To be argued:

Court of Appeals

State of New York

ESTHER TRINCERE,

Plaintiff-Appellant,

against

COUNTY OF SUFFOLK,

Defendant-Respondent.

BRIEF FOR THE DEFENSE ASSOCIATION OF NEW YORK AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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COURT OF APPEALS
STATE OF NEW YORK

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Preliminary Statement

A. The Appellate Division, Second Department in Trincere v. County of Suffolk ____, A.D.2d ____, 648 N.Y.S.2d 126 (2nd Dept. 1996) was correct in re-affirming the trust and sound discretion invested in the Trial Court in its ability to exercise rational analysis as the gatekeeper of prima facie cases. The Trial Court justly and properly exercises more than an observer's role and is not merely a figurehead charged only with the responsibility of reading the law to the jury. The Court has a long and hoary history of exercising discretion in the management of the logical process of the law. Not all cases in controversy are to be submitted to a jury. The rules of the common and civil law have been time-tested and/or legislatively pronounced and do not require a *de novo* pronouncement in every factual circumstance.

The legislature and the common law have, over the course of time, established that which is a "cause of action". It is not for the jury in each and every case presented by opposing parties to determine what constitutes a "cause of action".

Trial Court Judges are elected to exercise sound discretion in the management of their courtrooms and the logical process of the law and thus, may determine at the close of any party's case, that it did not sufficiently carry the probandum to establish a prima facie case.

B. Moreover, it has long been the law that premises owners, operators, managers and possessors are not insurers for those coming upon their property, regardless of the status of the person coming upon said property. Defects, such as they may be, are and have been actionable only upon the showing of multiple characteristics albeit amorphous, malleable and subject to factual vagaries; and the showing of notice.

The Appellate Division majority in Trincere allows for a totality of circumstances, including a minimal height differential, considered together with all the other characteristics of an alleged defect, and together with all of the other circumstances presented in a particular case which may render a putative defendant liable. Nonetheless, in the particular facts of the Trincere case, the Appellate Division found that the defect did not constitute a snare or trap, and that the height differential was minimal.

The dissenters' characterization of the majority opinion in Trincere disregards the majority's express disclaimer concerning totality of circumstances. The dissenters also avoid treatment of the failure upon the record to establish the essential notice element.

The characterization by the dissenters in Trincere of the factual matters *de hors* the record in the case and the conclusion drawn as to the apparent danger and the relativity of risks is an improper arrogation of the role and responsibility of the Trial Court.

For these reasons, the Defense Association of New York submits that the Court should affirm the majority decision.

Questions Presented

1. Whether or not defendants may be cast in liability for trivial height differentials in walkway or passageway surfaces on property which possess none of the characteristics of a trap or a snare?

2. Whether in a negligence case the Trial Court is invested with the authority to exercise judgment with respect to prima facie cases of negligence and/or characterizing causes of action, or whether the Trial Court has no role in espousing the law of the jurisdiction as established by common law history and the legislature and that all cases or matters in opposition are to be decided de novo by a jury?

STATEMENT OF FACTS

A. The Parties' Theories on Liability

In this negligence action, plaintiff alleged that she tripped and fell on a defect in the cement paving slabs of the North Plaza of the H. Lee Dennison Building in Hauppauge, New York, of which defendant County of Suffolk (the "County") had notice but failed to correct (R. 9-12, 112, 128).

The County's position at the liability trial was that although the paving slab upon which plaintiff fell may not have been perfectly flush, the County was not required to maintain it in a perfect condition, but only in a reasonable condition so that it was not a trap, snare or nuisance (R. 134). The County argued that the defect was merely trivial (R. 134), and that the only negligence was plaintiff's failure to observe the paving slab and to watch where she was walking (R. 134-135).

B. Plaintiff's Trial Proof on Liability

Plaintiff testified that she fell on the north side of the Dennison Building as she was entering the building from a large plaza area which consisted of cement slabs (R. 136-138). At the time of the accident, plaintiff was looking straight ahead and did not observe any obstacles in her way (R. 143). Although she could see the ground, she did not observe the raised cement slab on which she tripped (R. 143), which is circled in the photographs in evidence (R. 140-142, R. 178-185).

