CONTINUING LEGAL EDUCATION SEMINAR

New York, *free of charge*, by Videoconference

DEFENSE ASSOCIATION OF NEW YORK ("DANY")

has been granted CLE accreditation by the New York Office of Court Administration
and will present the following seminar:

DEFENDING SLIP / TRIP AND FALL CASES WITH BIOMECHANICAL ANALYSIS

by Videoconference via ZOOM

This course will cover topics including kinematics and human movement; engineering codes and standards; human factors; scene photos; injury biomechanics; fraud factors; surveillance and/or accident videos; maintenance and inspections; slip resistance and the slip-o-meter; evolution of biomechanics law and admissibility of experts; rebutting plaintiff experts; and summary judgment.

1.5 CLE Credits will be granted in Skills to New York attorneys

Thursday, November 5, 2020

6:00 p.m. - 7:30 p.m.

Panel:

William N. Devito - Managing Attorney, Kowalski & DeVito

Angela Levitan, Ph.D., CPE - Senior Biomechanist, ARCCA

Co-Presented by: *ARCCA*

NO FEE: Free for DANY Members, ABOTA NYC Members and anyone else interested!

Registration: Go to www.defenseassociationofnewyork.org, click on the event link and follow the instructions

PRESIDENT: Teresa A. Klaum **PRESIDENT-ELECT:** Bradley J. Corsair
CLE COMMITTEE: Teresa A. Klaum and Bradley J. Corsair, Chairs;
Steven R. Dyki, Heather Wiltshire Clement and Eileen E. Buholtz

Attendance Verification Codes & Attorney Affirmation

For New York CLE attendance verification purposes, any course codes announced during the program must be recorded on the affirmation form available on the CLE Board website at:
http://ww2.nycourts.gov/attorneys/cle/affirmation_sample.pdf

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Please pass this notice along to your colleagues

DEFENDING SLIP / TRIP AND FALL CASES WITH BIOMECHANICAL ANALYSIS

William N. DeVito - Managing Attorney, Kowalski & DeVito

Angela Levitan, Ph.D., CPE - Senior Biomechanist, ARCCA

CLE Materials - Table of Contents

Ask the Experts…

CASE STUDY:

Description: Claimant, descending stairs at a marina, slips and falls to her left on the landing and suffers a serious fracture of the lateral ankle (lateral malleolus). She alleges that an unsafe, slippery, wet surface caused her to "slip". The investigation reveals claimant was wearing very thick flip-flops.

ARCCA's biomechanical analysis indicates that this type of injury (lateral malleolus bone fracture) would be caused by the ankle "rolling-over" to one side (i.e., falling off her flip-flop).

ARCCA's surface analysis (using a Bungraber Mark-II to measure slip resistance) conclusively showed that, even if wet, the surface coating was well within acceptable safety parameters.

ARCCA's conclusion: the injury was caused by a misstep from rolling off the flip-flop – not by the condition of the insured's floor surface.

Slip, Trip or Fall – How Do You Know Which It Was?

When you have injuries being claimed due to an STF incident, deciding first whether it was a slip, trip or fall can help the investigating expert (biomechanics/ human factors) to determine whether the claimed injuries could have been caused by the incident.

A slip usually results in different injury mechanisms than a trip. Slips most often result in lower back, wrist or head injuries. Trips usually involve rotator cuff, wrist or knee injuries.

Analyzing and comparing the injuries to the description of the loss event and other available factors enables a biomechanics/human factors expert to reconstruct the event and reasonably determine whether the claimed accident matches the claimed injuries. If it doesn't, then it is likely that the injuries occurred elsewhere.

SLIPS

Possible:	Unlikely:
Sprains/strains	Degenerative Joint Disease
Meniscal tear	Osteophytes
Fractures (circumstances dictate)	Cervical Disc Herniation
Lumbar Disc Herniation	Carpal Tunnel Syndrome
	TMJ

TRIPS

Possible:	Unlikely:
Fractures	Carpal Tunnel Syndrome
Sprains/strains	Osteophytes
Rotator Cuff	Disc Herniation
	Degenerative Joint Disease
	TMJ

Contact ARCCA's biomechanics/ human factors experts for help with your next STF case or claim.

800-700-4944 | www.ARCCA.com

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Experts in Forensic, Scientific & Engineering Solutions

ENGINEERING CODES AND STANDARDS

Investigating an STF:

- What happened and what walkway was involved?
- Where did incident happen?
  - ❑ Check state, county, city, municipality codes and ordinances (ex. NYC has its own building code, Florida adopts IBC with amendments)
- When was the property built?
  - ❑ Check certificate of occupancy
- Were there renovations to the subject location?
  - ❑ Check building department websites, FOIL requests for permits, appraisal sites

International Building Codes
- Chapter 10 Means of Egress
- Chapter 11 Accessibility (ADA)
*Also International Residential Codes, International Property Maintenance Codes
https://codes.iccsafe.org

ANSI 117.1
Accessible and usable building and facilities

ASTM F1637
Standard practice for safe walking surfaces

ASSE/ANSI 1264.2
Standard for the provision of slip resistance on walking/working surfaces

OSHA
1910.24 subpart D Walking-working surfaces

102.6.1. Buildings Not Previously Occupied

A building or portion of a building that has not been previously occupied or used for its intended purposes in accordance with the laws in existence at the time of its completion shall comply with the provisions of the International Building Code or International Residential Code, as applicable, for new construction or with any current permit for such occupancy.

102.6.2. Buildings Previously Occupied

The legal occupancy of any building existing on the date of adoption of this code shall be permitted to continue without change, except as otherwise specifically provided in this code, the International Fire Code or International Property Maintenance Code, or as is deemed necessary by the building official for the general safety and welfare of the occupants and the public.

*IBC 2015 Chapter 1

For more than 30 years, ARCCA has been providing expert forensic, scientific and engineering solutions to its clients via its many office locations nationwide. Our team of experts can help with all phases of investigation: from initial file review and triage, inspections and testing, report/affidavit/disclosure preparation, evidence preservation, and exhibit preparation and trial testimony.

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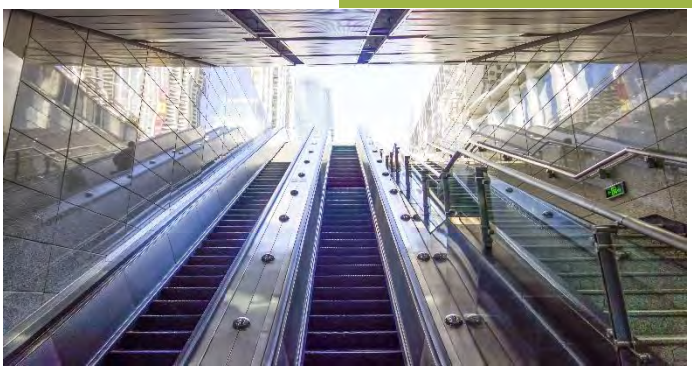
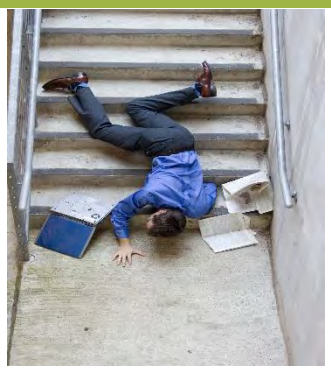
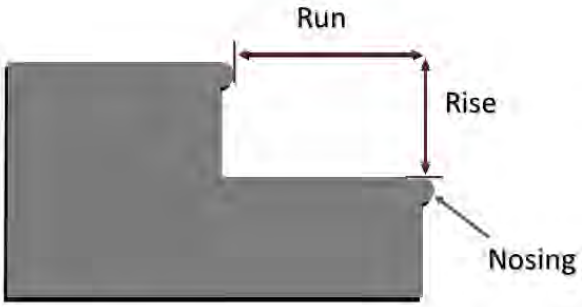




STAIRS

Stairway Design

- Riser Height and Tread Depth
- Dimensional Uniformity
  2015 IBC - <3/8" between largest and smallest riser or tread
- Nosing Discontinuities



*Check IBC or IRC/One-Two Family Dwelling Codes in the appropriate years for dimensional requirements.

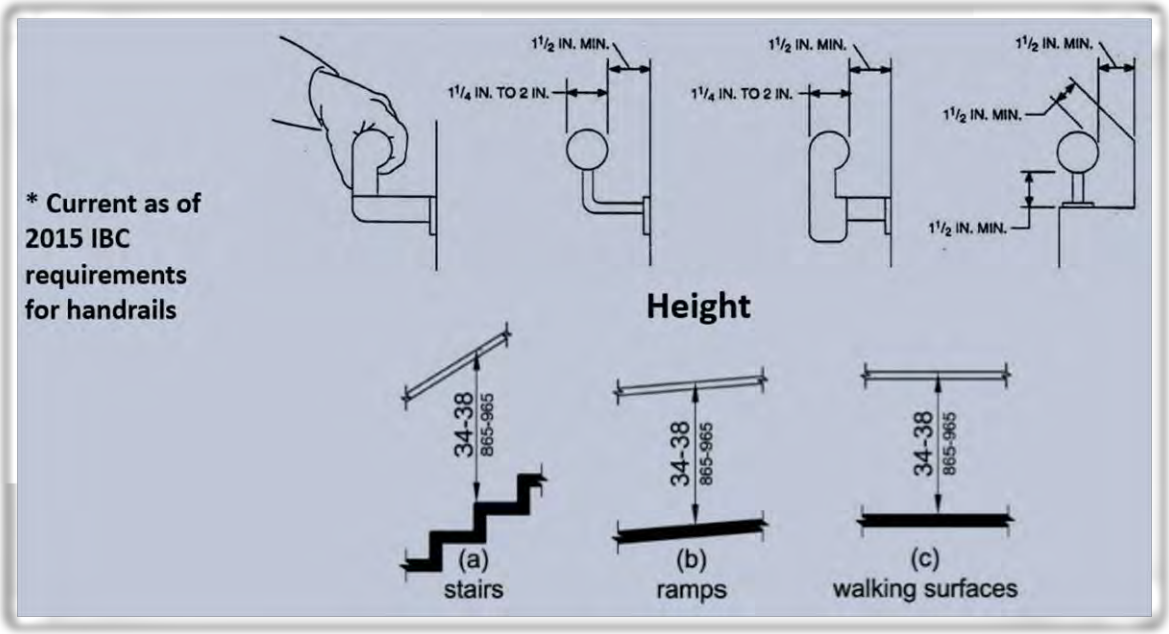
*** ASTM F1637 - Section 4.2**

Obstructions or changes in elevation

– Codes allow ¼" differential and ½" if edge beveled

HANDRAILS

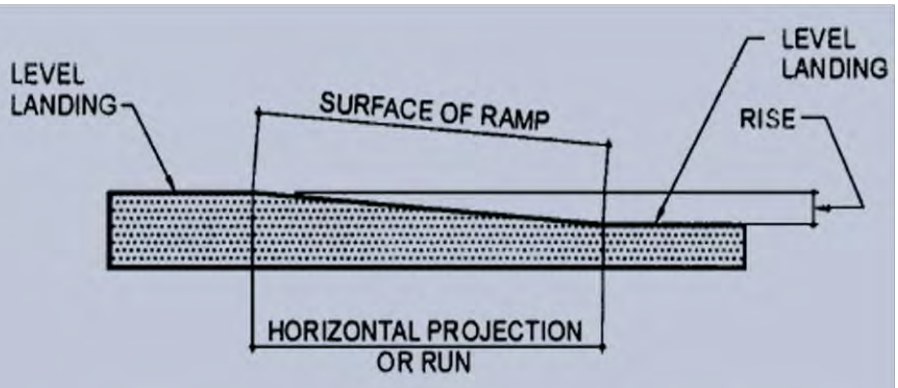
* Current as of 2015 IBC requirements for handrails



RAMPS

*Current 2015 IBC Requirements for ramp slope (Chapters 10 and 11)

Curb ramp requirements found in ICC A117.1



Slope	Maximum Rise		Maximum Horizontal Projection	
	in.	mm	ft	m
1:12 to < 1:16	30	760	30	9
1:16 to < 1:20	30	760	40	12

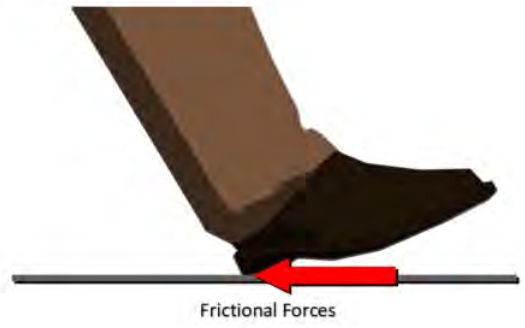
Biomechanical Analysis of Slip, Trip and Fall

Investigations of slip, trip and fall claims typically address the cause of the accident and the claimed injuries. Each case must be decided upon based on the specific facts of the incident while taking into account the claimant's behavior. Accidents involve a number of factors related to engineering, biomechanics, human factors and the environment, such as building codes, the weather, and illumination. This article explains the causative factors involved in slip, trip, and fall events, and how a trained biomechanical engineer uses these factors to evaluate slip, trip and fall incidents. A comprehensive analysis of these factors can help evaluate the cause of the slip, trip or fall accident and if there is any objective evidence to support or refute the claimed injuries. If there are objective finding to support the claimed injuries, the analysis will then determine the proximate cause of the claimed injuries.

