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Trial Lawyers Section Digest

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Message from the Chair

As we approach year's end, it is my pleasure to share with you some of the work we have done on the Trial Lawyers Executive Committee in 2013. To those of you who may not know us, we are a dedicated group of litigators committed to improving our profession and the quality of the services it renders, one trial lawyer at a time.

We support the promotion of legal education among law students as well as our colleagues of all experience levels. We have done this by participating in moot court competitions as judges in our local law schools. We have done this by participating in the annual Trial Academy, a wonderful NYSBA program sponsored by the Young Lawyers Section held over the course of five days at Cornell University. This "boot camp" type event is aimed at providing an intensive introduction to trial techniques and tactics to the newly admitted attorney. In fact, we have further supported this unique program by offering scholarships to worthy candidates who have demonstrated both a need for assistance and a commitment to fostering diversity in the profession. Our members also actively participate in CLE presentations on topics that deal directly with virtually all aspects of litigation. We have volunteered to participate in mentoring programs to provide recent graduates having an interest in litigation with rare and valuable courtroom experience.

Our online publication is a useful resource to our members and focuses on new developments in the law that affect our practice.

Among our most important functions is the work that we do in supporting each other and the networking opportunities we generate by the active role that we play in striving to make ourselves and our members better lawyers. We acutely appreciate the diversity of our population and the diverse legal needs of our members. Our Section is actively committed to meeting those needs for the betterment of all.

Our Summer Meeting is, perhaps, our best opportunity to strengthen the bonds among our members at some truly fabulous destinations. Our trip this year to Killarney, Ireland was a resounding success on all levels. We were pleased to have the Hon. Judith Gische, Justice of the Supreme Court, First Department, address us on effective appellate advocacy. Professor Patrick Connors is a valued contributor to our Section's CLE offerings and we always look forward to his annual presentations on recent legal developments directly impacting our practice. We were also joined by some local Irish judges and practitioners who shared their courtroom experiences which, in many ways, were similar to our own. Of course, it wasn't all work by any means. We golfed at some of Ireland's loveliest courses and explored the Gap of Dunloe and the Ring of Kerry as well as a pub or two.

We are currently planning our 2014 Summer Meeting, Sunday, July 27 – Wednesday, July 30 in Sonoma, California. Mark your calendars to join us. Visit www.nysba.org/trial to keep up with the latest on the 2014 Annual and Summer Meetings and all the Section news.

Our Section is always looking for new members who share our goals, enthusiasm and values. The larger our ranks, the more good we can do, the more people we can reach and the more profound the mark we can leave on the profession we care so much about. Contact me at: hecht@mhcglaw.com to get more involved.

Elizabeth Hecht

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Premises Liability: The "Open and Obvious/Not Inherently Dangerous" Doctrine

By John Sandercock and Steven B. Prystowsky

New York premises liability law requires that a landowner "act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[1] One exception to this broad duty is that a landowner has no duty to warn persons on the land of an open and obvious danger.[2]

In *Tagle v. Jakob*, a young man climbed a tree, touched one of two power lines running through it, and fell 25 feet. The Court of Appeals dismissed his complaint against the landowner, holding that she had no duty to remedy the allegedly dangerous condition because the power company's easement gave it exclusive control of the tree, and she had no duty to warn him because the power lines running through the tree were open and obvious.

"[I]n order to establish its entitlement to judgment as a matter of law, a landowner must have evidence that the condition causing the injury was both 'open and obvious' and 'not inherently dangerous.'"

However, merely establishing that a condition was open and obvious no longer entitles a landowner to summary judgment. Today, in order to establish its entitlement to judgment as a matter of law, a landowner must have evidence that the condition causing the injury was both "open and obvious" and "not inherently dangerous":

> We do not suggest that a court is precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, *as a matter of law, was not inherently dangerous* (emphasis in original).[3]

Whether an owner can make that showing has become one of the most frequently litigated tort issues in New York.

Early History

The expression "not inherently dangerous" has been used 379 times, and the broader expression, "inherently dangerous," has been used 1,239 times by New York courts since 1888 in connection with a variety of issues, including vicarious liability, products liability, and premises liability. The specific expression, "not inherently dangerous as a matter of law," used almost exclusively in trip-and-fall cases, dates only to 2003.[4]

The first use of the expression in a trip-and-fall case may be in *Winters v. City of New York*,[5] in which a laborer delivering bricks to a building site on 86th Street in 1883 fell off a plank being used as a ramp and fractured his knee on an iron spike in the street that the builders had been using (but not on that day) to fasten the ropes on their derrick. The trial court dismissed the complaint, finding that plaintiff had not shown the City was negligent. Plaintiff appealed, and the judgment was affirmed. Justice Van Hoesen, in a concurring opinion, argued that the complaint was properly dismissed because the plaintiff had not shown the spike was obviously dangerous.

> Some proof was necessary that it was inherently dangerous, or that it was so misplaced or so concealed, or that its situation with respect to its surroundings was such, that men of common prudence could see that it was likely to cause injury.[6]

In *Pitkin v. New York Cent. & H.R.R. Co.*,[7] the plaintiff's decedent, a 13-year-old boy, stumbled over a stepping box on a train platform, and fell beneath the wheels of a train that was entering the station. The box, which was about 6-7 inches high, was placed there to assist passengers getting on and off the trains.[8] The Appellate Division reversed the judgment for the plaintiff, finding no evidence that the railroad was negligent:

> It was a perfectly simple contrivance, with nothing inherently dangerous about it. So far as appears, it was kept in about the same spot, and no one prior to this day had ever found danger or difficulty in either using or avoiding it. If some stranger, coming there in the nighttime, had tripped over it, a different question might have been presented. But we think there was nothing which should have indicated to or warned defendant that a person in the daytime would be injured by or as the result of it.

Judge Cardozo, writing for the majority in *MacPherson v. Buick Motor Co.*,[9] refused to make a distinction between "things inherently dangerous and things imminently

dangerous," stating "[i]f danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent."

In *Daly v. Rector*,[10] a pedestrian tripped and fell in a driveway constructed across the sidewalk along 155th Street in Manhattan, where Trinity Church had (and still has) a cemetery. The driveway sloped gradually from the gateway to the street, and was bordered with bluestone curbing. Plaintiff obtained a jury verdict on her negligence theory, even though there was no evidence of any defect in the driveway, and the church appealed. The Appellate Division reversed the judgment and dismissed the complaint, finding that the original construction was not inherently dangerous, the driveway was a necessary incident to the use of the property, and that pedestrians were not entitled to an absolutely level and unobstructed passageway.

Rejection of Old Law

Some earlier cases indicated that the open and obvious character of a dangerous condition negates a landowner's duty to maintain its premises in reasonably safe condition. Many of these cases involved construction workers suing under Labor Law § 200, or a factual situation in which the landowner's duty to maintain the premises was at least partially obviated, as in *Tagle*.[11]

The idea that the open and obvious character of a dangerous condition negates a landowner's duty to maintain the premises in reasonably safe condition has been expressly rejected by all four departments of the Appellate Division.[12] These cases are all based on the idea that the "duty to warn" and the "duty to maintain" must be analyzed separately, as they were in *Tagle*.[13] The Second Circuit anticipated this development in *Michalski v. Home Depot, Inc.*:

> [W]e think the New York Court of Appeals would adopt the reasoning of Restatement (Second) of Torts § 343A and the majority of other jurisdictions, which hold that the open and obvious nature of a dangerous condition on its property does not relieve a landowner from a duty of care where harm from an open and obvious hazard is readily foreseeable by the landowner and the landowner has reason to know that the visitor might not expect or be distracted from observing the hazard.[14]

The policy choices on which these decisions are based are highlighted in the majority and concurring opinions in *Westbrook*. Justice Saxe, writing for the majority, stated that a landlord should not be allowed to leave unrepaired a dangerous condition, no matter how obvious it was.[15] Justice Buckley, concurring with the judgment, argued that there is no duty to protect *or* warn against open and obvious conditions, and that to hold otherwise would "preclude landowners from availing themselves of the least expensive manner of preventing accidents, i.e., giving a warning."[16]

In many recent cases, the open and obvious character of a defect does not absolve the landowner of the duty to maintain the premises in safe condition, but rather raises an issue of fact concerning comparative negligence.[17]

Today, to obtain summary judgment, a premises owner must show that the readily observable condition is "not inherently dangerous,"[18] or that the allegedly dangerous condition did not pose a reasonably foreseeable hazard.[19]

Use of Photographs

Courts frequently rely on photographs to determine whether a condition is open and obvious.[20]

In *Boyd v. New York City Housing Authority*,[21] the court remarked that the plaintiff's expert's opinion that the unlocked gate was not open and obvious did not raise an issue of fact because it was belied by the color photographs he took which showed the gate was readily apparent. The dissenting justice argued that there was nevertheless an issue of fact because some of the photographs supported the expert's opinion that the photographs gave the appearance of one continuous fence.

In *Broodie v. Gibco Enterprises, Ltd.*,[22] several color photographs in the record showed that the step was not particularly high, clearly painted in black and white so as to be visible in low light, and not inherently dangerous.

In *Heit v. Sha-Wan-Ga Lodge, Inc.*,[23] photographs of porch steps painted the same shade of gray as the porch helped the Second Circuit Court of Appeals affirm the trial court's finding of fact that the uniform color created the optical effect of one level where more than one existed.

The Appellate Division has tacitly acknowledged the important role played by photographs in deciding cases by the number of the times it has complained about the poor quality of photographs in Records on Appeal.[24]

Recurring Issues

A small number of recurring situations give rise to a disproportionately large number of cases in this area. Among them are single-step risers in restaurants, wheel stops in parking lots, obstructions in supermarket aisles, and curbs in unexpected places.