Plaintiff described the slab as being raised above the surrounding slabs by "[a] half inch. A little over a half inch" (R. 143). She first noticed the condition after she had fallen and was on the ground, stating that there had been nothing to bring it to her attention prior to the accident (R. 144).

Plaintiff's proof relating to prior accidents was excluded on multiple grounds (R. 40, 64-65, 74-75, 83-100, 94, 174-175.

C. The County's Dismissal Motions

Following plaintiff's testimony, the County moved for a directed verdict dismissing the complaint, or in the alternative for summary judgment, asserting that: (1) the raised slab was not an actionable defect or dangerous condition, but was a trivial defect which did not constitute a trap, snare or nuisance; and (2) the raised slab was an open and obvious condition for which the County did not owe a duty to warn and which plaintiff should have seen had she employed the reasonable use of her own senses (R. 152-156).

Plaintiff opposed the motion, asserting that there is no rule that a defect has to be of any minimum dimension in order to render a municipality liable for personal injuries, and that the question of whether a defect is too trivial is a jury question (R. 156-157).

The trial court reserved decision (R. 158).

D. Defendant's Trial Proof on Liability

The County read to the jury the following portions of plaintiff's deposition testimony (R. 160-161):

> "Question: At the time that you fell was your foot caught in any manner?"
>
> "Answer: No."
>
> * * *
>
> "Question: Where were you looking immediately before you fell?
>
> "Answer: I was looking at the door of the entrance.
>
> "Question: At anytime when you were walking across the plaza from the steps to the door did you look down the surface?
>
> "Answer: No. I was looking at the door of the entrance."
>
> * * *
>
> "Question: The concrete slab that you say that you tripped on did you see that slab, at anytime, prior to falling?
>
> "Answer: I was just concentrating on the door that I was to enter.
>
> "Question: Well, did you see the slab before you fell?
>
> "Answer: No, no." (R. 160-161).

E. The Trial Court's Dismissal of the Complaint

The County of Suffolk rested, then moved to renew its prior motion for a directed verdict or, in the alternative, for summary judgment, for the same reasons, asserting additionally that plaintiff failed to show notice of the claimed defect (R. 162-166). Over plaintiff's opposition (R. 166-168), the Court granted the motion:

> THE COURT: In Mascaro against the State[1], the case here says that "Where defect in sidewalk curb, which allegedly was raised about two inches above adjacent sidewalk, was trivial and slight in nature and possessed none of the characteristics of a trap or snare, and there was no evidence to show actual or constructive notice, State was not liable for injuries sustained by pedestrian when she fell while walking across sidewalk curb and out onto pavement of a state highway." Now, here the witness' testimony was that this level was less than two inches. As a matter of fact, she indicated a half inch. And here there was no indication of any notice of defect in the record, either actual or constructive.
>
> The Court is of the opinion that the defendant's motion has merit. (R. 168-169).
>
> MR. ZEIGLER [Plaintiff's counsel]: Your Honor, if I might interrupt. The Marcus case specifically deals with this two inch question. And the Appellate Division in that case held that there is no such thing as a two inch minimum dimensional requirement. The law doesn't require any minimal dimensional requirement. That's Marcus against Nassau County, the Second Department case. (R. 169-170).
>
> THE COURT: In Marcus against Nassau County is where they were working on the road.
>
> MR. ZEIGLER: Right.
>
> THE COURT: And two inches deep, about three or four feet wide, and they left it, and they had no warning signs or

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[1] 46 A.D.2d 941, 362 N.Y.S.2d 78 (3rd Dept. 1974), aff'd, 38 N.Y.2d 870, 382 N.Y.S.2d 742 (1976).

anything about it. And there it was obvious that they had done some work and that they knew about the defect because they created it themselves. That's a different situation than the one at hand.

Even though the Court is reluctant to grant the defendant's motion, the Court thinks under the circumstances it has merit here, and the motion to dismiss is herewith granted. (R. 170-171).

F. **The Appellate Division's Order**

Plaintiff appealed the judgment dismissing the complaint to the Appellate Division, Second Department.