Science of Movement

Understanding the manner of the fall incident is the first step in investigating a specific claim. This includes the difference between the mechanisms associated with a slip and trip as well the kinematic differences for each event. Biomechanics research shows that walking has a predictable pattern. Normal ambulation entails that the foot entering its swing phase be lifted off the ground and progressed forward as part of the human gait cycle. During normal walking, a slip occurs when there is insufficient friction between heel of the leading foot and the walking surface, causing the foot to slide forward. When this happens, the body's center of mass is behind the base of support and therefore the body will fall downward and rearward. When a trip occurs, the swinging leading foot is impeded by an obstruction. The body's center of mass continues to move forward past the base of support. If balance cannot be restored, the body will fall forward.

Slip



Trip

Environment

For a slip, trip and fall claim to have a causal relationship to a "defect", the "defect" must be proximate to the mechanism of the fall. Many slip, trip, and fall claims identify some design parameter of the walkway/stairs that was non-complaint with building codes or standards. On

closer examination, these defects are often found not to be proximate to the mechanism of the fall, whether it was a trip or slip. Consequently, there can be no causal relationship between the fall and claimed injuries. Conducting such investigations requires collecting exacting details from such items as claimant statements, depositions, and incident reports.

In addition, detailed inspections of the alleged defect and surrounding environment are an important step in slip, trip, and fall investigations. Specific to slips and trips are codes and standards addressing the slip resistance of walking surfaces, like ramps and stairs, and floor levelness that reduce obstructions along the travel path. As it pertains to the incident investigation, it is important to refer to codes from the year a building was built or part of a building was renovated. In addition, states or even cities may adopt codes with amendments specific to their jurisdiction. Finally, understanding the mechanism of the fall is important in identifying the particular codes that may or may not have been violated.

For example, when assessing the presence of a trip hazard, the elevation differential should be measured from the walking surface and the shape of the projection should be documented with the proper instruments (measuring tape, contour gauge, etc.). To assess the potential for slip, is it important to use a validated and calibrated tribometer (slip meter). Details as to the presence and type of contaminant (water, oil, snow/ice) are necessary for testing and/or for addressing maintenance practices.

Human Factors

Many slip, trip and fall investigations only assess engineering codes. These investigations ignore the human interaction with the environment and the purported causal relationships between the subject incident and claimed injuries.

Fundamentally, from a human factors perspective, a person's ability to safely navigate their environment entails an integration of sensory cues, such as visual, with their past experiences to evaluate any potential hazards. Successful navigation through an environment requires sensory input to develop a mental construct of the environment, which includes identifying obstacles that one can potentially trip over or slip on. Typically, the visual sensory input is the primary sensory input of this process. The visual identification of structures and objects in an environment in part requires adequate contrast, size, and lighting.

A person's behavior prior to and during an incident, as well as his or her familiarity with the subject location, may provide information as to if are navigating in a reasonably safe manner. Incorporating human factors and biomechanical aspects into the investigations often uncovers areas where the claimant's behavior contributed to their incident, their described motion during the incident is not consistent with the laws of physics, or their injuries are not consistent with the incident.

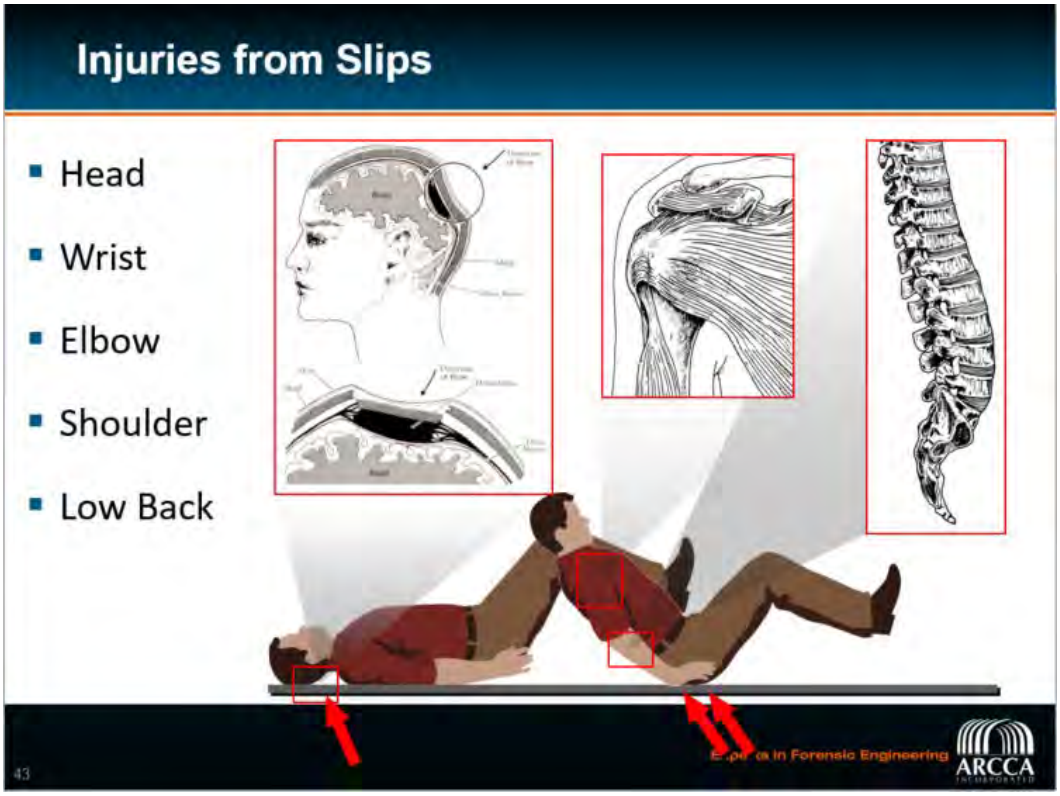
Injury Biomechanics

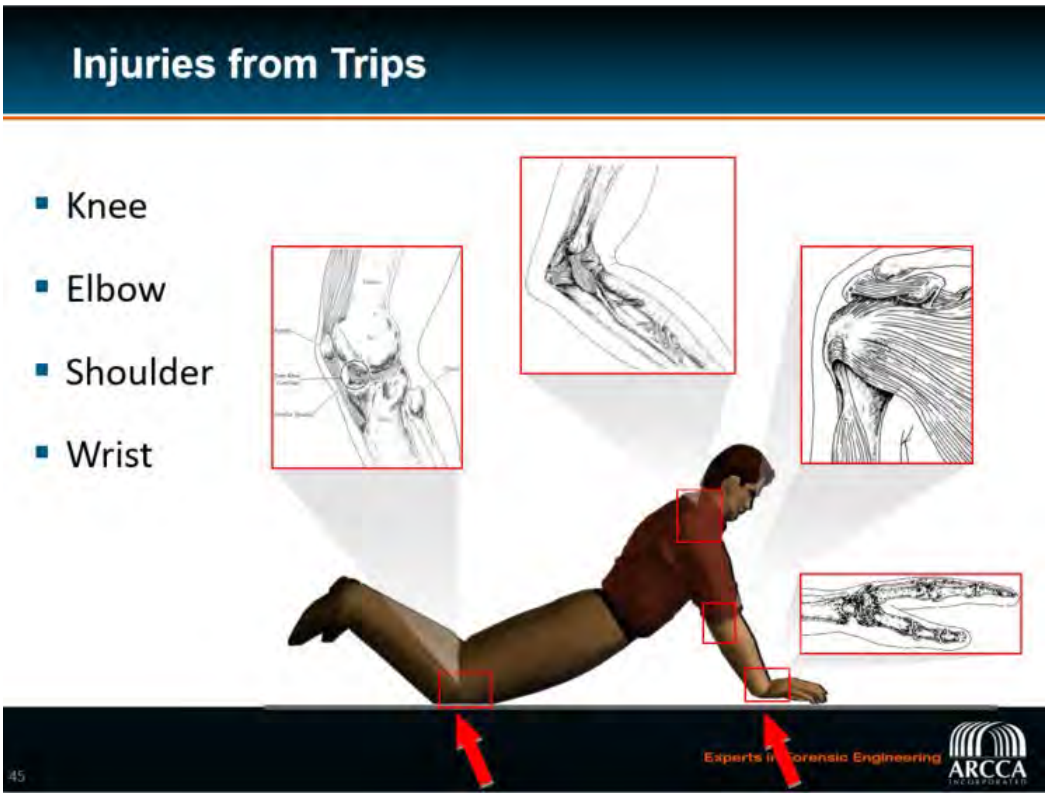
Bodily injury occurs when the tissue or bone is loaded beyond its physiological limits. Biomechanics is the body of knowledge that deals with how the body responds to applied forces.

All injuries have mechanisms. An injury mechanism is the mechanical process that causes a specific injury to occur. An injury mechanism takes into account the direction and magnitude of the load applied to cause physiological trauma.

Determination of a causal relationship between claimed injuries and a specific event requires thorough analyses of the subject inject, an understanding of the unique tolerance level of the individual in question, and a biomechanical analysis of the associated injury mechanisms and force magnitudes. A biomechanical engineer trained in applying the concepts of mechanical engineering and the physical sciences to the joints and tissues of the human body is needed to determine the potential for a causal relationship between claimed injuries and specific incident.

It is important to recognize the typical areas of the body that may be injured for each manner of falling. The body falls rearward when a slip occurs, therefore injuries are typically on the posterior aspect of the body, such as the head, wrist, elbow, and low back. When a trip occurs, the body falls forward, therefore injuries are typically seen on the anterior aspect of the body, such as the knee, elbow, shoulder, and wrist. Obtaining information in regards to activities of daily living will establish the injured party's personal tolerance for a person specific analysis as well as identify alternative injurious activities.





Fraud

The factors discussed previously can be utilized in slip, trip, and fall fraud cases. Several questions are addressed in these investigations. The first question addresses where there really is a hazard. The presence of water on a flooring surface is not always indicative of a slip hazard. Many flooring surfaces, even when wet, provide adequate slip resistance during normal activities. The second question refers to the reported kinematics of the incident. Often times, claimant's described kinematics are inconsistent with the principles of biomechanics and the laws of physics. This can also be addressed via the use of video analysis. Third, are the kinematics of the impact consistent with the injuries? Is the injury mechanism present for the claimed injury? For example, you would not expect a fractured knee cap during a slip. Finally, it is important to know whether the individual has any contributing medical conditions. Impairments that can compromise the body's balance or reduce one's foot clearance with the floor surface can cause one to fall due to slightest of perturbances.

Easley v U Haul

2018 NY Slip Op 08008 [166 AD3d 852]

November 21, 2018

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, January 2, 2018

[*1]

Robert Easley, Respondent,
v
U Haul et al., Appellants.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York, NY (Benjamin Gonson and Kevin Pinter of counsel), for appellants.

Mallilo & Grossman, Flushing, NY (Yelena Ruderman of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Queens County (Chereé A. Buggs, J.), entered November 22, 2017. The order denied the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

The plaintiff allegedly was injured when he tripped and fell on a half-inch to one-inch metal protrusion sticking out of the ground while walking into a U Haul parking lot maintained and operated by the defendants. The plaintiff subsequently commenced this personal injury action against the defendants, asserting negligent maintenance of the property. After the completion of discovery, the defendants moved for summary judgment dismissing the complaint, arguing that the defect was too trivial to be actionable. In an order entered November 22, 2017, the Supreme Court denied the motion, and the defendants appeal.

Whether a dangerous or defective condition exists on property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of

fact for the jury (*see Pellegrino v Trapasso*, 114 AD3d 917 [2014]; *Acevedo v New York City Tr. Auth.*, 97 AD3d 515 [2012]; *Stoppeli v Yacenda*, 78 AD3d 815 [2010]). However, not every injury related to an elevated defect need be submitted to a jury (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Kehoe v City of New York*, 88 AD3d 655, 656 [2011]).