Single-step risers are generally deemed not inherently dangerous.[25]

The theory that conditions in an area can create the illusion of a flat surface, visually obscuring any steps, is referred to in New York case law as "optical confusion," although this term is not used in other states.[26] The earliest cases in which this argument succeeded also involved

allegations of inadequate lighting.[27] In *Schreiber v. Philip & Morris Restaurant Corp.*, the court stated:

> It is true that recovery has been allowed for falls caused by stepdowns or changes in floor level. The cases involve, generally, factual elements distinguishable from the present case. Thus, findings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition (citing cases).[28]

However, this theory is rejected more often than it succeeds today.[29]

Interior staircases in restaurants and theatres are generally deemed not inherently dangerous.[30]

The Second Department has held several times that wheel stops in parking lots are not inherently dangerous.[31] The issue does not appear to have arisen in the other Departments.

"Courts will no doubt continue to be divided as they are asked to find the line between conditions that should be apparent to one making reasonable use of his or her senses and those that pose a trap for the unwary."

The Second Department has generally held that unattended obstructions in supermarket aisles are not inherently dangerous.[32] However, the First Department has twice denied defendants' motions for summary judgment when faced with obstructions in supermarket aisles, finding reasons why the defendants might not have exercised reasonable care.[33]

Speed bumps have been held not inherently dangerous to pedestrians.[34]

Power cables and electronic equipment are generally deemed not inherently dangerous.[35]

Clothing racks in stores have been held not inherently dangerous.[36]

Opinion is divided as to overhead pipes and beams[37] and curbs in unexpected places.[38]

Courts will no doubt continue to be divided as they are asked to find the line between conditions that should be apparent to one making reasonable use of his or her senses and those that pose a trap for the unwary.

Endnotes

1. *Basso v. Miller*. 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 568 (1976).
2. *Tagle v. Jakob*, 97 N.Y.2d 165, 169, 737 N.Y.S.2d 331, 333-334 (2001).
3. *Cupo v. Karfunkel*, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40, 43 (2d Dept. 2003).
4. *Powers v. St. Bernadette's Roman Catholic Church*, 309 A.D.2d 1219, 1219, 765 N.Y.S.2d 102, 103 (4th Dept. 2003).
5. 15 Daly 102, 2 N.Y.S. 695, 697 (Gen. Term 1888).
6. *Id*. at 697.
7. 94 App. Div. 31, 34, 87 N.Y.S. 906, 908 (4th Dept. 1904).
8. *Pitkin* might be decided differently if it arose today. *See, e.g., Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 70, 773 N.Y.S.2d 38, 40 (1st Dept. 2004) (box 10–12 inches high on floor of supermarket deemed possible trap by panel majority).
9. 217 N.Y. 382, 394, 111 N.E. 1050, 1051 (1916).
10. 188 App. Div. 280, 176 N.Y.S. 734 (1st Dept. 1919).
11. *See, e.g., Sandler v. Patel*, 288 A.D.2d 459, 733 N.Y.S.2d 131 (2d Dept. 2001) (plaintiff was aware of defect on stairs that caused him to fall); *Bojovic v. New York City Housing Authority*, 284 A.D.2d 356, 726 N.Y.S.2d 444 (2d Dept. 2001) (accident caused by defect plaintiff was there to remedy); *Patrie v. Gorton*, 267 A.D.2d 582, 699 N.Y.S.2d 218 (3d Dept. 1999) (broken, uneven sidewalk which plaintiff tenant may have been obligated under lease to repair); *Hill v. Corning Inc.*, 237 A.D.2d 881, 654 N.Y.S.2d 524 (4th Dept.), *lv. denied in part and dismissed in part*, 90 N.Y.2d 884, 661 N.Y.S.2d 826 (1997) (Labor Law § 200). All of these cases have been abrogated.
12. *See Cohen v. Shopwell, Inc.*, 309 AD2d 560, 765 NYS2d 40 (1st Dept. 2003); *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dept. 2004) (3-2); *Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40 (2d Dept. 2003) (front wheel of courier's lift caught in depressed area where sidewalk met metal grille of transformer vault, causing courier to fall); *MacDonald v. City of Schenectady*, 308 A.D.2d 125, 761 N.Y.S.2d 752 (3d Dept. 2003); *Bax v. Allstate Health Care, Inc.*, 26 A.D.3d 861, 863, 809 N.Y.S.2d 378, 380-381 (4th Dept. 2006).
13. *See Westbrook*, 5 A.D.3d at 73, 773 N.Y.S.2d at 42, citing *Cohen* and *MacDonald*.
14. 225 F.3d 113, 121 (2d Cir. 2000).
15. *Westbrook*, 5 A.D.3d at 74, 773 N.Y.S.2d at 43.
16. *Id*. at 78. Justice Buckley's position, although it remains a minority view in most cases, may still be the law when it comes to natural features of the landscape. *See, e.g., Melendez v. City of New York*, 76 A.D.3d 442, 443, 906 N.Y.S.2d 263, 264 (1st Dept. 2010) (dismissing complaint where plaintiff fell off ledge at top of waterfall in Bronx River Park); *Tulovic v. Chase Manhattan Bank, N.A.*, 309 A.D.2d 923, 925, 767 N.Y.S.2d 44, 46 (2d Dept. 2003) (*Cupo* rule absolves landowners from liability for injuries sustained by inattentive plaintiffs who trip over naturally occurring topographic conditions). *Cf. Arsenault v. State*, 96 A.D.3d 97, 946 N.Y.S.2d 276 (3d Dept. 2012) (analyzing whether defendant took reasonable precautions to protect park patrons from falling rocks at base of waterfall); *King v. Cornell Univ.*, 41 Misc.3d, 451, 973 N.Y.S.2d 534, (Sup. Ct., Tompkins County, 2013) (due to absence of photographs in evidence, question of fact whether edge of gorge was open and obvious precluded summary judgment for defendant).
17. *Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89, 924 N.Y.S.2d 32 (1st Dept. 2011); *Cupo*, 1 A.D.3d at 48, 767 N.Y.S.2d at 40; *MacDonald*, 308 A.D.2d at 125, 761 N.Y.S.2d at 752; *Custodi v. Town of Amherst*, 81 A.D.3d 1344, 1347, 916 N.Y.S.2d 685, 687 (4th Dept. 2011).
18. *See, e.g., Verdejo v. New York City Hous. Auth.*, 105 A.D.3d 450, 963 N.Y.S.2d 78 (1st Dept. 2013) (wet leaves on sidewalk following recent precipitation).
19. *See, e.g., Adamo v. National R.R. Passenger Corp.*, 71 A.D.3d 557, 897 N.Y.S.2d 85 (1st Dept. 2010) (stopped escalator); *Jones*

v. Presbyterian Hosp. in City of New York, 3 A.D.3d 225, 771 N.Y.S.2d 109 (1st Dept. 2004) (short flight of auditorium steps); *Michalski*, 225 F.3d at 121 (four-inch pallet resting on forklift tines); *Matteo v. Kohl's Dept. Stores, Inc.*, 2012 WL 760317, 7-9 (S.D.N.Y. 2012), *aff'd*, __ Fed. Appx. __, 2013 WL 3481365 (2d Cir. 2013) (wheel at base of store display rack); *Ramos v. Sears/Kmart*, 2010 WL 3911487, 5-6 (S.D.N.Y. 2010) (stopped escalator).

20. *See, e.g.*, *Tagle*, 97 N.Y.2d at 169-170, 737 N.Y.S.2d at 334 (photographs showed wires passing through tree).

21. 105 A.D.3d 542, 964 N.Y.S.2d 10 (1st Dept. 2013).

22. 67 A.D.3d 418, 418, 888 N.Y.S.2d 32 (1st Dept. 2009). *See also Remes v. 513 West 26th Realty, LLC*, 73 A.D.3d 665, 666, 903 N.Y.S.2d 8 (1st Dept. 2010) (photographs showed obvious drop in elevation and trimmings against wall outlining steps).

23. 288 F.2d 65, 66 (2d Cir. 1961).

24. *See, e.g.*, *Gennaro v. Cord Meyer Development Co. & LLC*, 57 A.D.3d 725, 726, 871 N.Y.S.2d 214, 215 (2d Dept. 2008) (poor quality of black and white photocopies of color photographs submitted in opposition to defendant's motion rendered them insufficient to raise triable issue of fact as to whether defendant had constructive notice of the alleged defect); *Trinidad v. New York City Transit Authority*, 60 A.D.3d 437, 873 N.Y.S.2d 488 (1st Dept. 2009) (due to poor quality of photographs it submitted, defendant failed to demonstrate that crack in stairs was so trivial as to be nonactionable); *Berry v. Rocking Horse Ranch Corp.*, 56 A.D.3d 711, 712, 868 N.Y.S.2d 270, 271 (2d Dept. 2008) (poor quality photographs, purportedly depicting accident site, were insufficient to demonstrate that alleged driveway condition was too trivial to be actionable); *Card v. Brown*, 43 A.D.3d 594, 595, 840 N.Y.S.2d 840, 841 (3d Dept. 2007) ("[t]o the extent that plaintiff claims that certain photographs require that her motion be granted, we note that the rather poor quality photocopies of photographs in the record are insufficient to definitively dispose of the issue of liability").

