIEF JUDGE LIPPMAN: Okay. Thanks,
18 counsel.

19 Rebuttal.

20 MS. HAMBOUSSI: Your Honors, I just want to
21 go to the fact that she had said - - - just to
22 clarify, the fact that she had said she had gone up
23 and down those stairs many times. In the case of
24 Rivas v. Crotona Estate, there was a - - - the
25 plaintiff's heel got caught on a hole from missing

1 tiles, and the plaintiff said that they had traveled
2 almost every day upon - - - over that area where the
3 hole was. And the court said that that fact alone
4 does not defeat the fact of whether or not there was
5 a dangerous condition there. It would go more to
6 something at trial that would say whether or not
7 there was a duty to warn or it goes to whether or not
8 - - - the open and obvious effect.

9 Here, the fact that she had used the stairs
10 and said she might have seen it - - - it didn't say
11 that she recalled exactly where it was, on one - - -
12 what step it was, and like I said, it doesn't
13 delineate the fact that they had a duty to keep those
14 stairs safe, a main stairway that goes from one floor
15 to the other. And in my opinion, I don't see it as
16 de minimis; I see it as a defect that was well in
17 size and right in the middle of the stair, right
18 where somebody should be expected to be using that
19 stairway. Okay.

20 CHIEF JUDGE LIPPMAN: Okay. Thanks,
21 counsel.

22 MS. HAMBOUSSI: Thank you, Your Honors.

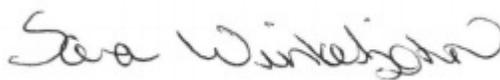
23 CHIEF JUDGE LIPPMAN: Thank all of you.
24 Appreciate it.

25 (Court is adjourned)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Hutchinson v. Sheridan Hills House Corp., No. 144, and Zelichenko v. 301 Oriental Boulevard, LLC, No 145, and Adler v. QPI-VIII, LLC, No. 146 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 22, 2015