In determining whether a defect is trivial, courts "must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Kavanagh v Archdiocese of the City of N.Y.*, 152 AD3d 654, 655 [2017] [internal quotation marks omitted]; *see Trincere v County of Suffolk*, 90 NY2d at 978). "[T]here is no 'minimal dimension test' or per se rule that a defect must be . . . a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d at 977). However, a defendant "may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection" (*Hutchinson v Sheridan Hill House Corp.*, [*2]26 NY3d 66, 78 [2015] [internal quotation marks omitted]; *see Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [1960]).

The defendants presented evidence that the alleged defect was an inch or less in size, that the incident occurred in the daytime hours under clear conditions, and that the area immediately surrounding the alleged defect was clear of debris and not dangerous or trap-like. This evidence was sufficient to establish, prima facie, that the defect was trivial and nonactionable as a matter of law (*see Kam Lin Chee v DiPaolo*, 138 AD3d 780, 782 [2016]; *Gaud v Markham*, 307 AD2d 845, 846 [2003]; *see also Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), since he relied on conclusory allegations (*see Boise Cascade Off. Prods. Corp. v Gilman & Ciocia, Inc.*, 30 AD3d 454 [2006]; *Becker v Shore Drugs*, 296 AD2d 515 [2002]).

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint. Mastro, J.P., Sgroi, Duffy and LaSalle, JJ., concur.

[*1]

Gonzalez v Palen
2015 NY Slip Op 51101(U) [48 Misc 3d 135(A)]
Decided on July 21, 2015
Appellate Term, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 21, 2015
SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT
PRESENT: Lowe, III, P.J., Hunter, Jr. and Ling-Cohan, JJ.
570998/14

Ruben Gonzalez, Plaintiff-Respondent,

against

Jesus H. Palen and Manuel Diplan, Defendants-Appellants.

Defendants appeal from a judgment of the Civil Court of the City of New York, Bronx County (Jose A. Padilla, J.), entered on or about September 30, 2013, after a jury trial on damages only, in favor of plaintiff and awarding him damages in the principal sum of $175,000. The appeal brings up for review an order (same court and judge), dated July 8, 2013, which granted plaintiff's in limine Frye motion to preclude defendants' expert from testifying.

Per Curiam.

Judgment (Jose A. Padilla, J.), entered on or about September 30, 2013, reversed, without costs, and matter remanded for a new trial on damages.

The trial court erred in determining that defendants' biomechanical engineer, Dr. Kevin Toosi, was not qualified to render an opinion as an expert as to the cause of plaintiff's injuries. Even assuming that an evidentiary hearing was warranted to assess Toosi's professional qualification (*see Frye v United States*, 293 F 1013 [DC Cir 1923]), the evidence presented at

the *Frye* hearing established that Toosi had the academic and professional qualifications - including a PhD in biomechanical engineering, a license to practice medicine in Iran, and three years' experience in accident reconstruction, which included the study of the effects of force on occupants inside a vehicle - to render an opinion as an expert on the issue of whether the force generated in the subject motor vehicle accident was sufficient to cause the injuries alleged by plaintiff (*see Vargas v Sabri*, 115 AD3d 505 [2014]). Toosi's lack of a license to practice medicine in the United States did not render him unqualified (*id*.). To the contrary, Toosi's stated education, background, experience and areas of specialty rendered him able to testify as to the mechanic's of the injury (*id*.; *Plate v Palisade Film Delivery Corp*., 39 AD3d 835 [2007]).

Inasmuch as Toosi's testimony was probative of a central issue in the case, the preclusion of this evidence cannot be deemed harmless (*see Valentine v Grossman*, 283 AD2d 571 [2001]; *Plate v Palisade Film Delivery Corp*., 39 AD3d at 837). Accordingly, the matter is remanded to Civil Court for a new trial on damages.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

I concur I concur I concur

Decision Date: July 21, 2015

Return to Decision List

Guerra v Ditta

2020 NY Slip Op 03771 [185 AD3d 667]

July 8, 2020

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, September 2, 2020

[*1]

Cecilia Guerra, Appellant,
v
Paul A. Ditta, Respondent.

Ogen & Sedaghati, P.C., New York, NY (Eitan Alexander Ogen of counsel), for appellant.

McCabe, Collins, McGeough, Fowler, Levine & Nogan LLP, Carle Place, NY (Patrick M. Murphy of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Wavny Toussaint, J.), dated July 22, 2016, and (2) an order of the same court dated May 4, 2017. The order dated July 22, 2016, denied the plaintiff's motion for an evidentiary hearing on the issue of alleged juror misconduct. The order dated May 4, 2017, insofar as appealed from, denied that branch of the plaintiff's motion which was pursuant to CPLR 4404 (a) to set aside a jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages.

Ordered that the appeal from the order dated July 22, 2016, is dismissed as academic in light of our determination of the appeal from the order dated May 4, 2017; and it is further,

Ordered that the order dated May 4, 2017, is reversed insofar as appealed from, on the law, that branch of the plaintiff's motion which was pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages is granted, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The parties were involved in a rear-end motor vehicle collision on May 25, 2010. The accident occurred when the traffic light at which the parties were stopped turned green. The defendant took his foot off his brake, and his vehicle struck the rear of the plaintiff's vehicle. The plaintiff alleged that she sustained significant injuries to her back as a result of the accident. Summary judgment on the issue of liability was granted to the plaintiff and a trial was held on the issue of damages.

Prior to trial, the plaintiff moved to preclude the defendant's proffered biomechanical expert, Kevin K. Toosi, from testifying or, in the alternative, for a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]). The motion was denied. Toosi testified at trial that the plaintiff's injuries could not have been caused by the accident. The jury returned a verdict in the defendant's favor, finding that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). The plaintiff moved, inter alia, pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages. The plaintiff also moved for an evidentiary hearing to determine whether one of the jurors committed misconduct and improperly influenced the verdict. In an order dated July 22, 2016, the Supreme Court denied the motion for an evidentiary hearing on the issue of alleged juror misconduct. In an order dated May 4, 2017, the court denied that branch of the first motion which was to set aside the jury verdict in the interest of justice and for a new trial on the issue of damages. The plaintiff appeals from both orders.

" 'A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise' " (*Simon v Granite Bldg. 2, LLC*, 170 AD3d 1227, 1231 [2019], quoting *Russo v Levat*, 143 AD3d 966, 968 [2016]). "In considering such a motion, '[t]he Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected and must look to his [or her] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision' " (*Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d 672, 676 [2019], quoting *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]).

We agree with the defendant that setting aside the verdict was not warranted in the interest of justice due to the Supreme Court's determination not to hold a *Frye* hearing. "A

court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" (*People v LeGrand*, 8 NY3d 449, 458 [2007]; *see Shah v Rahman*, 167 AD3d 671, 673 [2018]). "Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted" (*People v Brooks*, 31 NY3d 939, 941 [2018]). The court properly relied upon a decision of this Court and a decision of the Appellate Term, First Department, in determining that biomechanical engineering is a scientific theory accepted in the field (*see Plate v Palisade Film Delivery Corp.*, 39 AD3d 835 [2007]; *Gonzalez v Palen*, 48 Misc 3d 135[A], 2015 NY Slip Op 51101[U] [App Term, 1st Dept 2015]; *see also Shah v Rahman*, 167 AD3d at 673).

However, we disagree with the Supreme Court's determination that there was a proper foundation for the admission of Toosi's opinions and testimony. Separate and distinct from the *Frye* inquiry is the " 'admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case' " (*People v Brooks*, 31 NY3d at 941, quoting *Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). "The question is whether the expert's opinion sufficiently relates to existing data or is connected to existing data only by the ipse dixit of the expert" (*People v Brooks*, 31 NY3d at 941 [emphasis and internal quotation marks omitted]). Here, the defendant failed to establish that Toosi's opinions related to existing data and were the result of properly applied accepted methodology (*see Pascocello v Jibone*, 161 AD3d 516 [2018]; *Dovberg v Laubach*, 154 AD3d 810, 813 [2017]; *cf. Clemente v Blumenberg*, 183 Misc 2d 923 [1999] [Sup Ct, Richmond County 1999]). Thus, Toosi's testimony should have been precluded. Accordingly, we reverse the order dated May 4, 2017, insofar as appealed from, grant that branch of the plaintiff's motion which was pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages, and remit the matter to the Supreme Court, Kings County, for a new trial on the issue of damages.

In light of our determination, the plaintiff's remaining contentions on the appeal from the order dated May 4, 2017, need not be reached. Furthermore, in light of our determination, the appeal from the order dated July 22, 2016, has been rendered academic. Austin, J.P., Roman, Maltese and LaSalle, JJ., concur.

Hutchinson v Sheridan Hill House Corp.

2015 NY Slip Op 07578 [26 NY3d 66]

October 20, 2015

Fahey, J.

Court of Appeals

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, December 16, 2015

[*1]

Leonard Hutchinson, Appellant,
v
Sheridan Hill House Corp., Respondent.

Matvey Zelichenko, Appellant, v 301 Oriental Boulevard, LLC, Respondent.

Maureen Adler,[*2] Appellant, v QPI-VIII LLC, et al., Respondents.

Argued September 17, 2015; decided October 20, 2015

Hutchinson v Sheridan Hill House Corp., 110 AD3d 552, affirmed.

Zelichenko v 301 Oriental Blvd., LLC, 117 AD3d 1038, reversed.

Adler v QPI-VIII, LLC, 124 AD3d 567, reversed.

{**26 NY3d at 72} OPINION OF THE COURT

Fahey, J.

These cases teach that it is usually more difficult to define what is trivial than what is significant. The common factual and procedural thread among the three appeals before us is that an individual tripped on a defect in a sidewalk or stairway, and was injured, but was foreclosed from going to trial on the ground that the defect was characterized as too trivial to be actionable. We hold that the Appellate Division erred in dismissing the complaint in two of the three cases.

I.

On April 23, 2009, plaintiff Leonard Hutchinson was walking on a concrete sidewalk in the Bronx when his right foot "caught" on a metal object protruding from the sidewalk and he fell, sustaining injuries. Hutchinson commenced this personal injury action against Sheridan Hill House Corp. The sidewalk where Hutchinson tripped abuts a building owned by Sheridan, which is responsible for maintaining the sidewalk in a reasonably safe condition under Administrative Code of the City of New York § 7-210 (a).

Discovery ensued. Hutchinson was deposed, along with a housing development director associated with Sheridan and two of its porters. Testimony was given that the sidewalk had been replaced in the summer of 2007. For his part, Hutchinson described the metal object as being "screwed on in the concrete" and gave rough estimates of its dimensions.

An employee of Sheridan's counsel visited the sidewalk in December 2010 and photographed and measured the metal object. He concluded that the object, cylindrical in shape, projected "between one eighth of an inch . . . and one quarter {**26 NY3d at 73}of an inch" above the sidewalk and [*3]was "approximately five eighths of an inch" in diameter. **[FN1]**

Sheridan moved for summary judgment dismissing the complaint, asserting that the defect was trivial in nature and hence nonactionable and that Sheridan did not create, or have actual or constructive notice of, the defect. Sheridan submitted, among other documents, an affidavit of the law firm employee who had photographed the metal protrusion, giving his measurements; the photographs; the deposition testimony; and the engineer's report. In response, Hutchinson contended that there are issues of fact regarding whether the metal object created a hazard in the nature of a trap or snare and whether Sheridan had constructive notice of its existence.

Supreme Court granted summary judgment in favor of Sheridan on the ground that it lacked notice of the defect (2012 NY Slip Op 33804[U] [2012]).**[FN2]** The Appellate Division affirmed, holding that Sheridan had demonstrated that it did not have notice of the defect and, in addition, that the metal object's "minor height differential alone is insufficient to establish the existence of a dangerous or defective condition" (110 AD3d 552, 553 [1st Dept 2013]).

Two Justices dissented, reminding the majority that " 'there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable' " (*id.* at 554 [Acosta, J.P., and Saxe, J., dissenting], quoting *Trincere v County of*

Suffolk, 90 NY2d 976, 977 [1997]). Moreover, the dissenters would have held that "an issue of fact remains as to whether the protruding piece of metal may be characterized as a trap or a snare such as could, without warning, snag a passerby's shoe" (110 AD3d at 556 [Acosta, J.P., and Saxe, J., dissenting]).

Hutchinson appeals pursuant to CPLR 5601 (a). We affirm.

II.

On May 2, 2010, plaintiff Matvey Zelichenko fell while walking down a staircase in the lobby of a residential building in{**26 NY3d at 74} Brooklyn he was visiting for the first time. The staircase has five risers or vertical elements. It has four step treads, made of terrazzo, 12 inches in horizontal depth, each with a one-inch nosing that projects over the riser below. There are handrails on each side, and Zelichenko made use of one.