25. *See Langer v. 116 Lexington Avenue, Inc.*, 92 A.D.3d 597, 939 N.Y.S.2d 370 (1st Dept. 2012) (reflector tape eliminated optical confusion at single step to entrance of banquet hall); *Franchini v. American Legion Post*, 107 A.D.3d 432, 967 N.Y.S.2d 48 (1st Dept. 2013) (single concrete step separating area where door was located from patio); *Bittar v. New Growing, Inc.*, 94 A.D.3d 630, 942 N.Y.S.2d 354 (1st Dept. 2012) (single step separating restaurant dining area from restrooms); *Broodie v. Gibco Enterprises, Ltd.*, 67 A.D.3d 418, 888 N.Y.S.2d 32 (1st Dept. 2009) (single step separating bar area from dining area at restaurant); *Burke v. Canyon Road Rest.*, 60 A.D.3d 558, 876 N.Y.S.2d 25 (1st Dept. 2009) (step leading to front door of restaurant); *Smith v. South Bay Home Ass'n, Inc.*, 102 A.D.3d 668, 957 N.Y.S.2d 728 (2d Dept. 2013) (single carpeted step up to stage); *Nelson v. 40-01 Northern Blvd. Corp.*, 95 A.D.3d 851, 943 N.Y.S.2d 216 (2d Dept. 2012) (single-step riser in contrasting color at restaurant); *Loiacono v. Quattro Piu, Inc.*, 82 A.D.3d 940, 919 N.Y.S.2d 87 (2d Dept. 2011) (step inside restaurant); *Tyz v. First Street Holding Co., Inc.*, 78 A.D.3d 818, 910 N.Y.S.2d 179 (2d Dept. 2010) (single step riser in restaurant); *Bretts v. Lincoln Plaza Associates, Inc.*, 67 A.D.3d 943, 890 N.Y.S.2d 87 (2d Dept. 2009) (single-step riser at restaurant); *Murray v. Dockside 500 Marina, Inc.*, 32 A.D.3d 832, 821 N.Y.S.2d 608 (2d Dept. 2006) (single carpeted step descending from doorway platform to catering hall); *Powers v. St. Bernadette's Roman Catholic Church*, 309 A.D.2d 1219, 765 N.Y.S.2d 102 (4th Dept. 2003) (single step leading from computer room to hallway).

    But see Hadgraft v. Morin, 94 A.D.3d 701, 941 N.Y.S.2d 513 (2d Dept. 2012) (small single-step riser on insufficiently lit walkway); *Surujnaraine v. Valley Stream Cent. High School Dist.*, 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept. 2011) (single-step riser separating entrance to lobby of high school auditorium from abutting sidewalk); *Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d 712, 917 N.Y.S.2d 896 (2d Dept. 2011) (single upward step into bathroom).

26. *See Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89, 92, 924 N.Y.S.2d 32, 34 (1st Dept. 2011); *Roros v. Oliva*, 54 A.D.3d 398 (2d Dept. 2008) (hardwood floors with single-step riser created optical confusion); *Chafoulias v. 240 E. 55th Street Tenants Corp.*, 141 A.D.2d 207, 533 N.Y.S.2d 440 (1st Dept. 1988) (deeming plaintiff's theory to be legally sufficient); *Heit v. Sha-Wan-Ga Lodge, Inc.*, 288 F.2d 65, 66 (2d Cir. 1961) (stairs painted same color as porch); *Brooks v. Bergdorf-Goodman Co.*, 5 A.D.2d 162, 170 N.Y.S.2d 687 (1st Dept. 1958) (rejecting plaintiff's theory of "optical confusion").

27. *See, e.g.*, *Bloch v. Frank G. Shattuck Co.*, 2 A.D.2d 20, 22, 152 N.Y.S.2d 964, 965 (2d Dept. 1956) (inadequate lighting and overall muddy condition of floor created illusion of one level plane and thereby presented deceptive appearance of safety).

28. 25 A.D.2d 262, 263, 268 N.Y.S.2d 510, 511 (1st Dept. 1966).

29. *See Franchini*, 107 A.D.3d at 432, 967 N.Y.S.2d at 48 (rejecting argument that concrete step created optical confusion, as it was a different color from tiled floor); *Philips v. Paco Lafayette LLC*, 106 A.D.3d 631, 632, 966 N.Y.S.2d 400 (1st Dept. 2013) (photographs undermined plaintiff's contention that unpainted concrete curb created optical confusion); *Smith v. South Bay Home Ass'n*, 102 A.D.3d at 668, 957 N.Y.S.2d at 728 (no issue that carpeting on step leading up to stage was inherently dangerous); *Bittar v. New Growing, Inc.*, 94 A.D.3d 630, 942 N.Y.S.2d 354 (1st Dept. 2012) (record did not support plaintiff's argument that step created "optical confusion"); *Langer*, 92 A.D.3d at 597, 939 N.Y.S.2d at 370 (reflective strips on steps eliminated any optical confusion); *Dadon v. 102-30 66th Road Co-Op Owner's, Inc.*, 90 A.D.3d 976, 977, 934 N.Y.S.2d 829 (2d Dept. 2011) (alleged difficulty seeing first step due to natural light did not defeat defendant's motion); *Kamps v. New York City Transit Authority*, 89 A.D.3d 421, 931 N.Y.S.2d 858 (1st Dept. 2011) (photographs showed perimeter of square concrete platform abutting subway exit was marked with yellow paint); *Martin v. City of New York*, 82 A.D.3d 653, 654, 919 N.Y.S.2d 330 (1st Dept. 2011) (photographs of curb were not sufficient to defeat motions); *Remes v. 513 West 26th Realty, LLC*, 73 A.D.3d 665, 666, 903 N.Y.S.2d 8 (1st Dept. 2010) (photographs showed an obvious drop in elevation and trimmings against the wall outlining the steps); *Stillman v. Frankel*, 44 A.D.2d 821, 355 N.Y.S.2d 788 (1st Dept. 1974) (no evidence that concrete steps leading to plaza constituted a trap); *Brooks*, 5 A.D.2d at 163, 170 N.Y.S.2d at 687 (approach to steps inside store was sufficiently marked with two-inch orange line painted across entire width of top step).

30. *Sato v. Ippudo NY*, 104 A.D.3d 423, 960 N.Y.S.2d 408 (1st Dept.), *aff'd*, 21 N.Y.3d 1057 (staircase leading to restrooms); *Salman v. L-Ray LLC*, 93 A.D.3d 568, 941 N.Y.S.2d 52 (1st Dept. 2012) (three steps leading from restrooms to bar area); *Salerno v. Street Retail, Inc.*, 38 A.D.3d 515, 831 N.Y.S.2d 265 (2d Dept. 2007) (carpeted theater stairs); *Webber v. Miller*, 17 A.D.3d 352, 793 N.Y.S.2d 105 (2d Dept. 2005) (steps leading to restroom in restaurant); *Knickerbocker v. Ulster Performing Arts Center*, 74 A.D.3d 1526, 903 N.Y.S.2d 578 (3d Dept. 2010) (carpeted theater stairs).

31. *Stern v. River Manor Care Center, Inc.*, 106 A.D.3d 990, 965 N.Y.S.2d 377 (2d Dept. 2013), *Gallub v. Popei's Clam Bar, Ltd., of Deer Park*, 98 A.D.3d 559, 949 N.Y.S.2d 467 (2d Dept. 2012), *Pipitone v. 7-Eleven, Inc.*, 67 A.D.3d 879, 889 N.Y.S.2d 234 (2d Dept. 2009), *Giambruno v. Wilbur F. Breslin Development Corp.*, 56 A.D.3d 520, 867 N.Y.S.2d 202 (2d Dept. 2008); *Sclafani v. Washington Mutual*, 36 A.D.3d 682, 829 N.Y.S.2d 553 (2d Dept. 2007); *Zimkind v. Costco Wholesale Corp.*, 12 A.D.3d 593, 785 N.Y.S.2d 108 (2d Dept. 2004). *See also Gallo v. Hempstead Turnpike, LLC*, 97 A.D.3d 723, 948 N.Y.S.2d 660 (2d Dept. 2012) (concrete barrier designed to prevent shopping carts from rolling beyond certain point); *Gibbons v. Lido and Point Lookout Fire District*, 293 A.D.2d 646, 740 N.Y.S.2d 440 (2d Dept. 2002) (cement parking block on floor of firehouse).

    But see Davarashvili v. ABM Industries Inc., 81 A.D.3d 776, 916 N.Y.S.2d 830 (2d Dept. 2011) (placement of a "parking delineator" created tripping hazard); *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 554 (2d Dept. 2008) (wheel stop in parking lot was same color as surrounding asphalt).

32. *See Dapolito v. Stop & Shop Supermarket*, 90 A.D.3d 693, 934 N.Y.S.2d 337 (2d Dept. 2011) (empty four-inch high display platform between ends of two aisles at supermarket); *Flaim v. Hex Food, Inc.*, 79 A.D.3d 797, 912 N.Y.S.2d 426 (2d Dept. 2010) (unattended U-boat dolly in supermarket aisle); *Stern v. Costco Wholesale*, 63 A.D.3d 1139, 882 N.Y.S.2d 266 (2d Dept. 2009) (bright orange flatbed shopping cart in store aisle); *Harris v. APW Supermarkets, Inc.*, 63 A.D.3d 1000, 880 N.Y.S.2d 549 (2d Dept. 2009) (plastic shelf extender in supermarket aisle); *Neiderbach v. 7-Eleven, Inc.*, 56 A.D.3d 632, 868 N.Y.S.2d 91 (2d Dept. 2008) (15-inch high blue plastic crate in uncluttered store aisle); *Espinoza v. Hemar Supermarket, Inc.*, 43 A.D.3d 855, 841 N.Y.S.2d 680 (2d Dept. 2007) (stack of empty milk crates in supermarket aisle).

    But see Robinson v. 206-16 Hollis Ave. Food Corp., 82 A.D.3d 735, 918 N.Y.S.2d 161 (2d Dept. 2011) (two-foot high display of pig's tails at end of merchandise rack between two aisles).

33. *Furment v. Ziad Food Corp.*, 104 A.D.3d 562, 960 N.Y.S.2d 648 (1st Dept. 2013) (produce box placed next to plaintiff in supermarket aisle while plaintiff was bending over to retrieve something); *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dept. 2004) (3-2) (box left in aisle of store). In *Westbrook*, the box was "just off the corner, in the middle of the aisle." In *Furment*, the plaintiff evidently testified that the box was placed next to her just as she was bending over to retrieve something from a low shelf.

34. *Rivera v. City of New York*, 57 A.D.3d 281, 870 N.Y.S.2d 241 (1st Dept. 2008), *Brande v. City of White Plains*, 107 A.D.3d 926, 966 N.Y.S.2d 911 (2d Dept. 2013).

