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# THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE


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## THE PRACTICE PAGE

### PHOTOGRAPHS OF PERHAPS-TRIVIAL TRIP HAZARDS

HON. MARK C. DILLON*

The law is well-settled that property owners are under an obligation to maintain their premises in a reasonably safe condition for other persons (*E.g. Henry v Hamilton Equities*, 34 NY3d 136 [2019]). If a plaintiff is injured by a hazardous condition, liability may be imposed if the property owner created the defect or, alternatively, had actual or constructive notice of it (*Di Sanza v City of New York*, 11 NY3d 766 [2008]). But those considerations are overridden if the defect qualifies as a trivial, non-actionable one (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]).

How do we define triviality? 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, and therefore, determining liability issues based exclusively on the dimensions of a defect is not permissible (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). While the size of a defect is of course very important, courts must more broadly consider all of the specific facts and circumstances of the case (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 77). Relevant facts and circumstances include 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). A defect at a highly-trafficked sidewalk in a poorly-lit location may lend itself to liability more than the same defect at an obscure location in daylight.

When relevant, the triviality of an alleged defect is a defense of the property owner. Photographs which fairly and accurately represent an accident site may be used to establish that a defect is trivial and not actionable (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 82-83). In fact, photographs are routinely submitted by parties in trip and fall actions to demonstrate the nature and dimensions of the alleged

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# THE PRACTICE PAGE:

## PHOTOGRAPHS OF PERHAPS TRIVIAL TRIP-HAZARDS

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defect and its other surrounding facts and and circumstances. Objective measurements of alleged defects are also often provided (*E.g. Luo v Croyden Apts., Inc.*, 219 AD3d 1364 [measurement by professional engineer of sidewalk height differential]).

May photographs alone be sufficient evidence to establish a property owner's triviality defense, without any objective measurements of the alleged hazard? This question was addressed in *Snyder v AFCO Avports Mgt., LLC*, 232 AD3d 209 (2024). The case involved a plaintiff's trip and fall upon a misleveled concrete slab of a sidewalk leading to the terminal of Stewart International Airport in Orange County. The accident occurred during daylight in clear weather. The defendants were the Port Authority of New York and New Jersey, which held a commercial lease for the airport, and AFCO Avports Management, LLC, which managed relevant portions of the property. At depositions, neither the plaintiff nor her husband, who was present during the accident, were asked to estimate or describe the height differential of the sidewalk slabs. Two incident reports --- one by an airport employee and one by a New York Trooper called to the scene, likewise provided no measurement of the trip hazard. The sidewalk slabs were replaced mere days after the occurrence, so no investigator or professional engineer could obtain an objective measurement of the defect for litigation purposes. The only evidence of the dimensions of the defect and other surrounding facts and circumstances were 11 photographs taken by the plaintiffs themselves shortly after the occurrence itself, from various distances, angles, and elevations.

The defendants moved for summary judgment under CPLR 3212, arguing that the photographs established the triviality of the height differential between the concrete sidewalk slabs as a matter of law. The defendants also proffered the opinion of a human factors expert that the elevation differential was visible and apparent from 10 steps away, but the expert's opinion was ultimately found to be conclusory, speculative, and therefore inadmissible. In opposition, there was no affidavit from the plaintiff or her husband. Instead, the motion was opposed on the ground that summary judgment could not as a matter of law be granted to a property owner absent some objective measurement of the hazard, which was entirely missing here.

The Appellate Division surveyed the relevant case law and determined that as a general proposition, property owners may establish their *prima facie* entitlement to summary judgment on triviality without submitting objective measurements of a defect's dimensions (*Snyder v AFCO Avports Mgt., LLC*, 232 AD3d at 215). But, the decision holds, a defendant's triviality defense is much harder to establish without objective measurement evidence. Where photographs are the sole evidence of the defect, their depictions must be such that specific inferences can be drawn of a defect's dimensions. That may occur when the defect is "near other objects of known or standard size that are present, such as a coin, a shoe, a baseball, a soda can, or other objects of uniform size (*Id.*, at 216).