On the second step tread from the bottom, Zelichenko's right leg "got caught" when he stepped on a part of the nosing where there was a missing piece or "chip." His leg twisted and he fell, with resulting injuries. Zelichenko commenced this personal injury action against 301 Oriental Boulevard, LLC, the owner of the building.

[*4]

During discovery, Zelichenko and the superintendent of the building gave deposition testimony. Zelichenko identified several photographs as fairly and accurately depicting the stairway and, in particular, the area of the missing "chip." In one such photograph, a shoe-clad foot is shown on the step tread in question, next to an indentation in the nosing of the step; the toe of the shoe projects over the nosing.

301 Oriental moved for summary judgment dismissing the complaint, contending that the alleged defect in the step was trivial and nonactionable as a matter of law and that it was not on notice of the defect. 301 Oriental relied on an affidavit of an engineering consultant, Jeffrey J. Schwalje, who had inspected, measured, and photographed the staircase in May 2011; the photographs; and the deposition testimony.

Schwalje measured the dimensions of the missing "chip" as 3¬ inches in width and one-half inch in depth. Schwalje stated that the chipped step tread in question "did not present a tripping or slipping hazard. The small chip in the nosing is forward of a person's foot contact

area and would be safely negotiated. There was more than sufficient space behind the chip for an individual to safely plant his/her foot." He further opined that "[a] person descending the stairway would not bear any weight on the chipped space or any other part of the step edge in the subject step tread unless his/her foot completely overstepped the tread."

Zelichenko opposed the motion, relying on the photographs of the staircase and an affidavit of another engineer, Stuart K. Sokoloff. With regard to the size of the "chip," Sokoloff agreed with Schwalje's assessment of the width of the "chip" but, based on the photographs, he concluded that the depth of the missing area was one inch in places.{**26 NY3d at 75}

Sokoloff relied on a monograph entitled "The Staircase—Studies of Hazards, Falls and Safer Design" by architecture professor John Templer. According to Sokoloff, Professor Templer, after explaining the physical processes whereby a human being walks down stairs, "states that one of the factors that may cause a fall is a broken tread" on a stairway, because "[w]hen our gait on stairs is disrupted or altered we can lose our balance or stumble especially when a defect is unsuspected, unknown, unanticipated and unexpected." Sokoloff added that "[i]t is necessary that all stair tread[s] be uniform without missing sections to support a person descending a stair in order for [the] person to maintain . . . balance when negotiating the steps."

Sokoloff criticized Schwalje's assertion that there was more than enough space behind the chip for an individual to place his or her foot. Citing Professor Templer, Sokoloff opined that "the foot can make contact with the end of the nosing." Sokoloff explained the process as follows:

> "As the other foot moves down the stairs, the foot currently in contact with the tip of the tread rolls forward until that second foot contacts the tread/step below. If a portion of the tip/nosing is missing during the stepping process . . . the contact area[ ] of the front of [the] foot is compromised/reduced to an extent that there would be insufficient tread area to support the ball/front of [the] foot with full body weight on it, and the foot could roll due to lack of support. This explains the mechanism of the plaintiff's fall."

Supreme Court denied 301 Oriental's motion, ruling that issues of fact existed as to actual or constructive notice and as to whether the alleged defect was trivial as a matter of law. The Appellate Division reversed Supreme Court's order and granted 301 Oriental's motion.

[*5]

The Appellate Division stated that

> "[t]he evidence revealed that the alleged defect consisted of a chip measuring about 3¬ inches wide and about « inch deep, located almost entirely on the edge of the second to last step from the bottom, and not on the walking surface. Upon an examination of all of the facts presented, we find that the alleged defect was trivial, did not possess {**26 NY3d at 76} the characteristics of a trap or nuisance, and, therefore, was not actionable" (117 AD3d 1038, 1040 [2d Dept 2014]).

We granted Zelichenko leave to appeal (24 NY3d 904 [2014]) and now reverse.

III.

On March 30, 2010, plaintiff Maureen Adler was injured in a fall on the interior staircase of the apartment building where she lived. As she recalled in her deposition testimony, she was walking down the stairs when her right foot "got caught" on "a big clump in the middle of the stair"—a protrusion of some sort in a step tread—which had "been painted over." Adler commenced a personal injury action against QPI-VIII LLC and Vantage Management Services, LLC, the owner and manager of the building.

Adler's counsel photographed the protrusion in the step, and at her deposition Adler acknowledged that the photographs fairly and accurately depicted the stairway and the "clump." Adler testified that the stairway was illuminated by a 60-watt light bulb, that she was "[p]robably looking down" as she descended the stairs, that she did not recall any dirt or debris on the stairs, and that they were not slippery or cracked. She explained that she was very familiar with the stairway and in fact had seen the "clump" before on previous occasions.

The building superintendent testified that he had not noticed any uneven surface on the stairs prior to Adler's accident nor received any complaints about such. He stated that the stairs had been painted some "three or four years before" the date of the accident.

Defendants moved for summary judgment dismissing the complaint, asserting that the alleged defect was trivial in nature and hence nonactionable and that they had not created the defect and did not have actual or constructive notice of its existence. They relied on Adler's photographs as well as the deposition transcripts. Notably, defendants did not produce any measurements or other evidence of the dimensions of the "clump."[FN3]

Supreme Court denied the motion, ruling that defendants had failed to establish as a matter of law that they neither created{**26 NY3d at 77} the alleged defect nor had actual or constructive notice of it, or that the defect was trivial. The Appellate Division reversed and granted the motion, ruling that "[t]he evidence, and in particular the photographs, established that the alleged defect was trivial as a matter of law and did not possess the characteristics of a trap or nuisance, and, therefore, was not actionable. In opposition, the plaintiff failed to raise a triable issue of fact" (124 AD3d 567, 568-569 [2d Dept 2015] [citations omitted]). The Appellate Division did not pass on the issue of notice. We granted Adler leave to appeal (25 NY3d 903 [2015]) and now reverse.

[*6]

IV.

In *Trincere v County of Suffolk* (90 NY2d 976 [1997]), this Court held that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 977), and therefore that granting summary judgment to a defendant "based exclusively on the dimension[s] of the . . . defect is unacceptable" (*id.* at 977-978). Plaintiff Trincere tripped over a concrete paving slab, raised about a half inch in relation to the surrounding slabs in a plaza, and the lower courts dismissed her complaint, ruling the defect trivial as a matter of law. We held that a court must consider "all the facts and circumstances presented" (*id.* at 977) before concluding that no issue of fact exists, and emphasized that these factors will include, but should not be limited to, "the dimension[s] of the defect at issue" (*id.*). For this reason, we noted that "whether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury" (*id.* [internal quotation marks omitted]). Nevertheless, we noted that the Appellate Division had in fact considered all "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere*, 90 NY2d at 978 [internal quotation marks omitted]), and we concluded that it had properly ruled that no issue of fact existed (*id.*).

[1] *Trincere* thus recognizes the doctrine that a defect alleged to have caused injury to a pedestrian may be trivial as a matter of law, but requires a holding of triviality to be based on all the specific facts and circumstances of the case, not size alone. In our opinion, we cited *Guerrieri v Summa* (193 AD2d 647 [2d Dept 1993]), which expressed the trivial defect doctrine{**26 NY3d at 78} as the principle that a defendant " 'may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or

nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection' " (*id.* at 647, quoting *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [2d Dept 1960], *rearg denied* 11 AD2d 946 [2d Dept 1960]; *see also e.g. Trionfero v Vanderhorn*, 6 AD3d 903, 903-904 [3d Dept 2004]; *Squires v County of Orleans*, 284 AD2d 990, 990 [4th Dept 2001]; *Morales v Riverbay Corp.*, 226 AD2d 271, 271 [1st Dept 1996]). *Trincere* and the line of cases in which it stands establish the principle that a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it "unreasonably imperil[s] the safety of" a pedestrian (*Wilson v Jaybro Realty & Dev. Co.*, 289 NY 410, 412 [1943]).

The repetition of the phrase "not constituting a trap" in many Appellate Division opinions should not be taken to limit the means by which a plaintiff may demonstrate a question of fact concerning the hazard posed by a physically small defect. Liability does not "turn[ ] upon whether the hole or depression, causing the pedestrian to fall, . . . constitutes 'a trap' " (*Loughran v City of New York*, 298 NY 320, 321-322 [1948]). The case law provides numerous examples of factors that may render a physically small defect actionable, including a jagged edge (*see e.g. Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]; *Jacobsen v Krumholz*, 41 AD3d 128, 128-129 [1st Dept 2007]); a rough, irregular surface (*see e.g. Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458, 458 [1st Dept 2009]); the presence of other defects in the vicinity (*see e.g. Young v City of New York*, 250 AD2d 383, 384 [1st Dept 1998]); poor lighting (*see e.g. McKenzie v Crossroads Arena*, 291 AD2d 860, 860-861 [4th Dept 2002], *lv dismissed* 98 NY2d 647 [2002]); or a [*7]location—such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet (*see e.g. Brenner v Herricks Union Free Sch. Dist.*, 106 AD3d 766, 767 [2d Dept 2013]; *Wilson v Time Warner Cable*, 6 AD3d 801, 802 [3d Dept 2004]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]; *Glickman v City of New York*, 297 AD2d 220, 221 [1st Dept 2002]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000], *rearg denied* 2001 NY App Div LEXIS 1472 [1st Dept 2001]; *Jacobsen*, 41 AD3d at 128-129; *Tesak v Marine Midland Bank*, 254 AD2d 717, 718 [4th Dept 1998]).{**26 NY3d at 79}

Our survey of such cases indicates that the lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult

to traverse safely on foot. Attention to the specific circumstances is always required and undue or exclusive focus on whether a defect is a "trap" or "snare" is not in keeping with *Loughran* and *Trincere*.

Finally, the trivial defect doctrine is best understood with our well-established summary judgment standards in mind. In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the party opposing the motion to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.

V.

We now apply these principles to the cases before us on appeal.

In *Hutchinson*, defendant Sheridan met its burden of making a prima facie showing that the cylindrical projection was trivial as a matter of law by producing measurements indicating that it was only about one quarter of an inch in height and about five eighths of an inch in diameter, together with evidence of the surrounding circumstances. The dimensions are set out in the record on appeal, which contains photographs showing ruler measurements of the object.

Plaintiff Hutchinson, seeking to show a triable issue of fact concerning features of the defect that would magnify the hazard it presents, asserts that the object had an abrupt edge, was irregular in shape, and was firmly inserted into the sidewalk, so that, in the words of the dissenting Justices at the Appellate Division, it "could, without warning, snag a passerby's shoe" (110 AD3d at 556 [Acosta, J.P., and Saxe, J., dissenting]). Hutchinson also suggests that he was not required to look down at his feet while walking along the sidewalk.

The characteristics enumerated by Hutchinson—the abruptness of the projecting edge, the alleged irregularity of its shape, {**26 NY3d at 80} and its rigidity and firm insertion into the sidewalk—are not dispositive, being true of many contours in a sidewalk. Moreover, contrary to the assertions of Hutchinson and the Appellate Division dissenters, the test established by the case law in New York is not whether a defect is *capable* of catching a

pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances.

Here, the metal object that Hutchinson tripped over, protruding only about a quarter of an [*8]inch above the sidewalk, was in a well-illuminated location approximately in the middle of the sidewalk and in a place where a pedestrian would not be obliged by crowds or physical surroundings to look only ahead. The object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as a hazard. Its edge was not jagged and the surrounding surface was not uneven. Taking into account all the facts and circumstances presented, including but not limited to the dimensions of the metal object, we conclude that the defect was trivial as a matter of law.

The Appellate Division properly ruled that the defect was not actionable. There is accordingly no need for us to address Sheridan's alternative contention based on lack of actual or constructive notice.

VI.

Plaintiff Zelichenko argues that the trivial defect doctrine should be limited to municipal defendants or to cases involving accidents on sidewalks, and does not apply to his fall on an interior staircase. He asserts that absent the trivial defect doctrine, a municipality would be burdened with inspecting, maintaining and repairing miles of sidewalk so as to rid public paths of every slight defect resulting from weathering and from expansion and contraction with changes in temperature. By contrast, Zelichenko points out, this policy consideration does not apply to owners of buildings, who may reasonably be required to ensure that interior walkways and staircases are safe. Moreover, he argues, expectations differ in varying locations and a person typically expects indoor surfaces to be more uniform and level, because they are not subject to so many changes due to the forces of nature.