In a 3-2 decision, the Appellate Division affirmed the judgment (R. 200), holding that the defect was slight and trivial and did not constitute a dangerous condition (R. 200):

> The case law reflects a prevailing view to the effect that "differences in elevation of about one inch, without more, *** [are} non-actionable" (Morales v. Riverbay Corp., ____ A.D.2d ____ [1st Dept., Apr. 25, 1996] citing Hecht v. City of New York, 89 A.D.2d 524, mod on other grounds 60 N.Y.2d 57; see also, Mascaro v. State of New York, 46 A.D.2d 941, aff'd 38 N.Y.S.2d 870; Allen v. Carr, 28 A.D.2d 155 aff'd 22 N.Y.S.2d 924; see also, Guerrieri v. Summa, 193 A.D.2d 647; Scally v. State of New York, 26 A.D.2d 606 aff'd 24 N.Y.2d 747; Keirstad v. City of New York, 24 A.D.2d 488 86 aff'd 17 N.Y.2d 535; Fleming v. Fifth Ave. Coach Lines, 23 A.D.2d 726; Branningan v. City of Plattsburgh, 3 A.D.2d 637; cf., Evans v. Pyramid Co of Ithaca, 184 A.D.2d 960). These cases also reflect the reality that municipal entities cannot possibly be expected to be on constructive notice of defects which are so trivial (see, Curci v. City of New York, 209 A.D.2d 574; Hecht v. City of New York, supra).
>
> We acknowledge the existence of dicta in prior decisions to the effect that "there is no rule that a defect * * * must be of certain minimum dimensions * * * in order to render one liable" (Ginger v. Held, 127 A.D.2d 562, 563; see also, Marcus v. County of Nassau, 95 A.D.2d 846). This does not mean, however, that a minimal height differential, considered of an alleged defect, and together with all the other circumstances presented in a particular case, may never render the issue of constructive notice a question of law, rather than a question of fact. In other words, we do not

> believe that a question of fact, to be presented to the jury, automatically exists in every case where the plaintiff claims to have tripped on an uneven sidewalk, no matter how exiguous the measurements of the unevenness might be. * * * (R. 200-201) ____ A.D.2d ____, 648 N.Y.S.2d 126, 126-127.

The dissent disagreed with the majority's conclusion that the defect which caused plaintiff's fall was so slight and trivial that it does not, as a matter of law, constitute a dangerous condition, stating in relevant part:

> The majority finds that the case law "reflects a prevailing view" that differences in elevation of about one inch are nonactionable, and, therefore, that the half-inch rise in the paving slab over which the plaintiff tripped cannot be considered a dangerous or defective condition. Although some cases have found a relatively slight elevation difference or small roadway depression to be nonactionable, there is no hard and fast rule that a (sic) elevation difference of less than one inch cannot constitute negligence. Indeed, the issue of whether or not a dangerous and defective condition exists generally "depends upon the peculiar facts and circumstances of each case and is a question of fact for the jury" (Schechtman v. Lappin, 161 A.D.2d 118, 121; see also, Varrone v. Dinaro, 209 A.D.2d 508; Guerrieri v. Summa, 193 A.D.2d 647). Thus, while it has been held that "the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway * * * as a consequence of which a pedestrian might merely stumble, stub his toe, or trip over a raised projection" (Guerrieri v. Summa, supra, at 647; see also, Liebel v. Metropolitan Jockey Club, 10 A.D.2d 1006), the question of whether a defect is so trivial that no negligence can arise from either its creation or the failure to repair it "cannot be determined merely on the basis of the depth of the particular sidewalk depression or difference in elevation" (Evans v. Pyramid Co. of Ithaca, 184 A.D.2d 960). Moreover, this Court has repeatedly observed that there is no rule that a pavement defect be of certain minimum dimensions, or constitute a trap, in order to render a municipality liable for injuries sustained thereby (see, Ginger v. Held, 127 A.D.2d 562; Marcus v. County of Nassau, 95 A.D.2d 846; Smith v. City of New York, 38 A.D.2d 965; Caldicott v. City of New York, 32 A.D.2d 832).
>
> * * *

In adopting the view that a difference in elevation of one inch or less cannot be considered actionable, the majority relies upon several cases in which the appellate courts have declined to impose liability upon property owners for slight and insignificant defects. However, these fact specific cases do not support the imposition of a general rule that defects which are one inch or less in height are not actionable as a matter of law. * * *