35. *Benson v. IT & LY Hairfashion, NA, Inc.*, 94 A.D.3d 932, 943 N.Y.S.2d 137 (2d Dept. 2012) (leg of tripod holding spotlight illuminating stage at trade show); *Holdos v. American Consumer Shows, Inc.*, 91 A.D.3d 823, 937 N.Y.S.2d 303 (2d Dept. 2012) (yellow and blue cable cover on floor of community college gymnasium during trade show); *Gonzalez v. New York Racing Ass'n, Inc.*, 69 A.D.3d 673, 893 N.Y.S.2d 568 (2d Dept. 2010) (sloped mat which covered electric cables at trade show). *But see Shah v. Mercy Medical Center*, 71 A.D.3d 1120, 898 N.Y.S.2d 589 (2d Dept. 2010) (cables extending from anesthesia machine across pathway in operating room).

36. *Schulman v. Old Navy/The Gap, Inc.*, 45 A.D.3d 475, 845 N.Y.S.2d 341 (1st Dept. 2007) (metal bracket on clothing rack); *Kaufmann v. Lerner New York, Inc.*, 41 A.D.3d 660, 838 N.Y.S.2d 181 (2d Dept. 2007) (rolling clothing rack inside dressing room area corridor).

37. Not inherently dangerous: *Hecht v. 281 Scarsdale Corp.*, 3 A.D.3d 551, 770 N.Y.S.2d 643 (2d Dept. 2004) (overhead pipe and valve near wall of defendants' parking garage upon which plaintiff struck his head). Issue of fact: *Stoppeli v. Yacenda*, 78 A.D.3d 815, 911 N.Y.S.2d 119 (2d Dept. 2010) (contractor struck his head on low beam while being led through house); *England v. Vacri Const. Corp.*, 24 A.D.3d 1122, 807 N.Y.S.2d 669 (3d Dept. 2005) (low pipe extending across basement doorway at construction site).

38. Not inherently dangerous: *Philips v. Paco Lafayette LLC*, 106 A.D.3d 631, 966 N.Y.S.2d 400 (1st Dept. 2013) (concrete curb 8 inches high and 10 inches wide beside entrance to subway station); *Capasso v. Village of Goshen*, 84 A.D.3d 998, 922 N.Y.S.2d 567 (2d Dept. 2011) (8-10 inch height differential between edge of curb and adjacent lawn); *Ramos v. Cooper Investors, Inc.*, 49 A.D.3d 623, 854 N.Y.S.2d 149 (2d Dept. 2008) (height differential between walkway and adjacent roadway); *Bilinski v. Bank of Richmondville*, 12 A.D.3d 911, 784 N.Y.S.2d 708 (3d Dept. 2004) (asphalt curb marking intersection of shrubbery bed and defendant's parking lot).

    Issue of fact: *Richards v. Passarelli*, 77 A.D.3d 905, 910 N.Y.S.2d 500 (2d Dept. 2010) (no warning signs or markings to alert drivers to height differential in parking lot); *Page v. State*, 72 A.D.3d 1456, 902 N.Y.S.2d 199 (3d Dept. 2010) (3-inch curb on the side of portable ramp); *Monge v. Home Depot, Inc.*, 307 A.D.2d 501, 761 N.Y.S.2d 886 (3d Dept. 2003) (width of aisle at outdoor plant display); *Hayes v. Texas Roadhouse Holdings, LLC*, 100 A.D.3d 1532, 954 N.Y.S.2d 348 (4th Dept. 2012) (curb in proximity to bench likely to be overlooked).

Summary of Cases Holding That Readily Observable Conditions Were Not Inherently Dangerous as a Matter of Law

In the following cases, courts granted summary judgment to defendants because the allegedly dangerous condition was held to be both readily observable and not inherently dangerous as a matter of law.

First Department

Franchini v. American Legion Post, 107 A.D.3d 432, 967 N.Y.S.2d 48 (1st Dept. 2013) (single concrete step separating area where door was located from patio);

Philips v. Paco Lafayette LLC, 106 A.D.3d 631, 966 N.Y.S.2d 400 (1st Dept. 2013) (concrete curb 8 inches high and 10 inches wide beside Soho subway station);

Villanti v. BJ's Wholesale Club, Inc., 106 A.D.3d 556, 965 N.Y.S.2d 472 (1st Dept. 2013) (bumper that ran along the bottom of a display case);

Rivers v. Villford Realty Corp., 106 A.D.2d 492, 964 N.Y.S.2d 531 (1st Dept. 2013) (calcium chloride pellets on sidewalk where no snow or ice present);

Boyd v. New York City Housing Authority, 105 A.D.3d 542, 964 N.Y.S.2d 10 (1st Dept. 2013) (unlocked gate that formed part of steel fence);

Verdejo v. New York City Housing Authority, 105 A.D.3d 450, 963 N.Y.S.2d 78 (1st Dept. 2013) (wet foliage condition following recent precipitation);

Sato v. Ippudo NY, 104 A.D.3d 423, 960 N.Y.S.2d 408 (1st Dept.), *aff'd*, 21 N.Y.3d 1057 (staircase leading to restrooms);

Haynie v. New York City Housing Authority, 95 A.D.3d 594, 944 N.Y.S.2d 104 (1st Dept. 2012) (concrete rocks, bricks, and other pieces of masonry debris piled up and blocking open entranceway to yard) (3-2);

Brown v. New York Marriott Marquis Hotel, 95 A.D.3d 585, 943 N.Y.S.2d 531 (1st Dept. 2012) (freshly mopped hotel stairs);

Bittar v. New Growing, Inc., 94 A.D.3d 630, 942 N.Y.S.2d 354 (1st Dept. 2012) (single step separating restaurant dining area from restrooms);

Salman v. L-Ray LLC, 93 A.D.3d 568, 941 N.Y.S.2d 52 (1st Dept. 2012) (three steps leading from restrooms to bar area of restaurant);

Langer v. 116 Lexington Avenue, Inc., 92 A.D.3d 597, 939 N.Y.S.2d 370 (1st Dept. 2012) (reflector tape eliminated optical confusion at single step to entrance of banquet hall);

Lazar v. Burger Heaven, 88 A.D.3d 591, 931 N.Y.S.2d 296 (1st Dept. 2011) (occupied sidewalk café chair);

Baynes v. City of New York, 81 A.D.3d 423, 916 N.Y.S.2d 58 (1st Dept. 2011) (gravel on recently milled street);

Matthews v. Vlad Restoration Ltd., 74 A.D.3d 692, 904 N.Y.S.2d 391 (1st Dept. 2010) (lower horizontal brace on scaffold);

Broodie v. Gibco Enterprises, Ltd., 67 A.D.3d 418, 888 N.Y.S.2d 32 (1st Dept. 2009) (single step separating bar area from dining area at restaurant);

Burke v. Canyon Road Rest., 60 A.D.3d 558, 876 N.Y.S.2d 25 (1st Dept. 2009) (step leading to front door of restaurant);

Rivera v. City of New York, 57 A.D.3d 281, 870 N.Y.S.2d 241 (1st Dept. 2008) (speed bump located on pedestrian walkway leading from front door of building);

Schulman v. Old Navy/The Gap, Inc., 45 A.D.3d 475, 845 N.Y.S.2d 341 (1st Dept. 2007) (metal bracket on clothing rack);

Bloom v. Lula Realty Corp., 43 A.D.3d 662, 840 N.Y.S.2d 870 (1st Dept. 2007) (iron gate with spring mechanism and without doorknob) (4-1);

Jones v. Presbyterian Hosp. in the City of New York, 3 A.D.3d 225, 771 N.Y.S.2d 109 (1st Dept. 2004) (short flight of auditorium steps).

Second Department

Brande v. City of White Plains, 107 A.D.3d 926, 966 N.Y.S.2d 911 (2d Dept. 2013) (bright yellow speed bump, 2-inch high, 10-inch wide, and 72-inch long inside parking garage);

Stern v. River Manor Care Center, Inc., 106 A.D.3d 990, 965 N.Y.S.2d 377 (2d Dept. 2013) (wheel stop in parking lot);

Sosa v. RS 2001, Inc., 106 A.D.3d 720, 964 N.Y.S.2d 227 (2d Dept. 2013) (piece of cardboard on floor);

DeCourcey v. Briarcliffe Congregational Church, 103 A.D.3d 799, 961 N.Y.S.2d 487 (2d Dept. 2013) (exterior stairway);

Zegarelli v. Dundon, 102 A.D.3d 958, 958 N.Y.S.2d 302 (2d Dept. 2013) (brick walkway with grass growing between bricks);

Smith v. South Bay Home Ass'n, Inc., 102 A.D.3d 668, 957 N.Y.S.2d 728 (2d Dept. 2013) (single carpeted step up to stage);

Gallub v. Popei's Clam Bar, Ltd., of Deer Park, 98 A.D.3d 559, 949 N.Y.S.2d 467 (2d Dept. 2012) (wheel stop in restaurant parking lot);

Gallo v. Hempstead Turnpike, LLC, 97 A.D.3d 723, 948 N.Y.S.2d 660 (2d Dept. 2012) (concrete barrier designed to prevent shopping carts from rolling beyond certain point);

Rivero v. Spillane Enterprises, Corp., 95 A.D.3d 984, 943 N.Y.S.2d 235 (2d Dept. 2012) (damp floor which had recently been mopped);

Nelson v. 40-01 Northern Blvd. Corp., 95 A.D.3d 851, 943 N.Y.S.2d 216 (2d Dept. 2012) (single-step riser in contrasting color at restaurant);

Callen v. Comsewogue School Dist., 95 A.D.3d 814, 942 N.Y.S.2d 818 (2d Dept. 2012) (chain, suspended between two poles, used to block roadway);

Schiavone v. Bayside Fuel Oil Depot, 94 A.D.3d 970, 942 N.Y.S.2d 585 (2d Dept. 2012) (gravel parking lot);

Benson v. IT & LY Hairfashion, NA, Inc., 94 A.D.3d 932, 943 N.Y.S.2d 137 (2d Dept. 2012) (leg of tripod holding spotlight illuminating stage at trade show);