[2] While it is true that pedestrian expectations differ between exterior and interior walking surfaces, and the trivial{**26 NY3d at 81} defect doctrine may have salutary consequences for municipalities, we do not accept Zelichenko's invitation to reframe the law of personal injury liability so radically. The trivial defect doctrine is grounded on a fundamental principle that spans all types of liability: that if a "defect is so slight that no careful or prudent [person] would reasonably anticipate any danger from its existence," and

yet an accident occurs that is traceable to the defect, there is no liability (*Beltz v City of Yonkers*, 148 NY 67, 70 [1895]). This principle is equally applicable to private landlords and municipalities. Moreover, the trivial defect doctrine has been applied to defects on stairways, including those that are inside privately owned buildings (*see e.g. Cassizzi v Fordham Univ.*, 101 AD3d 645, 646 [1st Dept 2012]; *Sawicki v Conklin Realty Co., LLC*, 94 AD3d 1083, 1083 [2d Dept 2012]; *Vachon v State of New York*, 286 AD2d 528, 530 [3d Dept 2001]; *Slate v Fredonia Cent. School Dist.*, 256 AD2d 1210, 1210-1211 [4th Dept 1998]).

[3] Zelichenko's further contentions, however, convince us that reversal is required. The Appellate Division in *Zelichenko*, in examining "all of the facts presented" (117 AD3d at 1040) as required by *Trincere*, concluded as a matter of law that the defect was trivial, stating in particular that the "chip" was "located almost entirely on the edge of the . . . step . . . and not on the walking surface" (*id.*). This was error.[FN4]

In particular, viewing the evidence in the light most favorable to Zelichenko, as we must in this procedural posture, we conclude that the Appellate Division erroneously decided that the "chip" was not on the walking surface of a step tread. Zelichenko's{**26 NY3d at 82} expert, Sokoloff, citing Professor Templer, explained that, when descending a stairway, a human "foot can make contact with the end of the nosing" so that the walking surface of a step tread extends to the nosing. Indeed, in the photograph in the record of a foot positioned next to the "chip," the toe of the shoe extends across and over the nosing in a way that does not appear forced or unnatural.

Moreover, even if there were room on the step for a person to place his or her foot behind the defect, it would not follow as a matter of law that the defect is "not on the walking surface." That a person may place his or her foot on a step in such a way as to avoid the nosing does not imply that every person will always do so. What counts here is not whether a person could avoid the defect, but whether a person would invariably avoid the defect while walking in a manner typical of human beings descending stairs. A defect underneath a handrail (*see Puma*, 55 AD3d at 585-586) will presumably not be on the walking surface, but a defect in a place where a person may in the normal course of events place the weight of his or her body, resting on a foot, may be on the walking surface.

Here, the step tread had a missing piece, of irregular shape, 3¬ inches in width and at least one-half inch in depth, on the nosing of the step, where a person might step, and the record contains an expert affidavit explaining the necessity for step treads to be of uniform

horizontal depth. After examining all the pertinent facts and circumstances of this case, as we are required to, we conclude that a material triable issue of fact exists regarding whether the defect was trivial.

For these reasons, the Appellate Division erred in concluding that the defect was nonactionable. Moreover, we agree with Supreme Court that an issue of fact exists as to actual or constructive notice (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Taylor v New York City Tr. Auth.*, 48 NY2d 903, 904 [1979]). Therefore, the Appellate Division erred in granting 301 Oriental's summary judgment motion.

VII.

[4] In *Adler*, the summary judgment record, which included deposition testimony and indistinct photographs, but no measurements of the alleged defect, is inconclusive. Without [*9]evidence of the dimensions of the "clump," it is not possible to determine whether it is the kind of physically small defect to{**26 NY3d at 83} which the trivial defect doctrine applies. We hold that defendants failed to meet their initial burden of making a prima facie showing of entitlement to judgment as a matter of law. The burden therefore did not shift to Adler to establish the existence of a material triable issue of fact.

We do not imply that there are no cases in which a fact-finding court could examine photographs and justifiably infer from them as a matter of law that an elevation or depression or other defect is so slight as to be trivial as a matter of law (*see e.g. Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006] ["The photographs of the stair introduced into evidence by the plaintiff show the patch to be a small, worn, rectangular-shaped area on the metal safety treads at the edge of the step. It has no sharp edges and appears shallow"]; *Julian v Sementelli*, 234 AD2d 866, 867 [3d Dept 1996] ["Our examination of those photographs shows only a slight height differential between two slabs of the sidewalk"]). Photographs that are acknowledged to "fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (*Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 984 [2d Dept 2011]). But we hold that the photographs in this case, whether alone or combined with the deposition testimony, cannot support a ruling of triviality as a matter of law.

For this reason, we agree with Adler's principal argument that the Appellate Division erred in holding that the alleged defect was trivial. Contrary to Adler's subsidiary contention,

however, the Appellate Division committed no error in declining to rule on the notice issue, after it ruled in defendants' favor on another basis. A defendant moving for summary judgment in a slip-and-fall case is not obliged to demonstrate lack of notice if it can prevail on another ground (*see generally Bachrach v Waldbaum, Inc.*, 261 AD2d 426, 426 [2d Dept 1999]; *Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 294-295 [1st Dept 1994]).

[5] Nevertheless, because we rule against defendants on their other ground, we must consider the notice issue, and we hold that defendants failed to meet their burden to make a prima facie showing that they neither created nor had notice of the defect as a matter of law. The deposition testimony left significant doubt as to who painted the staircase, when it was painted, and whether the "clump" was "visible and apparent and . . . exist[ed] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon*, 67 NY2d at 837).

{**26 NY3d at 84} VIII.

Trincere stands for the proposition that a defendant cannot use the trivial defect doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect, and that the reviewing court is obliged to consider all the facts and circumstances presented when it decides the motion. Summary judgment should not be granted to a defendant on the basis of "a mechanistic disposition of a case based exclusively on the dimension[s] of the . . . defect" (*Trincere*, 90 NY2d at 977-978), and neither should summary judgment be granted in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive (*see* section VII, discussing *Adler*). Moreover, in deciding whether a defendant has met its burden of showing prima facie triviality, a court must—except in unusual circumstances not present here—avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere (*see* section VI, discussing *Zelichenko*). In sum, there are no shortcuts to summary judgment in a slip-and-fall case.

[*10]

Accordingly, in *Hutchinson*, the order of the Appellate Division should be affirmed, with costs; in *Zelichenko*, the order of the Appellate Division should be reversed, with costs, and defendant's motion for summary judgment denied; and, in *Adler*, the order of the Appellate Division should be reversed, with costs, and defendants' motion for summary judgment denied.

In *Hutchinson v Sheridan Hill House Corp.*: Order affirmed, with costs.

Opinion by Judge Fahey. Chief Judge Lippman and Judges Pigott, Rivera, Abdus-Salaam and Stein concur.

In *Zelichenko v 301 Oriental Blvd., LLC*: Order reversed, with costs, and defendant's motion for summary judgment denied.

Opinion by Judge Fahey. Chief Judge Lippman and Judges Pigott, Rivera, Abdus-Salaam and Stein concur.

In *Adler v QPI-VIII LLC*: Order reversed, with costs, and defendants' motion for summary judgment denied.

Opinion by Judge Fahey. Chief Judge Lippman and Judges Pigott, Rivera, Abdus-Salaam and Stein concur.

Footnotes

Footnote 1:A consulting engineer retained by Hutchinson's counsel visited the accident site in May 2011, by which time the protruding object had been removed. In an unsworn report submitted by Hutchinson as an expert witness disclosure, the engineer stated, without explanation, his opinion that the diameter of the metal object had been about 1¬ inches.

Footnote 2: In dicta, Supreme Court found the engineer's report admissible under *Kearse v New York City Tr. Auth.* (16 AD3d 45, 47 n 1 [2d Dept 2005]), but inconclusive, and did not credit his estimate of the object's diameter.

Footnote 3: Adler herself did not offer a measurement of the protrusion at any stage of this action.

Footnote 4: The Second Department has attached significance to whether a defect was on "the walking surface" of a stairway in a number of recent cases. In *Maciaszek v Sloninski* (105 AD3d 1012, 1013 [2d Dept 2013]), the Second Department held a hole in a staircase to be trivial as a matter of law on the basis of circumstances that included that the hole "was one inch in diameter, half an inch deep, and located at the edge of the step." In *Grosskopf v 8320 Parkway Towers Corp.* (88 AD3d 765, 766 [2d Dept 2011]), the Court held that the alleged defect "consisted of a chip measuring less than two inches wide, located almost entirely on the nosing of the . . . step . . . and not on the walking surface," and concluded that the

"chip" was trivial as a matter of law. In an earlier, distinguishable case, *Puma v New York City Tr. Auth.* (55 AD3d 585 [2d Dept 2008]), the Second Department held that there was no defective or dangerous condition because the plaintiff's fall in a subway station occurred when his foot became caught in a drainage canal "located at the extreme edge of the stairway tread, underneath the handrail" (*id.* at 585-586), rather than on a walking surface. We take no position on whether these cases were correctly decided.

Imran v R. Barany Monuments, Inc.

2018 NY Slip Op 08921 [167 AD3d 992]

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Appellate Division, Second Department

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As corrected through Wednesday, January 30, 2019

[*1]

Halina A. Imran, Respondent,
v
R. Barany Monuments, Inc., et al., Appellants, et al., Defendants.

Picciano & Scahill, P.C., Westbury, NY (Francis J. Scahill and Andrea E. Ferrucci of counsel), for appellants.

Irwin & Poznanski, LLP (Joshua Brian Irwin and Pollack, Pollack, Isaac & DeCicco, LLP, New York, NY [Brian J. Isaac], of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants R. Barany Monuments, Inc., and Randy R. Barany appeal from an order of the Supreme Court, Queens County (Martin E. Ritholtz, J.), entered March 23, 2016. The order granted the plaintiff's motion pursuant to CPLR 4404 (a) to set aside a jury verdict on the issue of damages in the interest of justice and for a new trial.

Ordered that the order is affirmed, with costs.

On April 17, 2012, the plaintiff was involved in a four-vehicle collision. At the time of the accident, the plaintiff was a passenger in the front-most vehicle. In the bill of particulars, the plaintiff alleged, inter alia, that she sustained injuries to the cervical and lumbar regions of her spine and both knees as a result of the accident. In an order dated January 7, 2015, the Supreme Court granted the plaintiff's motion for summary judgment on the issue of liability against the defendants R. Barany Monuments, Inc., and Randy R. Barany (hereinafter together the defendants).

On June 5, 2015, the matter proceeded to a jury trial on the issue of damages against the defendants. During that trial, the defendants presented the testimony of a biomechanical engineering expert, Joseph McGowan. McGowan testified regarding delta-v, which is the change in velocity of a vehicle during a collision. Relying on certain photographs of the vehicle occupied by the plaintiff, a Honda CR-V, and the second front-most vehicle, a Ford Focus, which struck the Honda CR-V, damage repair estimates for both vehicles, and a crash test involving a Honda CR-V, McGowan concluded that the delta-v for the collision between the two vehicles was 5.7 miles per hour. He then utilized different crash tests to determine what happens to occupants in crashes with a similar delta-v. He concluded that the impact from the second front-most vehicle to the vehicle occupied by the plaintiff would not have caused the plaintiff's alleged injuries to the lumbar region of her spine or her knees.

Thereafter, the jury returned a verdict in favor of the defendants on the issue of damages, finding that the plaintiff did not sustain a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) as a result of the accident. Subsequently, the plaintiff moved pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial, arguing, inter alia, that McGowan's testimony on causation should have been precluded. The Supreme Court granted the motion, and the defendants appeal.

Under the circumstances of this case, we agree with the Supreme Court's determination to grant the plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of damages (*see Dovberg v Laubach*, 154 AD3d 810 [2017]). "An expert's opinion 'must be based on facts in the record or personally known to the witness' " (*Pascocello v Jibone*, 161 AD3d 516, 516 [2018], quoting *Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984]). Here, a proper foundation was lacking for the admission of McGowan's opinion (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). Among other things, McGowan failed to calculate the force exerted by all four vehicles, the crash test he utilized to determine the delta-v differed in several significant respects from the instant accident, and he reviewed simulations in which the weight of the dummies was not similar to that of the plaintiff.

The defendants' remaining contentions either are without merit or need not be reached in light of our determination. Rivera, J.P., Leventhal, Hinds-Radix and Brathwaite Nelson, JJ., concur.

Karpel v National Grid Generation, LLC

2019 NY Slip Op 05651 [174 AD3d 695]

July 17, 2019

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, September 4, 2019

[*1]

Nina Karpel, Appellant,
v
National Grid Generation, LLC, et al., Respondents, et al., Defendant.

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York, NY (Howard Schatz of counsel), for appellant.

Lavin, Cedrone, Graver, Boyd & DiSipio, New York, NY (Francis F. Quinn of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Robert A. Bruno, J.), dated June 5, 2018. The order granted the motion of the defendants National Grid Generation, LLC, Asplundh Construction Corp., and County of Nassau for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendants National Grid Generation, LLC, Asplundh Construction Corp., and County of Nassau for summary judgment dismissing the complaint insofar as asserted against them is denied.