In the end, the case illustrates the difficulty property owners face in establishing the trivial defect defense based on photographs alone. Generally, the triviality of defects raises questions of fact for a jury, unless the defense can be established as a matter of law (*Snyder v AFCO Avports Mgt., LLC*, 232 AD3d at 212-13). The photographs in *Snyder* depicted various objects in the general vicinity of the sidewalk slabs, including a fence and cars in the distance, a law enforcement officer standing nearby, the plaintiff lying on the sidewalk, and a piece of luggage closer to the site of the fall. None of those objects or people enabled an informed inferable measurement of the height differential of the sidewalk slabs. A standard orange construction cone sat atop the higher concrete slab with one half of its bottom extending over the height differential at the adjoining slab, but a shadow where the slabs met prohibited an informed inferable measurement of the differential in relation to the size of the cone. Summary judgment therefore needed to be denied to the defendants for their failure to meet their *prima facie* burden of establishing the triviality of the defect as a matter of law (*Id.*, at 217. *See also, Rubin v Sivan Merrick, LLC*, 235 AD3d 789 [2d Dept., 2025]).

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# THE PRACTICE PAGE:

## PHOTOGRAPHS OF PERHAPS TRIVIAL TRIP-HAZARDS

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It is said that a picture paints a thousand words. But in the detail-orientated business of litigation, not always.

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# TORTS AND CIVIL PRACTICE:

## Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ., *LEMIRE & HIGGINS, LLC*

**Premises liability claims**.

**Santiago v. National Grid (Fisher, J., 2/27/25)**

During a project to install a new gas main, the defendant and its contractor had to dig a trench along the edge of a public road and the plaintiff's driveway, after which the trench was backfilled with temporary asphalt. Plaintiff claimed he fell and was hurt when he lost his balance while trying to step over the trench. Defendants' motion for summary judgment, contending the defect was too trivial to be actionable and was otherwise an "open and obvious" hazard, was granted by Supreme Court (Powers, J., Schenectady Co.) but the Third Department reversed, noting that even small defects "can be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify" as hazardous.

**Votra v. Village of Cambridge (Ceresia, J., 2/20/25)**

New York law permits liability for a dangerous condition to be imposed on the owner of property that abuts public property if the landowner derives a special benefit from the property unrelated to public use. Here, the plaintiff claimed she was hurt in a fall when she caught her foot in a crevice in the sidewalk – part of which was sloped to form a driveway apron on the adjoining landowner's property. Supreme Court (Hogan, J., Washington Co.) granted summary judgment to all defendants but the plaintiff's complaint against the abutting property owner was reinstated on appeal. The Third Department cited to evidence that raised factual questions on the special benefit issue, including deposition testimony that the adjoining property owner arranged for the driveway to be cleared of snow and that the driveway was used regularly by the landowner's tenants.

**Englander v. State of New York (Pritzker, J., 3/20/25)**

Claimant, injured when his car crashed into a rock wall while navigating a "hairpin turn" on a state highway in Ulster County, claimed the road was not maintained in a reasonably safe condition – specifically, that his accident was caused by the lack of a guiderail and signs advising that the recommended speed on the turn was 5 mph. After trial, the Court of Claims (DeBow, J.) found in favor of the defendant and the Third Department affirmed. Claimant's evidence included an accident report summary that showed 45 accidents on the roadway over 16 years, but only 5 of the crashes involved vehicles that were travelling in the same direction as was the claimant, and the Appellate Division noted that while certain measures may have made the hairpin turn safer, "only reasonable care and foresight, not perfect safety, is required."