Toes v. National Amusements, Inc., 94 A.D.3d 742, 941 N.Y.S.2d 666 (2d Dept. 2012) (elevation differential between theatre seating area reserved for wheelchairs and adjacent row of seats);

Holdos v. American Consumer Shows, Inc., 91 A.D.3d 823, 937 N.Y.S.2d 303 (2d Dept. 2012) (yellow and blue cable cover on floor of community college gymnasium during trade show);

Dadon v. 102-30 66th Road Co-Op Owner's, Inc., 90 A.D.3d 976, 934 N.Y.S.2d 829 (2d Dept. 2011) (interior staircase leading to elevators in lobby of apartment building where plaintiff lived; rejecting theory of optical confusion caused by natural light);

Atehortua v. Lewin, 90 A.D.3d 794, 935 N.Y.S.2d 102 (2d Dept. 2011) (waterslide toy in defendants' backyard);

Iwelu v. New York City Transit Authority, 90 A.D.3d 712, 934 N.Y.S.2d 229 (2d Dept. 2011) (opening in riser of bottom step of stairway at subway station);

Dapolito v. Stop & Shop Supermarket, 90 A.D.3d 693, 934 N.Y.S.2d 337 (2d Dept. 2011) (empty four-inch high display platform between ends of two aisles at supermarket);

Soussi v. Gobin, 87 A.D.3d 580, 928 N.Y.S.2d 80 (2d Dept. 2011) (wire mesh grid on sidewalk under construction);

O'Brien v. Sayville Union Free School Dist., 87 A.D.3d 569, 928 N.Y.S.2d 85 (2d Dept. 2011) (bathroom door at elementary school);

Nunez-Wilson v. Carmo Realty, 85 A.D.3d 888, 925 N.Y.S.2d 342 (2d Dept. 2011) (three-inch height differential between raised spring floor and mat at gymnastics facility);

Mathew v. A.J. Richard & Sons, 84 A.D.3d 1038, 923 N.Y.S.2d 218 (2d Dept. 2011) (open lid of barbecue grill on display in store);

Capasso v. Village of Goshen, 84 A.D.3d 998, 922 N.Y.S.2d 567 (2d Dept. 2011) (8-10 inch height differential between edge of curb and adjacent lawn);

McGrath v. Oyster Bay Visiting Nurse Ass'n, Inc., 84 A.D.3d 894, 923 N.Y.S.2d 162 (2d Dept. 2011) (taped-off area parking lot during repaving project);

Ryan v. Richmond County Yacht Club, Inc., 83 A.D.3d 1036, 922 N.Y.S.2d 155 (2d Dept. 2011) (plaintiff failed to see two steps and fell while carrying a cake at waist height);

Popalardo v. Marino, 83 A.D.3d 1029, 922 N.Y.S.2d 158 (2d Dept. 2011) (scale in physician's examination room);

Loiacono v. Quattro Piu, Inc., 82 A.D.3d 940, 919 N.Y.S.2d 87 (2d Dept. 2011) (step inside restaurant);

Losciuto v. City University of New York, 80 A.D.3d 576, 914 N.Y.S.2d 296 (2d Dept. 2011) (three-step staircase separating upper patio area from lower patio area);

Azumally v. 16 West 19th LLC, 79 A.D.3d 922, 913 N.Y.S.2d 730 (2d Dept. 2010) (waste paper basket in office photocopy room);

Thomas v. Pleasantville Union Free School Dist., 79 A.D.3d 853, 913 N.Y.S.2d 702 (2d Dept. 2010) (rope strung between two stanchions across intersection of macadam path and running track);

Flaim v. Hex Food, Inc., 79 A.D.3d 797, 912 N.Y.S.2d 426 (2d Dept. 2010) (unattended U-boat dolly in supermarket aisle);

Tyz v. First Street Holding Co., Inc., 78 A.D.3d 818, 910 N.Y.S.2d 179 (2d Dept. 2010) (single-step riser in restaurant);

Reiss v. Ulster County Agr. Soc., 78 A.D.3d 679, 910 N.Y.S.2d 164 (2d Dept. 2010) (wet area of grassy fairground site);

Russ v. Fried, 73 A.D.3d 1153, 901 N.Y.S.2d 703 (2d Dept. 2010) (height differential between the lip of driveway and adjacent roadway);

Weiss v. Half Hollow Hills Cent. School Dist., 70 A.D.3d 932, 893 N.Y.S.2d 877 (2d Dept. 2010) (single-step riser separating landing outside school doors from abutting sidewalk);

Gonzalez v. New York Racing Ass'n, Inc., 69 A.D.3d 673, 893 N.Y.S.2d 568 (2d Dept. 2010) (sloped mat which covered electric cables at trade show);

Bretts v. Lincoln Plaza Associates, Inc., 67 A.D.3d 943, 890 N.Y.S.2d 87 (2d Dept. 2009) (single-step riser at restaurant);

Pipitone v. 7-Eleven, Inc., 67 A.D.3d 879, 889 N.Y.S.2d 234 (2d Dept. 2009) (concrete wheel stop in convenience store parking lot);

Seelig v. Burger King Corp., 66 A.D.3d 986, 888 N.Y.S.2d 123 (2d Dept. 2009) (mulched area and concrete abutment in parking lot outside restaurant);

Marchetti v. Modica, 65 A.D.3d 1095, 885 N.Y.S.2d 220 (2d Dept. 2009) (furniture partially blocked one walkway outside multi-family residence);

Rivas-Chirino v. Wildlife Conservation Soc., 64 A.D.3d 556, 883 N.Y.S.2d 552 (2d Dept. 2009) (concrete bleacher seating, constructed unevenly to simulate jungle setting, located between two wooden staircases);

Stern v. Costco Wholesale, 63 A.D.3d 1139, 882 N.Y.S.2d 266 (2d Dept. 2009) (bright orange flatbed shopping cart in store aisle);

Sherman-Schiffman v. Costco Wholesale, Inc., 63 A.D.3d 1031, 884 N.Y.S.2d 760 (2d Dept. 2009) (metal arm used to fasten two shopping carts together);

Meisels v. Lucille Roberts Health Clubs, Inc., 63 A.D.3d 1020, 881 N.Y.S.2d 482 (2d Dept.2009) (fuzz from newly installed carpet caught in grooves of exercise step);

Harris v. APW Supermarkets, Inc., 63 A.D.3d 1000, 880 N.Y.S.2d 549 (2d Dept. 2009) (plastic shelf extender in supermarket aisle);

Terranova v. Staten Island University Hosp., 57 A.D.3d 765, 870 N.Y.S.2d 84 (2d Dept. 2008) (footrest of wheelchair in hospital room);

Neiderbach v. 7-Eleven, Inc., 56 A.D.3d 632, 868 N.Y.S.2d 91 (2d Dept. 2008) (15-inch high blue plastic crate in uncluttered store aisle);

Giambruno v. Wilbur F. Breslin Development Corp., 56 A.D.3d 520, 867 N.Y.S.2d 202 (2d Dept. 2008) (wheel stops in parking lot);

Badalbaeva v. City of New York, 55 A.D.3d 764, 866 N.Y.S.2d 322 (2d Dept. 2008) (short, vertical posts strung with a cable);

Gagliardi v. Walmart Stores, Inc., 52 A.D.3d 777, 860 N.Y.S.2d 207 (2d Dept. 2008) (box containing unassembled chest of dresser drawers placed in aisle of store);

Lawson v. OneSource Facility Services, Inc., 51 A.D.3d 983, 859 N.Y.S.2d 249 (2d Dept. 2008) (freshly mopped hallway floor);

Schwartz v. Hersh, 50 A.D.3d 1011, 856 N.Y.S.2d 640 (2d Dept. 2008) (carpeted staircase that plaintiff had used at least 100 times);

Espada v. Mid-Island Babe Ruth League, Inc., 50 A.D.3d 843, 855 N.Y.S.2d 271 (2d Dept. 2008) (sloped roadway/parking lot covered with small round gravel);

Lasky v. Daly, 50 A.D.3d 640, 854 N.Y.S.2d 751 (2d Dept. 2008) (satellite dish antenna);

Heiden v. City of New York, 49 A.D.3d 693, 853 N.Y.S.2d 655 (wheeled leg of portable table);

Ramos v. Cooper Investors, Inc., 49 A.D.3d 623, 854 N.Y.S.2d 149 (2d Dept. 2008) (height differential between walkway and adjacent roadway);

Vidal v. Lakeside Plaza, Inc., 48 A.D.3d 456, 849 N.Y.S.2d 785 (2d Dept. 2008) (irregular height differential between curb and parking lot);

DiGeorgio v. Moratta, 47 A.D.3d 752, 850 N.Y.S.2d 556 (2d Dept. 2008) (height differential between grass and brick walkway);

Monahan v. New York City Dept. of Education, 47 A.D.3d 690, 851 N.Y.S.2d 586 (2d Dept. 2008 (pole supporting volleyball net);

Rao-Boyle v. Alperstein, 44 A.D.3d 1022, 844 N.Y.S.2d 386 (2d Dept. 2007) (uneven walkway at side entrance to house);

Mareno v. Shorenstein Realty Services, L.P., 44 A.D.3d 911, 844 N.Y.S.2d 131 (2d Dept. 2007) (wall-mounted tampon dispenser in restroom);

Dinallo v. DAL Electric, 43 A.D.3d 981, 842 N.Y.S.2d 519 (2d Dept. 2007) (jack assembly at construction site);

Espinoza v. Hemar Supermarket, Inc., 43 A.D.3d 855, 841 N.Y.S.2d 680 (2d Dept. 2007) (stack of empty milk crates in supermarket aisle);

Groon v. Herricks Union Free School Dist., 42 A.D.3d 431, 839 N.Y.S.2d 788 (2d Dept. 2007) (single step in hallway leading to gymnasium);

Kaufmann v. Lerner New York, Inc., 41 A.D.3d 660, 838 N.Y.S.2d 181 (2d Dept. 2007) (rolling clothing rack inside dressing room area corridor);

