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This opinion is uncorrected and subject to revision before
publication in the New York Reports.

1 No. 169
Pasquale D'Onofrio et al.,
 Appellants,
 v.
The City of New York,
 Respondent,
The New York City Transit
Authority,
 Defendant.

2 No. 170
Ida Shaperonovitch, et al.,
 Respondents,
 v.
City of New York,
 Appellant.

Case No. 169:

Brian J. Isaac, for appellants.
Deborah A. Brenner, for respondent.

Case No. 170:

Deborah A. Brenner, for appellant.
Lester B. Herzog, for respondents.

SMITH, J.:

In each of these cases, the issue is whether a map
submitted to New York City by Big Apple Pothole and Sidewalk

Protection Corporation gave the City the notice of a sidewalk defect that is required by the Pothole Law (Administrative Code of City of NY § 7-201 [c] [2]). We hold that neither map adequately identified the defect.

Pasquale D'Onofrio and Ida Shaperonovitch fell and were injured while walking in New York City. They and their spouses sued the City for their injuries. The City defended the lawsuits on the basis of the Pothole Law, which says in relevant part:

"No civil action shall be maintained against the city for . . . injury to person . . . sustained in consequence of any . . . sidewalk . . . being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice."

Plaintiffs asserted that Big Apple maps had given the "written notice" that the law requires.

Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with the Pothole Law. It does so through maps on which coded symbols are entered to represent defects. For example, a straight line is used for a raised or uneven portion of a sidewalk, a circle for a hole or hazardous depression, a line with a triangle at each end for an extended section of cracks and holes in a sidewalk, and so forth. In each of these cases, Big Apple submitted a map to the City before the accident;

the map had a symbol at the place where the accident happened; and the issue is whether the symbol was sufficient notice of the defect complained of.

The notice issue was submitted to the jury in both cases, and both juries found the notice adequate. In D'Onofrio, however, Supreme Court held the notice insufficient as a matter of law, set aside the verdict and granted judgment in the City's favor; the Appellate Division affirmed. In Shaperonovitch, Supreme Court denied the City's post-trial motion to set aside the verdict, and entered judgment in plaintiffs' favor; this judgment, too, was affirmed by the Appellate Division. We granted leave to appeal in both cases, and now affirm in D'Onofrio and reverse in Shaperonovitch.

The symbol used in D'Onofrio was a straight line, indicating "[r]aised or uneven portion of sidewalk." There is no evidence, however, from which the jury could have found that such a defect caused Mr. D'Onofrio's injury. He testified that, as he was walking over a grating, both his feet became caught almost simultaneously, causing him to fall forward. He said that he felt the grating move, and that he observed broken cement in the area; he attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." It is not completely clear how the accident happened, but there is no evidence that Mr. D'Onofrio walked across a raised or uneven portion of a sidewalk, even on the assumption that the grating is

part of the sidewalk. A photograph of the area where he fell does not show any surface irregularity or elevation. Since the defect shown on the Big Apple map was not the one on which the claim in D'Onofrio was based, the lower courts in that case correctly set aside the verdict and entered judgment in the City's favor.

The problem in Shaperonovitch is in a way the reverse of that in D'Onofrio: the nature of the defect that caused the accident is clear, but the symbol on the Big Apple map is not. Ms. Shaperonovitch testified that she tripped over an "elevation on the sidewalk." No unadorned straight line, the symbol for a raised portion of the sidewalk, appears on the Big Apple map at the relevant location. The Shaperonovitch plaintiffs rely on a symbol that does appear there: it is a line with a diamond at one end and a mark at the other that has been variously described as a poorly drawn X, the Hebrew letter shin, or a pitchfork without the handle. No symbol resembling this appears in the legend to the map. A Big Apple employee, called to testify by the City, acknowledged that Big Apple "did not notify the City of any raise" in the location where Ms. Shaperonovitch fell.

Plaintiffs in Shaperonovitch argue that the symbol on the map is "ambiguous" and that its interpretation is for the jury. We disagree; we do not see how a rational jury could find that this mark conveyed any information at all. Because the map did not give the City notice of the defect, the City was entitled

to judgment as a matter of law.

Accordingly, in D'Onofrio v City of New York, the order of the Appellate Division should be affirmed, with costs. In Shaperonovitch v City of New York, the order of the Appellate Division should be reversed, with costs, and the complaint dismissed.

Pasquale D'Onofrio, et al. v The City of New York, The New York City Transit Authority - No. 169

Ida Shaperonovitch, et al. v The City of New York - No. 170

JONES, J.(dissenting) :

Because I believe that the question of whether or not the Big Apple maps gave notice to the City of the defect injuring appellants was properly decided by the jury, I respectfully dissent.

Mapping hazards is hardly an exact science. Although the symbols on the Big Apple maps were not designed to give notice of every unique defect found on the sidewalks and roads of New York City, each symbol on the map legend represents a general category of potentially hazardous defects (e.g., "Hole or hazardous depression," "Raised or uneven portion of sidewalk," "Pothole or other hazard"). Clearly, if no symbol or a completely different symbol is used on the map, the City does not receive notice of a given defect. It follows that where the defect could reasonably be encompassed by the symbol used on the map, the question of whether the City received notice of that defect is for the fact finder and not one that can be easily answered as a matter of law.

Appellant D'Onofrio was injured when he tripped over a combination of the movement of a loose metal grating and the

broken cement alongside the edge of that grating. In the area where he fell, the Big Apple map depicted the defect as a "[r]aised or uneven portion of sidewalk." In my view, the gap created from the crumbling cement alongside the grating was an irregularity in elevation and could reasonably have been included under the category of "uneven sidewalk" -- it was at least a close call. This is not a case where a wrong symbol representing a different category of hazards was used (compare Camacho v City of New York, 218 AD2d 725 [2d Dept 1995] [no notice to the City where plaintiff was injured by a one foot deep hole but map symbol used was 'raised or uneven sidewalk' rather than 'hole or hazardous depression'])). To the contrary, no other symbol on the legend could more closely describe the instant hazard. As such, the question of notice to the City was properly resolved by the jury. Because the jury found that the City received notice, I would reverse the order of the Appellate Division and remit on the issue of apportionment of liability.

Appellant Shaperonovitch was injured when she tripped over an elevation on the sidewalk. Although such a defect would properly be depicted as a straight line (the symbol representing a "[r]aised or uneven portion of sidewalk"), the ambiguous symbols used on the map were: (1) a diamond disconnected horizontally through the middle (or two letter "V"s, one upside down), (2) a straight line, and (3) a mark resembling a poorly drawn "X" or a pitchfork prong. I disagree with the majority

that these symbols are meaningless. To the contrary, a deliberate mark on the map gives notice to the City of some defect -- rather than no defect at all -- at that location. As to which specific defects were depicted, the symbols could be reasonably interpreted in several ways. In my view, the question of whether the symbols were meaningless or whether they gave notice of one or more separate defects is not one that could be determined as a matter of law -- the issue was properly resolved by the jury. Accordingly, I would affirm the order of the Appellate Division.

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Case No. 169: Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur. Judge Jones dissents and votes to reverse in an opinion in which Judge Pigott concurs.

Case No. 170: Order reversed, with costs, and complaint dismissed. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur. Judge Jones dissents and votes to affirm in an opinion in which Judge Pigott concurs.

Decided December 18, 2008