The Evans case underscores that a determination of whether a defect is trivial should be based on a factual inquiry which includes consideration of the nature and the size of the defect, as well as its location. Here, the plaintiff testified that the paving slab was elevated a little over half an inch, and the photographs admitted into evidence show that the slab was elevated at an angle, and that the entire slab was significantly higher than the immediately surrounding slabs. Clearly, a significant height differential between two paving slabs in a public walkway creates a substantially greater risk of injury than the slight gap between flagstones which was at issue in Hecht v. City of New York, (60 N.Y.2d 57), upon which the majority relies. Considering the nature of the defect depicted in the photographs, as well as the fact that the elevated paving slab was located in heavily traveled plaza which led to the entrance of the Hauppauge courthouse, I disagree that the subject defect was so trivial and slight in nature that it cannot support a finding of negligence, as a matter of law (R. 201-203). ____ A.D.2d ____, 648 N.Y.S.2d at 128-129.

POINT I

THE DECISION OF THE APPELLATE DIVISION COMPORTS WITH ESTABLISHED LAW THAT TRIVIAL HEIGHT DIFFERENTIALS IN A WALKWAY OR A PASSAGEWAY THAT POSSESS NONE OF THE CHARACTERISTICS OF A TRAP OR A SNARE ARE NON-ACTIONABLE AS A MATTER OF LAW

It is respectfully submitted that the Appellate Division properly applied the law of this State, which provides that trivial height differentials in a public passageway or walkway that possess none of the attributes of a trap or a snare are insufficient, as a matter of law, to impose liability on the part of the property owner.

The dissenting opinion in the Appellate Division, the brief of the plaintiff-appellant, Esther Trincere (hereinafter "plaintiff"), and the *amicus curiae* brief of the New York State Trial Lawyers Association (hereinafter "NYSTLA"),[1] misapprehend the majority opinion of the Appellate Division. The majority opinion cannot be understood to mean that cases of this nature are governed by simply measuring the size of the height differential. In fact, the majority expressly provides for consideration of "other circumstances".

An examination of the plain language of the majority opinion, along with the cases cited therein, readily reveals that the gist of the Appellate Division's determination was that a difference in elevation of approximately one inch *which has none of the characteristics of a trap or a snare* does not give rise to liability. In no way can the

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[1] NYSTLA brief referred to in the instant brief refers to the brief submitted with their motion to file an *amicus curiae* brief not to the subsequently filed brief.

majority opinion be read to stand for the proposition that cases such as the one at bar are governed by a mechanistic measurement of the height differential and nothing else. This does not relieve counsel of the burden of placing such characteristics before the Court and jury.

Moreover, the Appellate Division's determination is in complete harmony with the law of the State as set forth by this Court. Furthermore, neither the dissenting opinion, the plaintiff, or the NYSTLA put forth any policy consideration whatsoever why the rule governing cases of this nature should be changed.

The Appellate Division properly affirmed the judgment based upon the directed verdict in favor of the defendant-respondent, County of Suffolk, since the difference in elevation was trivial, and there is not even a hint of proof that the area of the alleged accident constituted a snare or a trap.

A. The majority opinion at the Appellate Division expressly recognizes the need for "other characteristics" analysis

The dissent characterized the holding of the majority in the following manner:

> The majority finds that the case law 'reflects a prevailing view' that differences in elevation of about one inch are nonactionable, and therefore, that the half-inch rise in the paving slab over which the plaintiff tripped cannot be considered a dangerous or defective condition.

___ A.D.2d at ___, 648 N.Y.S.2d at 128 (underscoring supplied).

Plaintiff's brief characterizes the issues on appeal thus --

1. Must a defect in pavement be of a minimum dimension in order for it to be actionable?

   The Trial Court and the Appellate Division answered: Yes.

Brief for Plaintiff-Appellant at 1.

The heading of Point I of the *amicus curiae* brief of the NYSTLA accuses the Appellate Division majority of applying "mechanistic 'minimum size' rule."

That misunderstanding becomes readily apparent upon a perusal of the plain language of the majority opinion, as well as the cases cited.

The holding of the Appellate Division majority is clearly set forth in unmistakable language:

> The case law reflects a prevailing view to the effect that 'differences in elevation of about one inch, without more, * * * [are] non-actionable.' (citations omitted).
>
> ...
>
> We acknowledge the existence of dicta in prior decisions to the effect that 'there is no rule that a defect * * * must be of certain minimum dimensions * * * in order to render one liable' (citations omitted). This does not mean, however, that a minimum height differential, considered together with all of the other characteristics of an alleged defect, and together with all the other circumstances presented in a particular case, may never render the issue of constructive notice a question of law, rather than a question of fact.