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# TORTS AND CIVIL PRACTICE:

## Selected Cases from the Appellate Division, 3rd Department

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**Hankey v. Ogdensburg City School District (Garry, J., 1/16/25)**

Plaintiff, employed by a wholesale food distributor, was making a delivery of pies to the defendant school district's indoor sporting facility, in preparation for a Thanksgiving fundraiser. A school maintenance worker directed plaintiff to drop his delivery in a specified location some 10 feet away from the facility's hockey rink, where a high school gym class was underway. About 5 minutes into his delivery, plaintiff was struck on the side of his head with a hockey puck (which had caromed in his direction after it was shot from the ice and struck a goalpost). Supreme Court (Farley, J., St. Lawrence Co.) denied the defendant's motion for summary judgment, premised on a primary assumption of risk defense. Affirming, the Third Department noted that the plaintiff was on site to work, was instructed exactly where to make the delivery, and "was therefore neither a spectator nor a bystander…within the meaning of the doctrine."

**Plastic surgeon's alleged improper use of patient photos**.

**Perry v. Rockmore (Egan, J.P., 2/27/25)**

The defendant plastic surgeon operated on the plaintiff, after which she learned that photographs depicting her face before and after the procedure had been posted on various commercial websites and social media platforms to promote the physician's work. Supreme Court (Ferreira, J., Albany Co.) granted partial summary judgment to the defendant, dismissing the plaintiff's claim for breach of fiduciary duty. The Third Department agreed that plaintiff's exclusive remedy for a privacy violation claim was by statute (Civil Rights Law §§ 50 and 51) because New York does not recognize a common law claim of privacy. But the Appellate Division reinstated the breach of fiduciary duty claim because the plaintiff's complaint revealed such claim arose out the doctor-patient relationship and not the alleged violation of privacy.

**Service of late notice of claim (GML § 50-e) permitted.**

**Cook v. Maine-Endwell Central School District (Clark, J., 3/13/25)**

A notice of claim against a municipal defendant must generally be served within 90 days after the claim arises (General Municipal Law § 50-e), but Supreme Court has discretion to consider an application for leave to file a late notice of claim if permission is sought before expiration of the statute of limitations. Here, the petitioner's child tragically took his own life hours after being disciplined at school with suspension and possible expulsion. One year and 89 days after the student's death (within the SOL applicable to a tort or wrongful death claim against a municipal corporation), petitioner filed an application to file a late notice of claim, which was granted by Supreme Court (Faughnan, J., Broome Co.). The Third Department affirmed, concluding that the school district had "actual knowledge of the essential facts constituting the claim soon after decedent's death," that the defendant failed to show it would be substantially prejudiced by permitting the claim to go forward, and that the claim as described was not patently meritless.

**Labor Law Section § 240(1).**

**Burgos v. Darden Restaurants, Inc. (Pritzker, J., 1/2/25)**

Plaintiff was part of a work crew hired to demolish a walk-in freezer at a restaurant, and (while positioned on the roof of the building to cut around a sprinkler head) was hurt in a fall when the roof of the freezer collapsed. Contending he should have been provided with a portable scaffold or similar apparatus, plaintiff moved for summary judgment on liability under Labor Law § 240(1).

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# TORTS AND CIVIL PRACTICE:

## Selected Cases from the Appellate Division, 3rd Department

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Defendants alleged plaintiff declined to use 3 different-length ladders available to him, all of which were "the proper safety equipment" for demolishing the freezer, and had been instructed before the work started to contact his project manager if there was a problem. Supreme Court (Tait, J., Broome Co.) denied the motion and the Third Department affirmed, finding triable issues of fact regarding the sufficiency of the equipment provided and whether plaintiff was the sole proximate cause of his injuries.

# Immigration, Washington's Chaos, and the Mental Well-Being of Lawyers and Their Clients

DAVID W. MEYERS, ESQ., *MEYERS & MEYERS, LLP*

I am getting a head start on Mental Health Awareness Month. It's so important. Particularly in these incredibly chaotic times.