On October 10, 2018, at approximately 8:00 a.m., the plaintiff was jogging on Hicks Street, a two-way street with one lane of traffic in each direction, in Great Neck. The plaintiff, who was facing oncoming traffic, noticed a vehicle approaching and began moving to the left toward the side of the road. The plaintiff, looking straight ahead, allegedly was injured when she tripped and fell over a raised edge of a depression in the roadway as she was stepping out of the depression. At the time of the incident, the defendant Asplundh Construction Corp.

(hereinafter Asplundh), pursuant to a contract with the defendant National Grid Generation, LLC (hereinafter National Grid), was performing excavation work in the vicinity in connection with the installation of gas lines beneath the subject road. The plaintiff subsequently commenced this action to recover damages for personal injuries against, among others, Asplundh, National Grid, and the defendant County of Nassau (hereinafter collectively the defendants). After discovery, the defendants moved for summary judgment dismissing the complaint insofar as asserted against them, arguing, inter alia, that the alleged defective condition was trivial and therefore not actionable, or was open and obvious and not inherently dangerous. The Supreme Court granted the motion, and the plaintiff appeals.

Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Trincere v County of Suffolk*, 90 NY2d at 978 [internal quotation marks omitted]; *see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 77).

Here, the defendants failed to establish, prima facie, that the alleged defect was trivial as a matter of law and therefore not actionable. In support of their motion, the defendants submitted, inter alia, transcripts of the deposition testimony of the plaintiff and a general foreman of Asplundh, as well as photographs depicting the condition of the alleged defect as it existed at the time of the accident. The evidence demonstrated that Asplundh was in the process of restoring the excavated area in the location of the plaintiff's accident and that the alleged defective condition measured approximately four-feet wide, eight-feet long, and at least one-inch deep. Contrary to the defendants' contention, they failed to demonstrate, prima facie, that the alleged defect was physically insignificant, and that the characteristics of the defect and the surrounding circumstances did not increase the risks it posed (*see Simos v Vic-Armen Realty, LLC*, 161 AD3d 1023, 1024 [2018]; *Cortes v Taravella Family Trust*, 158 AD3d 788, 789 [2018]; *Craig v Meadowbrook Pointe Homeowner's Assn., Inc.*, 158 AD3d 601, 603 [2018]).

In addition, although the photographs of the accident site showed that the alleged defect had orange markings around its perimeter, " '[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' " (*Doughim v M & US Prop., Inc.*, 120 AD3d 466, 468 [2014], quoting *Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2011]; *see Stoppeli v Yacenda*, 78 AD3d 815, 816 [2010]). Furthermore, "proof that a dangerous condition is open and obvious does not preclude a finding of liability . . . but is relevant to the issue of the plaintiff's comparative negligence" (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]). "Thus, to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous" (*Crosby v Southport, LLC*, 169 AD3d 637, 640 [2019]; *see Cupo v Karfunkel*, 1 AD3d at 52). Here, the defendants failed to establish, prima facie, that the alleged defect was open and obvious and not inherently dangerous given the surrounding circumstances at the time of the accident (*see Dillon v Town of Smithtown*, 165 AD3d 1231, 1232 [2018]; *Dalton v North Ritz Club*, 147 AD3d 1017, 1018 [2017]; *Parente v City of New York*, 144 AD3d 1117, 1118 [2016]). Finally, contrary to the defendants' contention, the doctrine of primary assumption of risk is inapplicable to this action (*see Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]; *Behr v County of Nassau*, 124 AD3d 708 [2015]; *Ashbourne v City of New York*, 82 AD3d 461, 463 [2011]; *Cotty v Town of Southampton*, 64 AD3d 251, 257 [2009]).

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Chambers, J.P., Cohen, Duffy and Iannacci, JJ., concur.

Locke v Calamit

2019 NY Slip Op 06166 [175 AD3d 560]

August 21, 2019

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, October 2, 2019

[*1]

Denise Locke et al., Appellants,
v
Michael Calamit, Also Known as Michael Calamita, Respondent.

Elovich & Adell, Long Beach, NY (A. Trudy Adell, Mitchel Sommer, and Darryn Solotoff of counsel), for appellants.

DeSena & Sweeney, LLP, Bohemia, NY (Shawn P. O'Shaughnessy of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Randy Sue Marber, J.), entered October 27, 2017. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff Denise Locke (hereinafter the plaintiff), and her husband suing derivatively, commenced this action to recover damages for personal injuries the plaintiff alleges she sustained when she tripped and fell on a door saddle in a house she and her husband rented from the defendant, who owned the house. According to the plaintiff, she tripped and was injured as she attempted to enter the bathroom from the living room. The bathroom floor, which consisted of white tiles with a white marble door saddle in the doorway, was two inches higher than the adjoining living room floor, which consisted of hardwood. The defendant moved for summary judgment dismissing the complaint, contending, among other things, that the condition of the door saddle was open and obvious and not inherently dangerous. The Supreme Court granted the motion. The plaintiffs appeal.

An owner of land has a duty to maintain his property in a reasonably safe condition (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]; *Gani v Avenue R Sephardic Congregation*, 159 AD3d 873, 873 [2018]). However, there is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see Graffino v City of New York*, 162 AD3d 990, 991 [2018]; *Costidis v City of New York*, 159 AD3d 871, 871 [2018]).

Here, the defendant established, prima facie, that the condition of the door saddle was open and obvious, readily observable by those employing the reasonable use of their senses, known to the plaintiff prior to the accident, and not an inherently dangerous condition (*see Graffino v City of New York*, 162 AD3d at 991; *Espinosa v Fairfield Props. Group, LLC*, 160 AD3d 927, 927 [2018]). In opposition, the evidence submitted by the plaintiffs, which included, inter alia, an affidavit of the plaintiffs' expert offering only a conclusory opinion (*see Cardia v Willchester Holdings, LLC*, 35 AD3d 336, 337 [2006]), was insufficient to raise a triable issue of fact.

The parties' remaining contentions either are without merit or have been rendered academic in light of our determination.

Accordingly, we agree with the Supreme Court's determination to grant the defendant's motion for summary judgment dismissing the complaint. Dillon, J.P., Austin, Miller and Duffy, JJ., concur.

Padarat v New York City Tr. Auth.

2019 NY Slip Op 06406 [175 AD3d 700]

August 28, 2019

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, October 2, 2019

[*1]

Rosita Padarat, Respondent,
v
New York City Transit Authority et al., Defendants, Triangle Associates, Respondent, and VAJ Enterprises Corp., Appellant.

Paganini, Cioci, Pinter, Cusumano & Farole (Gannon, Rosenfarb & Drossman, New York, NY [Lisa L. Gokhulsingh and Edward Fleck], of counsel), for appellant.

Mallilo & Grossman, Flushing, NY (Francesco Pomara, Jr., and Yelena Ruderman of counsel), for plaintiff-respondent.

Margaret G. Klein (Mischel & Horn, P.C., New York, NY [Scott T. Horn, Arshia Hourizadeh, and Lauren Bryant], of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendant VAJ Enterprises Corp. appeals from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), dated June 14, 2016. The order denied that defendant's motion for leave to renew and reargue its prior motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Ordered that the appeal from so much of the order as denied that branch of the motion of the defendant VAJ Enterprises Corp. which was for leave to reargue its prior motion for summary judgment is dismissed, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order is reversed insofar as reviewed, on the law, on the facts, and in the exercise of discretion, that branch of the motion of the defendant VAJ Enterprises Corp. which was for leave to renew its prior motion for summary judgment is granted and, upon

renewal, the prior motion of the defendant VAJ Enterprises Corp. for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted on the merits; and it is further,

Ordered that one bill of costs is awarded to the appellant.

The plaintiff alleges that she sustained injuries when she tripped and fell as a result of a defective condition on a public sidewalk abutting the China Garden restaurant (hereinafter the restaurant). The restaurant is owned by the defendant VAJ Enterprises Corp. (hereinafter VAJ), which is a tenant of premises owned by the defendant Triangle Associates.

VAJ moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the grounds that the alleged defective condition was trivial as a matter of law; that VAJ was not an owner of the building and had no statutory duty to repair or maintain the sidewalk pursuant to section 7-210 of the Administrative Code of the City of New York; that VAJ did not have a duty to repair or maintain the sidewalk since it did not create the alleged condition, or make special use of the sidewalk abutting the restaurant; and that VAJ did not have a contractual obligation under the terms of the lease to repair or maintain the sidewalk abutting the restaurant.

In an order dated December 9, 2014, the Supreme Court held that section 7-210 of the Administrative Code imposes a nondelegable duty only upon an owner, and that no cause of action lies against VAJ, as a tenant, based on the Administrative Code. The court granted VAJ's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the ground that the alleged defective condition was trivial as a matter of law. The court did not consider the alternative grounds raised by VAJ. The plaintiff appealed from so much of the order as granted that branch of VAJ's motion which was for summary judgment dismissing the complaint insofar as asserted against VAJ, and this Court reversed, concluding, in a decision and order dated March 23, 2016, that VAJ failed to make a prima facie showing that the alleged defective condition was trivial as a matter of law (*see Padarat v New York City Tr. Auth.*, 137 AD3d 1095 [2016]).

Thereafter, VAJ moved in the Supreme Court for leave to renew and reargue its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, on the alternative grounds that the Supreme Court had declined to address in its prior decision. In an order dated June 14, 2016, the court denied VAJ's motion. The court

reasoned that it lacked the authority to grant renewal because this Court, upon reversing the order awarding VAJ summary judgment, concluded that VAJ's motion should have been denied, stated that the Supreme Court should have denied VAJ's motion without regard to the sufficiency of the plaintiff's opposition, and did not remit the matter to the Supreme Court to determine VAJ's alternative grounds for summary judgment. VAJ appeals.

Contrary to the Supreme Court's determination, it was not precluded from granting renewal, or from considering and determining, on the merits, VAJ's additional grounds for summary judgment dismissing the complaint and all cross claims insofar as asserted against VAJ, due to this Court's conclusion that the Supreme Court should have denied the motion (*see e.g. Utica Mut. Ins. Co. v Brooklyn Navy Yard Dev. Corp.*, 83 AD3d 817 [2011]).

On the plaintiff's prior appeal from the Supreme Court's order granting VAJ's summary judgment motion, this Court had before it the single issue of whether VAJ had established its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it on the ground that the alleged defective condition was trivial. In the decision and order dated March 23, 2016, this Court, after setting forth the legal standards required to determine whether a defect is trivial and not actionable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Mazza v Our Lady of Perpetual Help R.C. Church*, 134 AD3d 1073 [2015]; *Grundstrom v Papadopoulos*, 117 AD3d 788 [2014]; *Deviva v Bourbon St. Fine Foods & Spirit*, 116 AD3d 654 [2014]), determined that VAJ failed to make a prima facie showing that the alleged defective condition was trivial because VAJ failed to submit any measurements of the dimensions of the alleged defective condition (*see Padarat v New York City Tr. Auth.*, 137 AD3d 1095 [2016]). No other issues or grounds for summary judgment were considered by this Court. Thus, this Court's denial of the motion signified only that the branch of the motion which was for summary judgment dismissing the complaint insofar as asserted against VAJ, on the ground that the defect was trivial and not actionable, was not properly granted.

While the Supreme Court was understandably reluctant to act in a manner that may have seemed contrary to this Court's decision and order, when read as a whole, that decision and order determined only that VAJ's motion, insofar as it sought summary judgment dismissing the complaint insofar as asserted against VAJ on the ground that the alleged defective condition was trivial as a matter of law, should have been denied.

Thus, the Supreme Court was not precluded from granting VAJ leave to renew its prior motion and considering its additional proffered grounds for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Nor was the Supreme Court's authority to grant renewal, or to consider and determine the merits of VAJ's additional grounds for summary judgment, dependent upon this Court remitting the matter to the Supreme Court for consideration of those additional grounds (*see e.g. Utica Mut. Ins. Co. v Brooklyn Navy Yard Dev. Corp.*, 83 AD3d 817 [2011]).

In the interest of judicial economy, and under the circumstances of this case where the record is complete, we deem it appropriate to address the merits of VAJ's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, rather than remit the matter to the Supreme Court, Queens County, to do so (*see Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796, 797 [2015]; *Krause v Lobacz*, 131 AD3d 1128, 1129 [2015]).

"As a general rule, a landowner or tenant will not be liable to a pedestrian injured by a defect in a public sidewalk abutting its premises" (*Cannizzaro v Simco Mgt. Co.*, 26 AD3d 401, 401 [2006]; *see Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]). An abutting landowner or tenant will only be liable if it either " 'created the defect, caused it to occur by a special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk' " (*Cannizzaro v Simco Mgt. Co.*, 26 AD3d at 402, quoting *Jeanty v Benin*, 1 AD3d 566, 567 [2003]; *see Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726 [2003]).