___ A.D.2d at ___, 648 N.Y.S.2d at 127 (underscoring supplied).

Plainly, the majority held that elevation differentials of approximately one inch are not actionable unless certain other circumstances exist. Reference to the cases cited by the majority reveals that the "circumstances" which would make such a differential actionable are those which amount to a trap or snare. Morales v. Riverbay Corp., 226 A.D.2d 271, 271, 641 N.Y.S.2d 276, 277 (1st Dept. 1996) ("In the matter at bar, the differential between the two slabs ...was about an inch and possessed none of the characteristics of a trap or snare"); Mascaro v.

State, 46 A.D.2d 941, 941, 362 N.Y.S.2d 78, 79 (3rd Dept. 1974), aff'd, 38 N.Y.2d 870, 382 N.Y.S.2d 742 (1976) ("We find ... that the defect complained of was trivial and possessed none of the characteristics of a trap or snare"); Allen v. Carr, 28 A.D.2d 155, 155, 284 N.Y.S.2d 796, 798 (4th Dept. 1967),aff'd, 22 N.Y.2d 924, 295 N.Y.S.2d 48 (1968) ("The plaintiff testified that she fell where there was a difference of elevation of 'half to an inch possibly' in the sidewalk and that the surface was rough. There was no suggestion of a trap or snare"); Guerrieri v. Summa, 193 A.D.2d 647, 648, 598 N.Y.S.2d 4, 5 (2nd Dep't 1993) ("In this regard, we note that the metal strip, which did not exceed three quarters of an inch in height, possessed none of the characteristics of a trap or snare"); Scally v. State, 26 A.D.2d 606, 606-607, 271 N.Y.S.2d 386, 387 (3rd Dept 1996), aff'd, 24 N.Y.2d 747, 299 N.Y.S.2d 624 (1969) ("(W)e find that the defect complained of was so trivial and slight in nature and possessed none of the characteristics of a trap or snare so that it could not reasonably have been foreseen that it would cause an accident and thus that liability could not be predicated thereon (citations omitted)"); Keirstead v. City of New York, 24 A.D.2d 486, 486, 260 N.Y.S.2d 696, 697 (2nd Dept 1965), aff'd, 17 N.Y.2d 535, 267 N.Y.S.2d 911 (1966) "The undisputed physical facts ... establish that the elevation was slight and that it had none of the characteristics of a trap or a snare; hence the complaint was properly dismissed (citation omitted).")

The majority opinion cited Brannigan v. City of Plattsburgh, 3 A.D.2d 637, 157 N.Y.S.2d 1017 (3rd Dept. 1956) in support of its holding. In Brannigan, the Third Department stated that "there is no requirement that a defect in a public sidewalk be of any particular depth in order to give rise to liability on the part of the municipality. Loughran v. City of New York, 298 N.Y.

320, 83 N.E.2d 136..." Id. 3 A.D.2d at 637, 157 N.Y.2d at 1018. Loughran is very heavily relied upon by both the plaintiff and the NYSTLA.

The majority opinion reveals that the Appellate Division majority took full cognizance of the existing law and applied it soundly.

The decision and order of the Appellate Division should be affirmed.

B. The Decision And Order Of The Appellate Division Is In Complete Accord With Prior Determinations By This Court

The Appellate Division majority did not run afoul of this Court's holding in Loughran v. City of New York, 298 N.Y. 320 (1948). Loughran, is completely distinguishable. It involved this Court's rejection of a four inch rule urged by the City of New York (*i.e.*, a hole in a public walkway must be at least four inches deep or it must constitute a trap in order for liability to arise). Any considerations requesting a pronouncement by the Court of a minimum actionable height differential of four inches are completely foreign to the case at bar.

Significantly, this Court's opinion in Loughran cited Lynch v. City of Beacon, 295 N.Y. 872 (1946) with approval, and Lynch provides solid support for the decision and order of the Appellate Division herein. Indeed, Lynch is cited in footnote 6 on the first page of Point 1 of the *amicus curiae* brief of the NYSTLA. (See, page 15 of NYSTLA's brief). However, the NYSTLA makes absolutely no effort to attempt to demonstrate that the rule set forth in Lynch is somehow not applicable to the case at bar. That silence is deafening. The principles set forth by this Court in Lynch control cases of this nature.