May is Mental Health Awareness Month, a time to reflect on the challenges that affect both attorneys and their clients—particularly in the (unnecessarily, I would argue) high-stress world of immigration law. Immigration policies often shift dramatically between presidential administrations, but few transitions have been as stark as the one that occurred in January of this year. The renewed very political focus on immigration in Washington, D.C., has left many immigrants and their families deeply concerned about what lies ahead. At the same time, attorneys who practice immigration law, especially those who practice in humanitarian immigration fields, find themselves under enormous pressure, balancing the legal and emotional needs of their clients while safeguarding their own well-being.

**A New Era of Immigration Policy, A Renewed Emotional Toll**

During Trump 1.0, immigration policies became significantly stricter, with measures such as the "zero-tolerance" policy, increased deportations, and efforts to eliminate protections like DACA. Now, as similar, and arguably even more restrictive, policies return to 1600 Pennsylvania Avenue, led in the darkness once again by Stephen Miller, the president's Minion in Chief, immigrants may experience longer wait times, more application denials, and heightened enforcement actions in the years ahead.

For immigrants, the stress of navigating an uncertain legal landscape is immense. The fear of deportation, the possibility of family separation, and the uncertainty surrounding work authorization can take a heavy emotional toll. But this stress isn't limited to immigrants alone. Attorneys who dedicate their careers to guiding clients through these obstacles often experience what is known as secondary traumatic stress (sometimes called "vicarious trauma" or "compassion fatigue"). This happens when lawyers absorb their clients' pain—hearing story after story of persecution, violence, or family hardship.

**The Mental and Emotional Toll for Clients and Attorneys**

Immigrants often endure trauma before they even step foot in the United States, whether they are fleeing persecution, violence, natural disasters, or war. These individuals may struggle with PTSD, anxiety, and depression, making it even harder to recount their stories for asylum applications, crime victim visas, or deportation defense cases. Even seemingly routine immigration matters, such as applying for a work permit renewal, can create extreme stress for clients whose livelihoods depend on it.

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# Immigration, Washington's Chaos, and the Mental Well-Being of Lawyers and Their Clients

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For immigration attorneys, the work is relentless. We aren't just managing caseloads; we are dealing with deeply personal and often heartbreaking narratives, all while navigating a bureaucratic system that can be frustratingly slow and indifferent. Lawyers who work with trauma survivors often experience burnout, emotional exhaustion, and the very real effects of secondary trauma. It's not just about handling complex legal issues; it's about carrying the weight of our clients' fears and struggles.

**Building Resilience and Prioritizing Mental Health**

My wife always tells me, "You should try some breathing exercises." She's right. Whether we are attorneys or immigrants, we need to recognize the importance of taking care of ourselves.

For immigrants, this means understanding that mental health support is a crucial part of the immigration journey. Research shows that immigrants are often resilient, but that doesn't mean they don't need help. Seeking both legal and emotional support can make the process more manageable and improve overall well-being. A knowledgeable and competent immigration attorney can help reduce legal uncertainty, allowing immigrants to focus more fully on their mental and emotional health.

For attorneys, self-care isn't a luxury, it's a necessity. Immigration lawyers and other victim advocates must recognize the signs of burnout and secondary trauma before they become overwhelming. Many resources exist for lawyers facing stress-related health issues, including mental health counseling, support groups, and mindfulness techniques. The key is to identify stressors, manage them effectively, and build resilience for the challenges that cannot be changed.

**Moving Forward with Strength and Support**

If you are an immigrant concerned about your legal status or future under Trump 2.0, don't wait to seek legal guidance. The right attorney can help you take proactive steps to secure your status, protect your rights, and move forward with greater confidence during these uncertain times.

If you are an immigration attorney, don't ignore the toll this work takes on your mental and emotional health. You cannot effectively advocate for your clients if you are running on empty. Take care of yourself as well as you take care of them.

We all need support, whether navigating the immigration system or guiding others through it. Let's recognize the importance of mental health (yours, mine, all of ours), not just in the month of May, but every day.

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