VAJ established, prima facie, that it did not create the defect that allegedly caused the plaintiff's fall. VAJ submitted evidence in the form of transcripts of deposition testimony and photographs, demonstrating that there had been no changes to the sidewalk area in front of the restaurant from the time the restaurant started operation until the date of the incident, nor had there been any repairs or renovation work done to the sidewalk during that same time period (*see Devine v City of New York*, 300 AD2d 532, 533 [2002]).

With regard to the plaintiff's contention that VAJ made special use of the area of the sidewalk where the plaintiff fell, this theory was raised by the plaintiff for the first time in opposition to the motion for summary judgment, and thus cannot be considered as a basis for defeating summary judgment (*see Taustine v Incorporated Vil. of Lindenhurst*, 158 AD3d 785, 786 [2018]; *Methal v City of New York*, 116 AD3d 743, 744 [2014]; *Pinn v Baker's*

Variety, 32 AD3d 463, 464 [2006]; *Yaeger v UCC Constructors*, 281 AD2d 990, 991 [2001]). This contention of the plaintiff was opposed for the first time by VAJ on appeal. In any event, there is no merit to the plaintiff's contention that VAJ made special use for its own benefit of the area of the "sloped," "slanted" sidewalk where the plaintiff fell (*see Methal v City of New York*, 116 AD3d at 744; *Devine v City of New York*, 300 AD2d at 533). VAJ established that the "sloped," "slanted" sidewalk was present when VAJ first assumed the lease in 2009, and was not created for VAJ's use or at its behest; VAJ did not derive any special benefit that was unrelated to the public use (*see Kaufman v Silver*, 90 NY2d 204 [1997]; *Methal v City of New York*, 116 AD3d at 744; *Minott v City of New York*, 230 AD2d 719, 720 [1996]). Additionally, the restaurant entry flanked by two metal railings on either side did not extend into the public sidewalk area where the plaintiff allegedly fell, and there was no evidence that the entry way to the restaurant contributed in any way to the allegedly defective condition or played a part in the plaintiff's fall (*see MacLeod v Pete's Tavern*, 87 NY2d 912 [1996]). Moreover, the entry way flanked by the two metal railings did not define the plaintiff's path, in effect directing her toward the alleged defect and causing her to fall (*cf. Curtis v City of New York*, 179 AD2d 432 [1992]).

Further, under the terms of the lease between VAJ and the defendant landlord/owner, Triangle Associates, VAJ had no obligation to maintain the sidewalk (*see O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [2013]).

Therefore, VAJ demonstrated its prima facie entitlement to judgment as a matter of law. In opposition, the plaintiff failed to raise a triable issue of fact (*see Bousquet v Water View Realty Corp.*, 161 AD3d 718, 719 [2018]).

Accordingly, the Supreme Court should have granted renewal, and, upon renewal, granted VAJ's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Balkin, J.P., Miller, Brathwaite Nelson and Christopher, JJ., concur.

Pascocello v Jibone
2018 NY Slip Op 03466 [161 AD3d 516]
May 10, 2018
Appellate Division, First Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, June 27, 2018

[*1]

June M. Pascocello, Respondent,
v
Augustine Jibone et al., Appellants. Carole Antouri, Respondent, v Augustine Jibone et al., Appellants. (And a Third-Party Action.)

Picciano & Scahill P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Roth & Roth LLP, New York (Elliot Shields of counsel), for June Pascocello, respondent.

Abend & Silber, PLLC, New York (Josh Silber of counsel), for Carole Antouri, respondent.

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered December 5, 2017, which, in these related actions for personal injuries sustained in a motor vehicle accident, granted the joint motion of plaintiffs to preclude the testimony of defendants' biomechanical engineer Dr. Kevin Toosi at trial to the extent that his opinion is based on certain photographic evidence, unanimously affirmed, without costs.

An expert's opinion "must be based on facts in the record or personally known to the witness" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984] [internal quotation marks omitted]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]), and in the absence of such record support, an expert's opinion is without probative force (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Here, Supreme Court properly precluded Dr. Toosi from offering an opinion based on photographs for which no proper foundation had been established.

We have considered defendants' remaining contentions and find them unavailing. Concur —Friedman, J.P., Tom, Kapnick, Kahn, Kern, JJ.

Sarab v BJ's Wholesale Club

2019 NY Slip Op 06009 [174 AD3d 933]

July 31, 2019

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, September 4, 2019

[*1]

Lois Sarab et al., Appellants,
v
BJ's Wholesale Club, Respondent.

Basch & Keegan, LLP, Kingston, NY (Derek J. Spada of counsel), for appellants.

Morrison Mahoney LLP, New York, NY (Demi Sophocleous of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Dutchess County (Edward T. McLoughlin, J.), dated August 21, 2018. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff Lois Sarab (hereinafter the injured plaintiff) allegedly tripped and fell over the corner of a wooden pallet which protruded from beneath a display of cantaloupes in the defendant's store. The injured plaintiff, and her husband suing derivatively, commenced the instant action against the defendant, inter alia, to recover damages for personal injuries, alleging that the defendant was negligent in, among other things, allowing a dangerous condition to exist on its premises. The defendant moved for summary judgment dismissing the complaint on the ground, among others, that the allegedly dangerous condition was open and obvious, and not inherently dangerous as a matter of law. The Supreme Court granted the defendant's motion, and the plaintiffs appeal.

While a landowner has a duty to maintain its premises in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), there is no duty to protect or warn against an

open and obvious condition that is not inherently dangerous (*see Graffino v City of New York*, 162 AD3d 990, 991 [2018]; *Genefar v Great Neck Park Dist.*, 156 AD3d 762 [2017]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]). Here, the defendant established, prima facie, that the pallet was open and obvious and readily observable by the reasonable use of one's senses, and that the pallet was not inherently dangerous (*see Frankl v Costco Wholesale Corp.*, 165 AD3d 760, 761 [2018]; *Bartholomew v Sears Roebuck & Co.*, 159 AD3d 786, 787 [2018]; *Gerner v Shop-Rite of Uniondale, Inc.*, 148 AD3d 1122, 1123 [2017]; *Benjamin v Trade Fair Supermarket, Inc.*, 119 AD3d 880, 881 [2014]). In opposition, the plaintiffs failed to raise a triable issue of fact.

Accordingly, we agree with the Supreme Court's determination to grant the defendant's motion for summary judgment dismissing the complaint. Rivera, J.P., Hinds-Radix, LaSalle and Iannacci, JJ., concur.

Shah v Rahman

2018 NY Slip Op 08342 [167 AD3d 671]

December 5, 2018

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, January 30, 2019

[*1]

Syed A. Shah, Appellant,
v
Mo M. Rahman et al., Respondents.

Grover & Fensterstock, P.C., New York, NY (Simon B. Landsberg of counsel), for appellant.

Russo & Toner, LLP, New York, NY (Cecil E. Floyd and Josh H. Kardisch of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Mark I. Partnow, J.), dated March 18, 2016. The judgment, upon a jury verdict finding that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, is in favor of the defendants and against the plaintiff dismissing the complaint.

Ordered that the judgment is affirmed, with costs.

The plaintiff commenced this action against the defendants to recover damages for personal injuries he allegedly sustained when the vehicle he was driving was struck by a vehicle owned by the defendant Viacheslav Abrashkin and driven by the defendant Mo M. Rahman. Subsequently, the plaintiff was awarded summary judgment on the issue of liability. At a trial on the issue of damages, the plaintiff moved to preclude the defendants' expert, a biomechanical engineer, from testifying or, in the alternative, for a hearing on the admissibility of that expert's testimony pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]). The plaintiff argued, in effect, that the expert's testimony was not based on generally accepted principles and methodologies, and that there was not a proper foundation for the

admission of the expert's opinion. During oral argument, the defense attorney represented that the Supreme Court Justice recently presided over a trial where the same expert was permitted to testify regarding biomechanics and causation. The Supreme Court permitted the expert's testimony without first holding a hearing to determine its admissibility.

The expert gave trial testimony to the effect that the collision could not have caused the plaintiff's alleged injuries. The jury returned a verdict in favor of the defendants, and the Supreme Court issued a judgment in favor of the defendants and against the plaintiff dismissing the complaint. The plaintiff appeals from the judgment, arguing that the court erred in not precluding the expert's testimony or, in the alternative, in not holding a pretrial *Frye* hearing.

"The long-recognized rule of *Frye v United States* . . . is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained [*2]general acceptance in its specified field" (*Lipschitz v Stein*, 65 AD3d 573, 575 [2009] [internal quotation marks omitted]; *see Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 780 [2014]; *Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]; *People v Wesley*, 83 NY2d 417, 422 [1994]; *Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 71-72 [2011]). "General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert" (*Dovberg v Laubach*, 154 AD3d 810, 813 [2017]; *see Parker v Mobil Oil Corp.*, 16 AD3d 648, 650 [2005], *affd* 7 NY3d 434 [2006]). Further, even if the proffered expert opinion is based upon accepted methods, it must satisfy "the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case" (*Parker v Mobil Oil Corp.*, 7 NY3d at 447; *see Ratner v McNeil-PPC, Inc.*, 91 AD3d at 72-73).

In this case, we agree with the Supreme Court's determination to permit the expert's testimony without first holding a hearing to determine its admissibility (*see Vargas v Sabri*, 115 AD3d 505 [2014]; *see also Plate v Palisade Film Delivery Corp.*, 39 AD3d 835, 837 [2007]; *Cardin v Christie*, 283 AD2d 978, 979 [2001]). "A court need not hold a *Frye* hearing where[, as in the case at bar,] it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony" (*People v LeGrand*, 8 NY3d 449, 458 [2007]; *compare e.g. Vargas v Sabri*, 115 AD3d at 505-506, *Gonzalez v Palen*, 48 Misc 3d 135[A], 2015 NY Slip Op 51101[U] [2015], *with Singh v Siddique*, 52

Misc 3d 1204[A], 2016 NY Slip Op 50987[U] [2016]). Moreover, in this particular case, there was a proper foundation for the admission of the expert's opinion.

We note that the plaintiff does not contend that the verdict was contrary to the weight of the evidence. Mastro, J.P., Leventhal, Sgroi and Iannacci, JJ., concur.

Shillingford v New York City Tr. Auth.

2017 NY Slip Op 00945 [147 AD3d 465]

February 7, 2017

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, March 29, 2017

[*1]

Melissa Shillingford, Respondent,
v
New York City Transit Authority et al., Appellants.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Robert J. Bellinson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 7, 2016, in favor of plaintiff and against defendants in the total amount of $3,003,704.02, unanimously reversed, on the law, without costs, and the matter remanded for a new trial on damages.

In opposition to plaintiff's motion to preclude defendants' biomechanical engineer from testifying, defendants failed to present any scientific literature to support the expert's theories that bulging discs without damage to adjacent bony structures do not result from a force to the spine in its normal range of motion, that daily activity acceleration data may be used as a proxy for injury risk, or that crash-test dummy testing may be used to establish injury thresholds. Accordingly, Supreme Court properly precluded the expert's testimony regarding those theories (*see Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 418 [1st Dept 2008], *appeal dismissed* 12 NY3d 847 [2009]). However, Supreme Court erred in precluding the expert's testimony insofar as he sought to opine on the maximum force that may have been applied to plaintiff and the likelihood of resulting injury, without relying on the aforementioned theories; plaintiff's expert merely disagreed with defendants' expert's methodology and conclusions, presenting a battle of the experts for the jury to resolve (*see Vargas v Sabri*, 115 AD3d 505, 505-506 [1st Dept 2014]). Further, Supreme Court erred in precluding photographs of the vehicles after the accident, which were "probative and

admissible . . . [on] the question of damages" (*Homsey v Castellana*, 289 AD2d 201, 201 [2d Dept 2001] [internal quotation marks omitted]). Concur—Friedman, J.P., Andrias, Moskowitz, Kapnick and Kahn, JJ.

Vargas v Sabri

2014 NY Slip Op 01666 [115 AD3d 505]

March 13, 2014

Appellate Division, First Department

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As corrected through Wednesday, April 30, 2014

Ana M. Vargas et al., Appellants,
v
Akin Sabri, Respondent.

—[*1] Brand Brand Nomberg & Rosenbaum, LLP, New York (Brett J. Nomberg of counsel), for appellants.