In Lynch, the plaintiff tripped and fell over an elevation which ran across a sidewalk. The height of the elevation was between one and one-quarter and two inches, which was

significantly higher than the elevation in the case at bar. In Lynch, "(t) the Appellate Division stated: 'The undisputed physical facts, as shown by the photographs, as well as the testimony offered on behalf of the plaintiff, show that the elevation was slight and had none of the characteristics of a trap or snare.'" Id. 295 N.Y. at 873 (underscoring supplied).

This Court unanimously affirmed.

In the ensuing years since Lynch was decided, this Court has consistently applied the rule that a height differential in a walkway, which has none of the characteristics of a trap or a snare, is non-actionable.

In Heeney v. Topping, 13 N.Y.2d 1049, 245 N.Y.S.2d 770 (1963), the plaintiff tripped and fell over an elevation in a walkway of approximately one inch in height while he was attending a baseball game at Yankee Stadium. The elevation was located on the concrete step in front of the seats in the row where the plaintiff sat. Patrons had to walk on that step in order to get to the aisle. The elevation was the result of a repair to a crack in the concrete. This Court affirmed the Appellate Division, which had reversed a judgment in favor of the plaintiff and dismissed the complaint.

In Fox v. Brown, 15 N.Y.2d 597, 255 N.Y.S.2d 263 (1964), the plaintiff tripped and fell due to a hole on a New York City sidewalk. The hole was described as being 12 inches long, three inches wide and one inch deep. The trial court dismissed the complaint on the ground that the defect was trivial. By a divided court, the Appellate Division affirmed. The plaintiff appealed to this Court, limiting her contentions to the propriety of the dismissal of the complaint as against the defendant City of New York. In this Court, the City argued that, as a matter of

law, the defect was too trivial to impose liability. This Court unanimously affirmed the dismissal of the complaint.

Keirstead v. City of New York, 17 N.Y.2d 535, 267 N.Y.S.2d 911 (1966) involved a plaintiff who alleged that she fell on a broken sidewalk. An "aided and incident card" prepared by a police officer described the defect in the sidewalk as being 12 inches wide, 12 inches long and one inch deep. The trial court dismissed the complaint at the close of the plaintiff's case. The Appellate Division affirmed, stating that the "undisputed physical facts ... established the elevation of the sidewalk to be slight, with none of the characteristics of a trap or snare .. " Id., 13 N.Y.2d at 535, 267 N.Y.S.2d at 911 (underscoring applied). This Court unanimously affirmed.

In Scally v. State, 24 N.Y.2d 747, 299 N.Y.S.2d 624 (1969), the plaintiff tripped and fell on a sidewalk in the Town of Islip, County of Suffolk. The plaintiff alleged that she tripped over a protruding metal plate in the sidewalk. The height of the protrusion was approximately three-quarters of an inch. The Appellate Division found that "the defect was trivial, slight in nature and possessed none of the characteristics of a trap or snare ..." Id.,13 N.Y.2 at 535, 267 N.Y.S.2d at 624. This Court affirmed the determination of the Appellate Division. (The plaintiff fails to indicate that Scally was affirmed by this Court. Also, contrary to the plaintiff's assertion, the protrusion was located on the sidewalk, not on the highway. Id. 24 N.Y.2d at 747).

In Hecht v. City of New York, 89 A.D.2d 524, 452 N.Y.S.2d 443 (1st Dept. 1982), modified on other grounds, and as modified, aff'd, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983), the plaintiff tripped and fell due to a defective sidewalk. The dissenting Justice in the Appellate Division described the defect as follows: "The proof of the defective sidewalk consisted of photographs showing a lateral separation between the flagstones of approximately one inch or

more and a noticeable difference in the elevation of the two flagstones." Id, 89 A.D.2d at 525, 452 N.Y.S.2d at 445. An examination of the photographs in the Record on Appeal in Hecht reveals a condition which is comparable to the condition depicted in the photographs in the case at bar (R 178-185). In Hecht, this Court held that the defect was "trivial" and thus, non-actionable. Id., 60 N.Y.2d at 61, 467 N.Y.S.2d at 189. See, also, Davenport v. Apostol, 22 N.Y.2d 943, 295 N.Y.S.2d 68 (1968).