Vergara v. A & S Twins Const. Corp., 41 A.D.3d 588, 837 N.Y.S.2d 742 (2d Dept. 2007) (pile of construction lumber);

Errett v. Great Neck Park Dist., 40 A.D.3d 1029, 837 N.Y.S.2d 701 (2d Dept. 2007) (stone wall edging flower bed);

Wehr v. Long Island R. Co., 38 A.D.3d 880, 832 N.Y.S.2d 648 (2d Dept. 2007) (flip seat in engineer's compartment of commuter train);

Salerno v. Street Retail, Inc., 38 A.D.3d 515, 831 N.Y.S.2d 265 (2d Dept. 2007) (carpeted staircase at movie theater);

Morgan v. TJX Companies, Inc., 38 A.D.3d 508, 831 N.Y.S.2d 582 (2d Dept. 2007) (display racks with which the plaintiff's shopping cart collided);

Lombardi v. Silk Mill Condominiums, Inc., 37 A.D.3d 429, 829 N.Y.S.2d 228 (2d Dept. 2007) (broken sign post obstructing sidewalk);

Bernth v. King Kullen Grocery Co., Inc., 36 A.D.3d 844, 830 N.Y.S.2d 222 (2d Dept. 2007) (empty merchandise cart in supermarket aisle);

Maraia v. Church of Our Lady of Mount Carmel, 36 A.D.3d 766, 828 N.Y.S.2d 525 (2d Dept. 2007) (red-carpeted altar platform inside church);

Brooks v. Sunben Realty, Inc., 36 A.D.3d 740, 829 N.Y.S.2d 171 (2d Dept. 2007) (yellow shunt board covering wires running across sidewalk—no opposition);

Sclafani v. Washington Mutual, 36 A.D.3d 682, 829 N.Y.S.2d 553 (2d Dept. 2007) (concrete parking barrier);

Brown v. Melville Indus. Associates, 34 A.D.3d 611, 823 N.Y.S.2d 697 (2d Dept. 2006) (rock in parking lot);

Neville v. 187 E. Main St., LLC, 33 A.D.3d 682, 822 N.Y.S.2d 599 (2d Dept. 2006) (entrance doorstep);

Ramsey v. Mt. Vernon Board of Education, 32 A.D.3d 1007, 821 N.Y.S.2d 651 (2d Dept. 2006) (wet cafeteria floor being mopped);

Misir v. Beach Haven Apartment No. 1, Inc., 32 A.D.3d 1002, 820 N.Y.S.2d 892 (2d Dept. 2006 (pile of wet leaves in driveway);

Luciano v. 144-18 Rockaway Realty Corp., 32 A.D.3d 505, 820 N.Y.S.2d 139 (2d Dept. 2006) (step outside grocery store);

Murray v. Dockside 500 Marina, Inc., 32 A.D.3d 832, 821 N.Y.S.2d 608 (2d Dept. 2006) (single carpeted step descending from doorway platform to catering hall; expert who did not inspect premises did not raise fact issue re optical confusion);

Meagher-Cox v. Winarski, 32 A.D.3d 379, 820 N.Y.S.2d 98 (2d Dept. 2006) (height differential between matted playground and adjacent asphalt parking lot);

Guerin v. City of New York, 31 A.D.3d 708, 818 N.Y.S.2d 476 (2d Dept. 2006) (height differential between doorframe and street level);

Fernandez v. Edlund, 31 A.D.3d 601, 819 N.Y.S.2d 291 (2d Dept. 2006) (unpaved driveway);

Casey v. Clemente, 31 A.D.3d 361, 817 N.Y.S.2d 644 (2d Dept. 2006) (aluminum ramp extended from rear of box truck);

Sun Ho Chung v. Jeong Sook Joh, 29 A.D.3d 677, 815 N.Y.S.2d 641 (2d Dept. 2006) (yellow warning tape around construction area);

Mastellone v. City of New York, 29 A.D.3d 540, 813 N.Y.S.2d 669 (coat rack in passageway);

Green v. Grenadier Realty Corp., 23 A.D.3d 346, 804 N.Y.S.2d 97 (2d Dept. 2005) (plaintiff slipped on metal plate during sleet storm);

Gaines v. Shell-Mar Foods, Inc., 21 A.D.3d 986, 801 N.Y.S.2d 376 (2d Dept. 2005) (cement parking lot divider);

Pirie v. Krasinski, 18 A.D.3d 848, 796 N.Y.S.2d 671 (2d Dept. 2005) (height differential between hallway and adjacent room; plaintiff's first visit to premises);

Atanasoff v. Elmont Union Free School Dist., 18 A.D.3d 678, 795 N.Y.S.2d 726 (2d Dept. 2005) (plaintiff fell while trying to climb through locked gate);

Cotto v. New York City Housing Authority, 17 A.D.3d 621, 794 N.Y.S.2d 84 (2d Dept. 2005) (garbage bag lying near a garbage can in a playground);

Webber v. Miller, 17 A.D.3d 352, 793 N.Y.S.2d 105 (2d Dept. 2005) (steps leading to restroom in restaurant);

Tenenbaum v. Best 21 Ltd., 15 A.D.3d 646, 790 N.Y.S.2d 236 (2d Dept. 2005) (foot-high platform);

Orlando v. Audax Const. Corp., 14 A.D.3d 500, 788 N.Y.S.2d 173 (2d Dept. 2005) (unpaved roadway under construction);

Capozzi v. Huhne, 14 A.D.3d 474, 788 N.Y.S.2d 152 (2d Dept. 2005) (gravel walkway which incorporated decorative cement slab);

Greenstein v. Realife Land Improvement, Inc., 13 A.D.3d 338, 786 N.Y.S.2d 110 (2d Dept. 2004) (wire mesh on concrete walkway under construction);

Zimkind v. Costco Wholesale Corp., 12 A.D.3d 593, 785 N.Y.S.2d 108 (2d Dept. 2004) (concrete wheel stop in parking lot);

Behar v. All Seasons Motor Lodge, Inc., 6 A.D.3d 639, 775 N.Y.S.2d 183 (2d Dept. 2004) (single carpeted step in motel lobby);

Kosarin v. W & S Associates, LP, 6 A.D.3d 503, 774 N.Y.S.2d 420 (2d Dept. 2004) (shallow depression in pavement);

Plis v. North Bay Cadillac, 5 A.D.3d 578, 773 N.Y.S.2d 451 (2d Dept. 2004) (heavy-link steel security chain);

Hecht v. 281 Scarsdale Corp., 3 A.D.3d 551, 770 N.Y.S.2d 643 (2d Dept. 2004) (overhead pipe and valve near wall of defendants' parking garage upon which plaintiff struck his head);

Jang Hee Lee v. Sung Whun Oh, 3 A.D.3d 473, 771 N.Y.S.2d 134 (2d Dept. 2004) (empty concrete fishpond in friend's yard held not dangerous during daylight hours);

Schoen v. King Kullen Grocery Co., Inc., 296 A.D.3d 486 (2d Dept. 2002) (flat pieces of cardboard on floor near employee who was unpacking boxes);

Gibbons v. Lido and Point Lookout Fire District, 293 A.D.2d 646, 740 N.Y.S.2d 440 (2d Dept. 2002) (cement parking block on floor of firehouse);

O'Connor v. Katonah Museum of Art, 251 A.D.2d 561, 676 N.Y.S.2d 183 (2d Dept. 1998) (rotating outdoor exhibit of conceptual art).

Third Department

Revesz v. Carey, 86 A.D.3d 821, 927 N.Y.S.2d 448 (3d Dept. 2011) (divots or irregularities in lawn);

Anton v. Correctional Medical Services, Inc., 74 A.D.3d 1682, 904 N.Y.S.2d 535 (3d Dept. 2010) (metal bed frame along wall of jail's medical unit);

Knickerbocker v. Ulster Performing Arts Center, 74 A.D.3d 1526, 903 N.Y.S.2d 578 (3d Dept. 2010) (carpeted theater stairs);

Bilinski v. Bank of Richmondville, 12 A.D.3d 911, 784 N.Y.S.2d 708 (3d Dept. 2004) (asphalt curb marking intersection of shrubbery bed and defendant's parking lot);

Holtslander v. C.W. Whalen and Sons, 126 A.D.2d 917, 510 N.Y.S.2d 937 (3d Dept. 1987) (canvas tent for housing casino games during bazaar).

Fourth Department

Milligan v. Sharman, 52 A.D.3d 1238, 859 N.Y.S.2d 827 (4th Dept. 2008) (proximity of the ninth tee to the eighth green);

Powers v. St. Bernadette's Roman Catholic Church, 309 A.D.2d 1219, 765 N.Y.S.2d 102 (4th Dept. 2003) (single step leading from computer room to hallway).

Cases in Which Questions of Fact Whether Condition Was Inherently Dangerous Precluded Summary Judgment

In the following cases, courts denied summary judgment, finding that even though the allegedly dangerous condition was readily observable, the defendant had not established that the condition was not inherently dangerous as a matter of law, or the plaintiff had raised an issue of fact concerning its inherent danger.

First Department

Drotar v. 60 Sweet Thing, Inc., 106 A.D.3d 426, 964 N.Y.S.2d 150 (1st Dept. 2013) (steps appeared to blend into each other);

Furment v. Ziad Food Corp., 104 A.D.3d 562, 960 N.Y.S.2d 648 (1st Dept. 2013) (produce box placed next to plaintiff in supermarket aisle while she was bending over to retrieve something);

Cafarella v. 2180 Realty Corp., 102 A.D.3d 404, 958 N.Y.S.2d 92 (1st Dept. 2013) (cement bag used to prop open vestibule door in apartment building lobby);

Rachlin v. 34th Street Partnership, Inc., 96 A.D.3d 690, 947 N.Y.S.2d 113 (1st Dept. 2012) (foot-long metal bar forming the base of a barrier used by defendant at its taxi stand);

Furnari v. City of New York, 89 A.D.3d 605, 933 N.Y.S.2d 248 (1st Dept. 2011) (uneven playing surface on softball diamond);

Sweeney v. Riverbay Corp., 76 A.D.3d 847, 907 N.Y.S.2d 214 (1st Dept. 2010) (garden hose placed across sidewalk in front of building) (4-1);

Salvador v. New York Botanical Garden, 74 A.D.3d 540, 905 N.Y.S.2d 150 (1st Dept.), *prior proceedings reported at* 71 A.D.3d 422, 895 N.Y.S.2d 410 (1st Dept. 2010) (telephone enclosure protruding into walkway);

Legon v. Petaks, 70 A.D.3d 457, 898 N.Y.S.2d 445 (1st Dept. 2010) (3-2) (plaintiff caught her foot underneath metal stand holding wire baskets at supermarket);

Caicedo v. Cheven Keeley & Hatzis, 59 A.D.3d 363, 874 N.Y.S.2d 82 (1st Dept. 2009) (files on floor at entrance to office cubicle);

Westbrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69, 773 N.Y.S.2d 38 (1st Dept. 2004) (3-2) (box left in aisle of store).