Bleakley Platt & Schmidt, LLP, White Plains (John A. Risi of counsel), for respondent.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 1, 2013, which denied plaintiffs' motion for a *Frye* hearing, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in denying plaintiffs' request for a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine the admissibility of the anticipated testimony of Dr. McRae, a biomechanical engineer. The fact that Dr. McRae lacked medical training did not render him unqualified to render an opinion as an expert that the force of the subject motor vehicle accident could not have caused the injuries allegedly sustained (*see e.g. Melo v Morm Mgt. Co.*, 93 AD3d 499, 499-500 [1st Dept 2012]). McRae's stated education, background, experience, and areas of specialty, rendered him able him to testify as to the mechanics of injury (*see Colarossi v C.R. Bard, Inc.*, 113 AD3d 407 [1st Dept 2014]).

Plaintiffs' challenge to Dr. McRae's qualifications and the fact that his opinion conflicted with that of defendant's orthopedic expert go to the weight and not the admissibility of his testimony (*see Williams v Halpern*, 25 AD3d 467, 468 [1st Dept 2006]). Plaintiffs' challenge to the basis for Dr. McRae's opinion addressed only portions of the evidence relied upon by him. Furthermore, the record shows that plaintiffs improperly attempted to put defendant to his proof [*2]by asserting, in the moving papers, that "defendant has not shown that the

hearsay 'studies' Mr. McRae relies upon are reliable," without identifying any of the studies referred to or explaining the basis for the belief that the studies were not reliable. Concur—Acosta, J.P., Renwick, Feinman and Clark, JJ.

KOWALSKI & DEVITO

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BIOGRAPHY

Mr. DeVito joined the firm in 2000 as a Trial Attorney. He began his career as a law clerk for the Superior Court of Connecticut. Shortly after completing his clerkship he began his litigation experience with a prominent plaintiff trial firm in New York City. In 1996, he joined an insurance carrier's staff counsel office and led an affirmative motion unit. In 1998, he was promoted to trial attorney and exclusively handled trial matters in Kings County.

After joining Staff Counsel he was promoted to Senior Trial Attorney and became a dedicated handling attorney for a major municipal contractor and city agencies. From 2006 to 2008 he managed bad-faith litigation throughout the country for personal lines. He has handled construction, automobile, UM/UIM, and general liability cases. He is active in Staff Counsel's CLE and CE training program and has developed and presented courses on defending Traumatic Brain Injury claims, Premises Liability, Life Care Plans and the New York City Administrative Code as applied to trip and fall cases. He has also served as a Continuing Legal Education Speaker and Instructor for the Defense Association of New York (DANY) and the National Business Institute (NBI).

EDUCATION

- B.A., Adelphi University, 1990 *Cum Laude* with Honors in Liberal Studies
- J.D., Pace Law School, 1993

ADMITTED

- New York
- New Jersey
- Connecticut
- U.S. District Court, Southern District of New York
- U.S. District Court, Eastern District of New York
- U.S. District Court, District of New Jersey

MEMBERSHIPS

- Defense Association of New York, Inc.

ANGELA (DiDOMENICO) LEVITAN, Ph.D., CPE

PROFESSIONAL BIOGRAPHICAL OUTLINE

BACKGROUND

Dr. Levitan earned a Ph.D. and an M.S. in Industrial and Systems Engineering, with an emphasis in Human Factors Engineering, at Virginia Polytechnic Institute and State University, Blacksburg, Virginia. Dr. Levitan also earned an M.S. in Mathematics from Virginia Polytechnic Institute and State University and a B.A. in Mathematics at The University of Connecticut, Storrs, Connecticut. She is a Certified Professional Ergonomist (CPE). Prior to joining ARCCA, Dr. Levitan spent 10 years working as a research scientist in the Center for Physical Ergonomics at the Liberty Mutual Research Institute for Safety in Hopkinton, Massachusetts. While at the Institute, she developed and conducted research projects in occupational biomechanics and human factors, focusing on the prevention of slips, trips, and falls and determining causal factors of related injuries. Findings were disseminated by Dr. Levitan through peer-reviewed journals, technical seminars, and presentations.

Dr. Levitan has completed research projects examining the mechanisms of balance control and the effect of task and environmental factors. Research projects have included the examination of microslips during gait, lateral reaching while working on stepladders, and postural transitions from non-erect postures to standing. Dr. Levitan investigated the relationship of kinematic, kinetic, and electromyographic data collected during laboratory studies performed on human participants to advance scientific knowledge regarding the interaction between human movement during task performance and the mechanisms of balance control as measured by the center of mass and the center of pressure. In addition to laboratory studies, Dr. Levitan gained valuable experience as part of a diverse interdisciplinary team that included engineers, safety professionals, physiologists, psychologists, and epidemiologists to identify high-risk tasks, particularly those in the construction industry, and potential causal factors of injuries related to falls. As part of the team, Dr. Levitan went on worksite visits, including commercial and residential construction sites, and interacted with various types of employees to obtain an accurate assessment of injury risks.

In addition to her work related to slips and falls, Dr. Levitan has extensive experience related to construction safety (including the New York Labor Laws), distracted walking, gait analysis, slip resistance testing, assessment of physical and mental workload, and effects of dual-tasking on performance. Dr. Levitan is also involved in accident and mishap investigation involving workplace injuries, ladder safety, falls from scaffolding and the biomechanics of injury. Dr. Levitan's work includes site and equipment inspections, applicable code compliance, testing, injury causation and tolerance analysis.

Dr. Levitan's academic and professional experience represents a unique combination of knowledge in slips, trips, and falls, occupational biomechanics, human factors, construction, general worksite safety, live subject kinematic and kinetic testing, and human anatomy. She has published in the areas of postural control, gait analysis, occupational biomechanics, safety, human factors, and ergonomics. Currently, she specializes in slip/trip/fall analysis, construction safety, human factors and ergonomics, and biomechanical and injury causation analysis.

SUMMARY OF EXPERIENCE

- Investigations of construction and industrial workplace accidents based on safety principles, human factors, proper equipment design and biomechanics.
- Developed and executed testing programs to assess various potential factors of workplace accidents, including personal protective equipment, fall protection, ladders and injury mechanisms.
- Investigations of slip, trip and fall mishaps utilizing expertise in codes, human factors, ergonomics and biomechanics.

- Evaluation of OSHA compliance/non-compliance in construction environments and general industry workplace settings.
- Conducted laboratory research studies involving identification techniques of microslips during gait and quantifying kinematic and kinetic differences between normal gait and slip events.
- Conducted laboratory research studies involving data collection from younger and older healthy participants, with a focus on age-related alterations in balance control mechanisms.
- Modified uni-planar methodological techniques for determining stabilization time after the application of an external perturbation during various tasks including manual materials handling, lateral reaching on stepladders, and multi-planar postural transitions.
- Conducted research on the interaction of physical and mental workload, including assessment (objective and subjective) and resource allocation.

AREAS OF SPECIALTY

- Slip/Trip/Fall Kinematics and Kinetics
- Ladder and Scaffolding Falls
- Injury Causation Biomechanics
- Human Kinematic Analysis and Testing
- Illumination Analysis and Testing
- Balance Control Measurement
- Human Factors and Ergonomics
- OSHA and NYC DOB Certified
- Construction Safety
- Industrial Safety
- Building Code Compliance
- ADA Compliance

CERTIFICATIONS AND AWARDS

- Certified Professional Ergonomist
- OSHA 30 Hour Outreach Training for the Construction Industry Certification (2013)
- OSHA Fall Protection for the Competent Person Certification (2013)
- OSHA Scaffolding Safety for the Competent Person Certification (2013)
- OSHA 10 Hour Outreach Training Program – General Industry Certification (2015)
- OSHA Industrial Truck Operator Certification (2017)
- NYC DOB 4-Hour Supported Scaffolding User Certification (2015)
- NYC DOB 32-Hour Supported Scaffold Installer/Remover Certification (2015)
- NYC DOB 8-Hour Site Safety Coordinator Training (2016)
- Designated as one of "100 Women Making a Difference in the Safety, Health and Environmental Profession" by ASSE's Women in Safety Engineering (2011)
- National Academies member of the Committee on Review of NIOSH Construction Research Program (invited July 2007)
- Grant Reviewer for NIOSH Study Section Meeting 2019

EDUCATION

Ph.D. Industrial and Systems Engineering, Human Factors Option (2003)
Virginia Polytechnic Institute and State University (Virginia Tech), Blacksburg, VA
Dissertation: *An investigation on subjective assessments of workload and postural stability under conditions of joint mental and physical demands*

M.S. Industrial and Systems Engineering, Human Factors Option and Safety Certificate (1999)
Virginia Polytechnic Institute and State University (Virginia Tech), Blacksburg, VA
Thesis: *Finger force capability: measurement and prediction using anthropometric and myoelectric measures*

M.S. Mathematics Department (1996)
Virginia Polytechnic Institute and State University (Virginia Tech), Blacksburg, VA

B.A. Mathematics Department (1992)
University of Connecticut, Storrs, CT

PROFESSIONAL EXPERIENCE

June 2013 – Present | ARCCA, Incorporated | Human Factors/Biomechanics

- Investigates the cause, nature, and severity of injuries using biomechanics.
- Evaluates slip, trip and fall mishaps including ladder falls, scaffolding falls, and slip resistance testing of walkway surfaces
- Performs analysis of building, industrial and construction codes associated with personal injuries and premise liability
- Applies the principles of human factors and biomechanics to the anatomy and physiology of the human body to explore the cause, nature, and severity of injuries, particularly those caused by slip, trip, and fall incidents.
- Participates in biomechanical investigations involving human volunteers and anthropometric test devices that explore human response to injury mechanisms, tolerance thresholds, and injury prevention.
- Analysis of ingress and egress issues from buildings and vehicles as related to loss of balance and consequential injury risk.
- Provides instruction in the area of slip/trip/fall analysis, human factors, and biomechanical and injury causation analysis.

August 2003 – May 2013 | Center for Physical Ergonomics (LMRIS) | Research Scientist

- Developed and conducted research projects in human factors and occupational biomechanics, focusing on the prevention of slips, trips, and falls and determining causal factors.
- Disseminated results to scientific community and customers through peer-reviewed journals, technical seminars, and presentations.
- Accountable for the design and management of research projects and associated team and technical staff.
- Also provided internal and external peer review of publications and presentations.

August 1999 – July 2003 | Army Research Laboratories | Research Assistant

- Internship

January 1998 – August 1999 | National Institute of Occupational Safety and Health | Research Assistant

- Fellowship

Summer 1997 | Industrial Ergonomics Laboratory | Research Assistant

- Internship

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

- Member, American Society of Safety Professionals
- Member, American Society of Biomechanics
- Member, Human Factors and Ergonomics Society
- Member, ASTM International, F13 Committee, Pedestrian/Walkway Safety and Footwear
- Member, IEA Slips, Trips and Falls Committee
- Member, Ladder Subgroup for National Fall Prevention Campaign (2012-2013)
- Member, NIOSH Fall Prevention Work Group (2011-2013)
- Member, Massachusetts Dept. of Public Health Working Group on Falls in Construction (2008-2013)

SELECT PUBLICATIONS

DiDomenico, A., Cohen, T.L. and Joganich, T. (2018). Effect of stair tread marking on foot placement during stair descent, in Proceedings of the Human Factors and Ergonomics Society's 2018 International Annual Meeting, Philadelphia, PA.

DiDomenico, A. (2018). Lateral reaching on stepladders and the belly button rule, in Proceedings of the XXXth Annual Occupational Ergonomics and Safety Conference, Pittsburgh, PA.

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DiDomenico, A. and Audino, D.C. (2014). Can worker behavior be the cause? How workplace pressure can lead to serious injury, New Jersey Law Journal, October.

DiDomenico, A., McGorry, R.W. and Banks, J.J. (2013). Methodological considerations of existing techniques for determining stabilization times following a multi-planar transition, Gait and Posture, 38(3), 541-543.

Strang A., **DiDomenico A.**, Berg W., McGorry R.W. (2013). Assessment of differenced center of pressure time series improves detection of age-related changes in postural coordination, Gait and Posture, 38(2), 345-348.

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DiDomenico, A., McGorry, R. W. and Banks, J. J. (2012). Considerations in determining stabilization times following a perturbation. Proceedings of the International Society of Posture and Gait Research, Trondheim, Norway.

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Catena, R. D., **DiDomenico, A.**, Banks, J. J. and Dennerlein, J. T. (2011). Balance control during lateral load transfers over a slippery surface, Ergonomics, 54(11), 1060-1071.

DiDomenico, A. and Nussbaum, M. A. (2011). Effects of different physical workload parameters on mental workload and performance. International Journal of Industrial Ergonomics, 41(3), 255-260.

DiDomenico, A., McGorry, R.W., Blair, M.F., and Huang, Y.H. (2011). Losing Balance Upon Standing: Do Construction Workers Perceive the Problem? Professional Safety.

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