It is eminently clear from the foregoing that the rule regarding minimal height differentials in walkways or passageways is well-settled and sound, and it has retained its vitality to the present time. Significantly, neither the dissenting opinion in the Appellate Division, the plaintiff, or the NYSTLA puts forth any legal reason or policy consideration why there should be a departure from that rule.

The Appellate Division dissent has stated that Scally v. State, 26 A.D.2d 606, 271 N.Y.S.2d 386 (3rd Dept. 1969), aff'd, 24 N.Y.2d 747, 299 N.Y.S.2d 624 (1969), discussed above, is "of little precedential value." Id. ____ A.D.2d at _____, 648 N.Y.S.2d at 129. It is impossible to imagine under what circumstances an affirmance by this Court would be "of little precedential value."

Furthermore, the dissent *sua sponte* characterized the height differential in the case at bar as "significant", and a much greater risk than the defect in Hecht v. City of New New York, supra. Id. _____ A.D.2d at ___, 648 N.Y.S.2d at 129. Clearly, a height difference of a half of an inch is not "significant." As demonstrated above, that differential is less than what this Court has found in other cases to be trivial. Moreover, as previously indicated, the defect in Hecht entailed

gaps in the flagstones of one inch, in addition to a height differential between the flagstones. No gap between the flagstones exists in the case at bar (R 178-185).

This Court has repeatedly held that a minimal height differential, which has none of the features of a snare or a trap, is not actionable. Indeed, the plaintiff's misapprehension is evident from page 14 of the plaintiff's brief, which mischaracterizes the dismissal of this action as being based upon a finding that because the differential was of a particular height, it was not a trap or a snare. As is readily apparent from the Appellate Division's majority opinion, the inquiry is two-fold, *i.e.*, whether the differential is minimal and whether it possesses the attributes of a trap or a snare. The rule in relation to cases of this nature has been repeatedly applied by this Court and that rule was applied by the Appellate Division majority in this case.

The NYSTLA attempts to frame an issue involving a split in Appellate Division authority. (See, brief of NYSTLA, pages 16-18, notes 7 and 8). The NYSTLA's argument is instantly destroyed when it is considered that in footnote 7, two of the cases were affirmed by this Court. (Keirstead v. City of New York, 17 N.Y.2d 535, 267 N.Y.S.2d 911 (1966); Scally v. State, 24 N.Y.2d 624 (1969). There were no affirmances by this Court in the cases listed in footnote 8. Clearly, the cases cited in footnote 7 on pages 16-17 of the NYSTLA's brief, which indicate that a trivial height elevation, which has none of the characteristics of a trap or a snare, is an insufficient basis for the imposition of liability, set forth the correct rule in this respect.

The balance of the NYSTLA's arguments also fail to withstand scrutiny.

For example, page 7 of the NYSTLA's brief indicates, without any support, that a factor which must be considered in cases of this nature is whether the area was heavily traveled or relatively remote. The law recognizes no such distinction. Pedestrians on walkways in this State

are entitled to the same protection from defects, and that protection does not depend upon how heavily the walkway is traveled.

In addition, page 21 of the NYSTLA's brief contains the spurious assertion that smaller defects are more dangerous. That contention simply flies in the face of logic and common sense.

Furthermore, on page 21 of its brief, the NYSTLA asserts utterly *de hors* the record, that the area was "dangerous" because individuals going to Court may be preoccupied. It is respectfully submitted that the tort law of this State does not and should not depend upon inherently subjective and vague factors such as an individual's preoccupation.

The standard in this State, as applied by the Appellate Division, soundly calls for an inquiry into objective and verifiable criteria. There is no reason to disturb that standard or the decision and order below.

The determination of the Appellate Division should be affirmed.

C. The Courts Below Properly Held That The Plaintiff Does Not Possess A Viable Claim, Since The Height Differential Was Trivial And Since The Site Of The Accident Possessed None Of The Attributes Of A Trap Or A Scare

When the plaintiff's action is examined in light of the rule governing cases of this nature it becomes instantly apparent that the plaintiff's claim is completely lacking in merit.