Second Department

Zhuo Zheng Chen v. City of New York, 106 A.D.3d 1081, 966 N.Y.S.2d 177, 179 (2d Dept. 2013) (question whether loading dock was adequately lit);

Mahoney v. AMC Entertainment, Inc., 103 A.D.3d 855, 959 N.Y.S.2d 752 (2d Dept. 2013) (puddle of liquid around concession area);

Devlin v. Ikram, 103 A.D.3d 682, 962 N.Y.S.2d 148 (2d Dept. 2013) (unidentified condition causing fall in parking lot);

Robles v. Bruhns, 99 A.D.3d 980, 953 N.Y.S.2d 143 (2d Dept. 2012) (four-inch high stumps on grass-covered island in parking area);

Acevedo v. New York City Transit Authority, 97 A.D.3d 515, 947 N.Y.S.2d 599 (2d Dept. 2012) (wooden board covering defect at edge of subway platform);

Sawyers v. Troisi, 95 A.D.3d 1293, 945 N.Y.S.2d 188 (2d Dept. 2012) (unlighted hallway in private residence without properly placed light switch opened onto staircase);

Calandrino v. Town of Babylon, 95 A.D.3d 1054, 944 N.Y.S.2d 286 (2d Dept. 2012) (water on deck of boat from unexpected source);

Gordon v. Pitney Bowes Management Services, Inc., 94 A.D.3d 813, 942 N.Y.S.2d 155 (2d Dept. 2012) (plastic mail bin placed near opening of cubicle);

Abrams v. Berelson, 94 A.D.3d 782, 942 N.Y.S.2d 132 (2d Dept. 2012) (3-2) (dissenters argued that loaded rifle misleadingly stored in BB-gun box was inherently dangerous; majority held for defendant without reaching the issue);

Hadgraft v. Morin, 94 A.D.3d 701, 941 N.Y.S.2d 513 (2d Dept. 2012) (small single-step riser on insufficiently lit walkway);

Russo v. Frankels Garden City Realty Co., 93 A.D.3d 708, 940 N.Y.S.2d 144 (2d Dept. 2012) (similarity in material and color of bottom concrete step and abutting cement sidewalk);

Surujnaraine v. Valley Stream Cent. High School Dist., 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept. 2011) (single-step riser separating entrance to lobby of high school auditorium from abutting sidewalk);

Cassone v. State, 85 A.D.3d 837, 925 N.Y.S.2d 197 (2d Dept. 2011) (orange cone secured to boardwalk during breast cancer walk);

Demuth v. Best Buy Stores, L.P., 85 A.D.3d 713, 924 N.Y.S.2d 826 (2d Dept. 2011) (cluster of concrete protruding from the ground);

Clark v. AMF Bowling Centers, Inc., 83 A.D.3d 761, 921 N.Y.S.2d 273 (2d Dept. 2011) (knee-high table in lobby of bowling alley—dim lighting and unusual placement of furniture);

Beck v. Bethpage Union Free School Dist., 82 A.D.3d 1026, 919 N.Y.S.2d 192 (2d Dept. 2011) (wheel of book cart extended into aisle between library shelves);

Robinson v. 206-16 Hollis Ave. Food Corp., 82 A.D.3d 735, 918 N.Y.S.2d 161 (2d Dept. 2011) (two-foot high display of pig's tails at end of merchandise rack between two aisles);

Katz v. Westchester County Healthcare Corp., 82 A.D.3d 712, 917 N.Y.S.2d 896 (2d Dept. 2011) (single upward step into bathroom);

Gutman v. Todt Hill Plaza, LLC, 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011) (unidentified condition in shopping center parking lot);

Davarashvili v. ABM Industries Inc., 81 A.D.3d 776, 916 N.Y.S.2d 830 (2d Dept. 2011) (placement of a "parking delineator" created tripping hazard);

Monaghan v. Lake Park 135 Crossways Park Drive, LLC, 80 A.D.3d 679, 915 N.Y.S.2d 290 (2d Dept. 2011) (masonite board on office building lobby floor);

Bloomfield v. Jericho Union Free School Dist., 80 A.D.3d 637, 915 N.Y.S.2d 294 (2d Dept. 2011) (hole or tear in high jump mat);

Stoppeli v. Yacenda, 78 A.D.3d 815, 911 N.Y.S.2d 119 (2d Dept. 2010) (contractor struck his head on low beam while being led through house);

Richards v. Passarelli, 77 A.D.3d 905, 910 N.Y.S.2d 500 (2d Dept. 2010) (no warning signs or markings to alert drivers to height differential in parking lot);

Carson v. Baldwin Union Free School Dist., 77 A.D.3d 878, 910 N.Y.S.2d 117 (2d Dept. 2010) (volleyball netting across floor in front of gymnasium doors);

Klee v. Cablevision Systems Corp., 77 A.D.3d 794, 909 N.Y.S.2d 539 (2d Dept. 2010) (cable stretched across plaintiff's lawn for 4-6 months after installation);

Villano v. Strathmore Terrace Homeowners Ass'n, Inc., 76 A.D.3d 1061, 908 N.Y.S.2d 124 (2d Dept. 2010) (unretracted sprinkler head on lawn);

Manicone v. City of New York, 75 A.D.3d 535, 905 N.Y.S.2d 640 (2d Dept. 2010) (bracket supporting a temporary fence erected on sidewalk);

Camacho v. TNT USA, Inc., 73 A.D.3d 827, 899 N.Y.S.2d 891 (2d Dept. 2010) (spaces between adjacent rollers on mechanism for moving freight at airport);

Shah v. Mercy Medical Center, 71 A.D.3d 1120, 898 N.Y.S.2d 589 (2d Dept. 2010) (cables extending from anesthesia machine across pathway in operating room);

Cooper v. American Carpet and Restoration Services, Inc., 69 A.D.3d 552, 895 N.Y.S.2d 96 (2d Dept. 2010) (coiled hose spread across most of width of ramp);

Crafa v. Marshalls of MA, Inc., 57 A.D.3d 937, 869 N.Y.S.2d 800 (2d Dept. 2008) (wheeled plant coaster on floor of store);

Van Salisbury v. Elliott-Lewis, 55 A.D.3d 725, 867 N.Y.S.2d 454 (2d Dept. 2008) (pile of electrical cables blocking access to supply shelf);

Roros v. Oliva, 54 A.D.3d 398, 399, 863 N.Y.S.2d 465, 466 (2d Dept. 2008) (identical flooring material created illusion that foyer and great room were on same plane);

Salomon v. Prainito, 52 A.D.3d 803, 861 N.Y.S.2d 718 (2d Dept. 2008) (cylindrical drainpipe lying in walkway);

McLachlan v. R & S, Inc., 52 A.D.3d 662, 861 N.Y.S.2d 108 (2d Dept. 2008) (small cardboard box on floor of defendant's store);

Boston v. City of New York, 51 A.D.3d 615, 858 N.Y.S.2d 265 (2d Dept. 2008) (30–inch high brick tree well);

Gamer v. Ross, 49 A.D.3d 598, 854 N.Y.S.2d 160 (2d Dept. 2008) (wires and construction debris);

Sewitch v. LaFrese, 41 A.D.3d 695, 839 N.Y.S.2d 114 (2d Dept. 2007) (accumulation of ice within missing portions of brick and mortar on steps);

Holly v. 7-Eleven, Inc., 40 A.D.3d 1033, 834 N.Y.S.2d 870 (2d Dept. 2007) (bundle of logs used to prop open door);

Slatsky v. Great Neck Plumbing Supply, Inc., 29 A.D.3d 776. 815 N.Y.S.2d 201 (2d Dept. 2006) (bag of cement on floor of store);

Cappella v. City of New York, 6 A.D.3d 567, 774 N.Y.S.2d 832 (2d Dept. 2004) (gas pipe protruding from sidewalk);

DiVietro v. Gould Palisades Corp., 4 A.D.3d 324, 771 N.Y.S.2d 527 (2d Dept. 2004) (walkway under construction);

Grgich v. City of New York, 2 A.D.3d 680, 770 N.Y.S.2d 91 (2d Dept. 2003) (tree stump inside tree well on public sidewalk);

Cupo v. Karfunkel, 1 A.D.3d 48, 767 N.Y.S.2d 40 (2d Dept. 2003) (depressed area of sidewalk adjacent to transformer vault);

Tulovic v. Chase Manhattan Bank, N.A., 309 A.D.2d 923, 767 N.Y.S.2d 44 (2d Dept. 2003) (exposed structural steel rebars).