By the plaintiff's own admission, the height differential amounted to nothing more than a paltry "(a) half inch. A little over a half inch" (R 143). Plainly, that elevation is trivial within the meaning of the governing case law, which was discussed above.

Furthermore, the location of the accident cannot be considered to be a trap or a snare. The attention of this Court is respectfully directed to the photographs in the Record on Appeal (R 178-185).

Those photographs speak volumes. In absolutely no way do those photographs depict any condition which is dangerous in any way. That walkway is similar to those which are commonly, safely and routinely traversed in everyday life.

In juxtaposition to the condition of the area of the accident herein, it is instructive to examine an example of an actionable trap. In Taylor v. New York City Transit Authority, 63 A.D.2d 63, 405 N.Y.S.2d 95 (1st Dept. 1978), aff'd, 48 N.Y.2d 903, 424 N.Y.S.2d 888 (1979), the plaintiff fell when her heel was caught in a crevice on a stairway. In its opinion, the Appellate Division's majority stated the following with respect to the condition: "Moreover, we believe that the nature and location of the crevice - obscured from view by the riser of the step above - made it a trap (citation omitted)". Id. 63 A.D.2d at 630, N.Y.S.2d at 96.

Absolutely no such considerations are present in the case at bar. The location of the accident was open and obvious (R 178-185).

POINT II

The Trial Court Is Soundly Charged With A Gatekeeper Responsibility And Must Exercise That Responsibility To Ensure That Only Prima Facie Cases Are Submitted For Jury Determination

The Trial Court's position is one of learning and responsibility and it is the function of the Trial Court to assess prima facie cases and to embody the historical development of the common law and the establishment of legislatively prescribed causes of action. It is an abrogation of the Trial Court's historic responsibility and legislatively designed function to, without performing any assessment analysis, pass the matter to a jury for de novo consideration of all matters, including whether or not there exists a cause of action.

In fact the legislature has established the mechanism by which the court can direct a verdict at CPLR Rule 4401.

Whether or not to grant a motion for a directed verdict is essentially a matter of experience; according to Professor Siegel (McKinney's Consolidated Laws of new York Annotated - CPLR 4401 Commentary at C4401:4).

The motion is not an occasion for weighing evidence but is rather a determination by the experienced Court that the jury can not find for the other side by any rational process.

Quite simply, this means that taking every favorable and credible inference from the evidence posited by the party opposing the motion, that party has failed to set out essential elements upon which a jury can base a recovery.

Again, to paraphrase Professor Siegel in his New York practice (Siegel, New York Practice Second Edition, West Publishing, 1991) at Section 402) -- It is generally assumed that a

party at trial has offered all he has and if the case is still legally inadequate, an end way be put to it here and now.

In the case now subject of consideration, the plaintiff put forth his best case and the Trial Court found that no jury could find for the plaintiff by any rational process because of plaintiff's failure to prove the defect was anything but slight and trivial (R - 136, 200), and that plaintiff failed to prove the defendant was on notice of the defect (R. 200).

Questions of mechanistic world views aside, plaintiff failed to show an essential element of the case. Thus, a prima facie case is not established and no jury should be bothered or imposed upon to contrive a recovery for plaintiff not even cognizable as a cause of action.

It serves the interests of the society and all of its components to know what is expected in civil society. That is to say, we should know what the rules are. It ill-behooves consistency and safe expectation to throw all systems of facts to a jury for ad hoc consideration of legal relief. Thus, the Court is called upon to be the touchstone of consistency.

In Guerrieri v. Summa, 193 A.D. 2d 647, 598 N.Y.S. 2d 4 (2nd Dept. 1993), the Appellate Division reversed the Supreme Court and granted summary judgment to the defendant, finding that a metal strip over which the plaintiff tripped did not constitute an actionable defect or a dangerous condition. It was noted that the metal strip, which did not exceed three quarters of an inch in height, possessed none of the characteristics of a trap or snare. It is not necessary that every case involving a defect be submitted to a jury when it may be determined as a matter or law, based not upon the mechanistic application of a minimum size rule, but rather upon the facts and circumstances of a given case, that an alleged defect is not actionable. The Appellate Division decision expressly acknowledged that such a determination may be made as a matter of

law and in this instance, there was no basis for submission of the case to the jury. The Court properly determined as a matter of law that the alleged defect was not actionable.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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