Third Department

Alexander v. St. Mary's Institute, 78 A.D.3d 1475, 912 N.Y.S.2d 153 (3d Dept. 2010) (partially ice-covered exterior stairs);

Timmins v. Benjamin, 77 A.D.3d 1254, 910 N.Y.S.2d 584 (3d Dept. 2010) (steep winder stairs without handrail that began directly outside bathroom door);

Page v. State, 72 A.D.3d 1456, 902 N.Y.S.2d 199 (3d Dept. 2010) (3-inch curb on the side of portable ramp);

MacDonald v. New York State Olympic Regional Development Authority, 46 A.D.3d 1085, 847 N.Y.S.2d 713 (3d Dept. 2007) (ungroomed interior of speedskating oval);

England v. Vacri Const. Corp., 24 A.D.3d 1122, 807 N.Y.S.2d 669 (3d Dept. 2005) (low pipe extending across basement doorway at construction site);

Sisson v. Metromedia Steakhouses, Inc., 17 A.D.3d 855, 794 N.Y.S.2d 138 (3d Dept. 2005) (refrigerator propped on steel pans fell on pest control technician who had previously complained it interfered with his work);

Wilson v. Time Warner Cable, Inc., 6 A.D.3d 801, 774 N.Y.S.2d 584 (3d Dept. 2004) (crack in sidewalk);

Soich v. Farone, 307 A.D.2d 658, 763 N.Y.S.2d 168 (3d Dept. 2003) (cracked and worn concrete driveway adjacent to vacant lot);

Monge v. Home Depot, Inc., 307 A.D.2d 501, 761 N.Y.S.2d 886 (3d Dept. 2003) (width of aisle at outdoor plant display).

Fourth Department

Belsinger v. M & M Bowling & Trophy Supplies, Inc., 108 A.D.3d 1041, __N.Y.S.2d__ (2013) (concrete step located immediately inside doorway);

Landahl v. City of Buffalo, 103 A.D.3d 1129, 959 N.Y.S.2d 306 (4th Dept. 2013) (worn marble step with a 1½–inch depression);

Hayes v. Texas Roadhouse Holdings, LLC, 100 A.D.3d 1532, 954 N.Y.S.2d 348 (4th Dept. 2012) (curb in proximity to bench likely to be overlooked);

Bevan v. Murray, 88 A.D.3d 1255, 930 N.Y.S.2d 364 (4th Dept. 2011) (unfinished deck);

Betette v. County of Monroe, 82 A.D.3d 1708, 920 N.Y.S.2d 512 (4th Dept. 2011) (upward facing door handle in hospital room);

Rice v. University of Rochester Medical Center, 55 A.D.3d 1325, 865 N.Y.S.2d 463 (4th Dept. 2008) (hole at the bottom of a slide);

Verel v. Ferguson Elec. Const. Co., Inc., 41 A.D.3d 1154, 838 N.Y.S.2d 280 (4th Dept. 2007) (three electrical conduits protruding about one foot from concrete floor of building under construction);

Lauricella v. Friol, 46 A.D.3d 1459, 847 N.Y.S.2d 494 (4th Dept. 2007) (open pit, 8-9 feet deep, inside a building).

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Scenes from the Trial Lawyers Section

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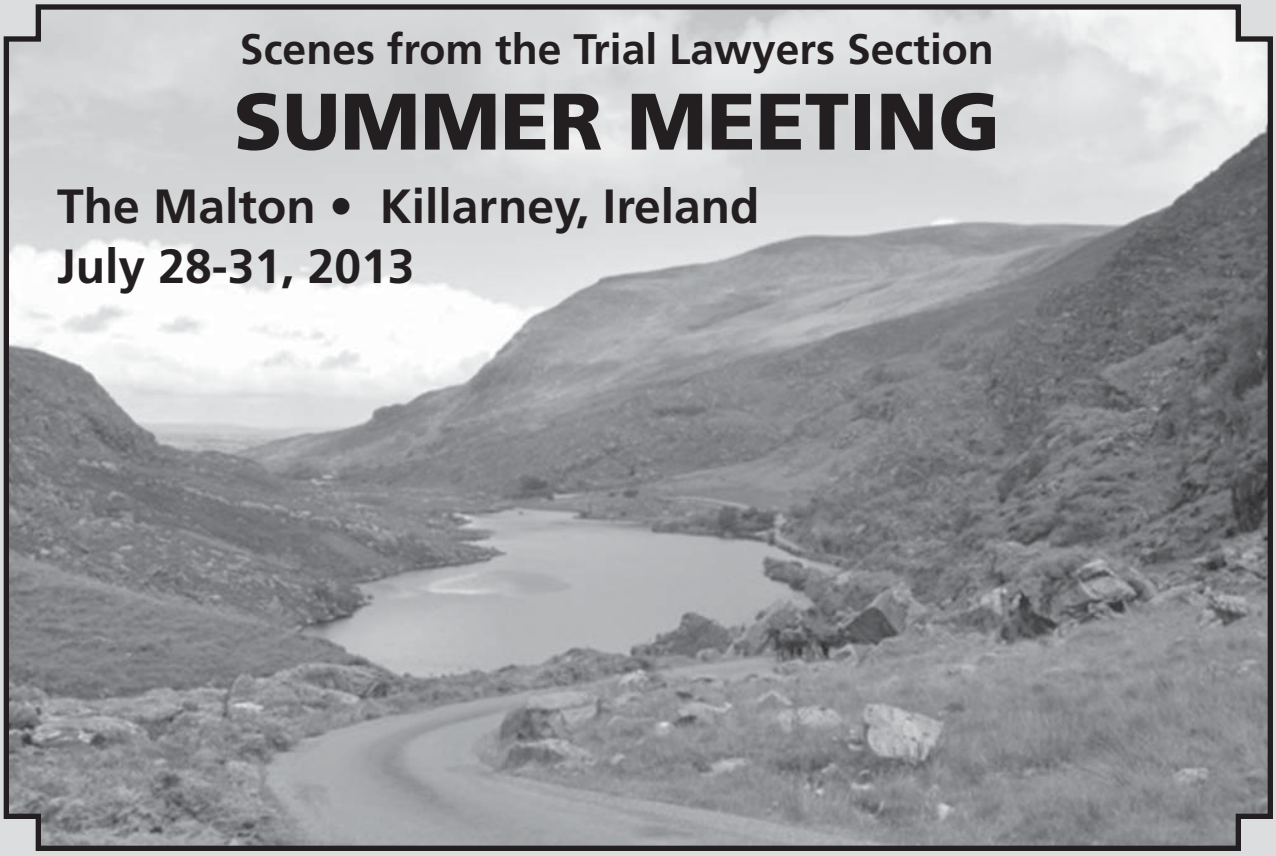

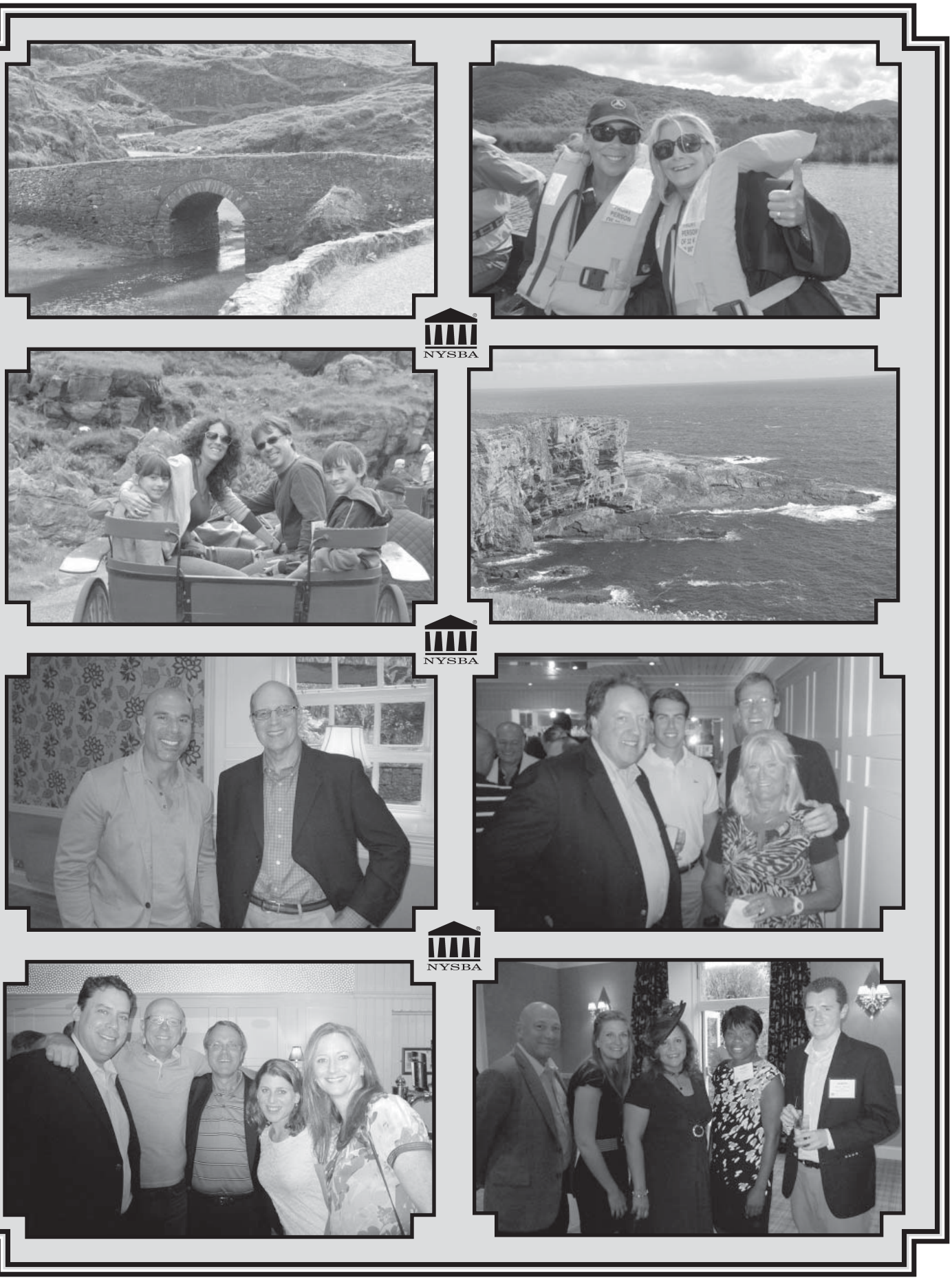









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