

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, September 17, 2015

- No. 144 Hutchinson v Sheridan Hill House Corp.**  
**No. 145 Zelichenko v 301 Oriental Boulevard, LLC**  
**No. 146 Adler v QPI-VIII, LLC**

In these unrelated trip-and-fall cases, the primary issue is whether the Appellate Division improperly resolved material questions of fact in finding the sidewalk and stairway defects that allegedly caused the accidents were trivial, and therefore not actionable, as a matter of law. The plaintiffs say the question whether these alleged defects created a dangerous condition should be resolved by a jury.

Leonard Hutchinson was injured in 2009, when he tripped and fell on a sidewalk in front of a Bronx group home owned by Sheridan Hill House Corp. He said his foot caught on a metal object protruding from the sidewalk. Sheridan said the object was five-eighths of an inch in diameter and rose less than one-quarter inch above the surface, but Hutchinson's expert estimated it was twice as big around. Supreme Court dismissed the suit on summary judgment.

The Appellate Division, First Department affirmed on a 3-2 vote, saying Sheridan proved the metal object "protruded only about three-sixteenths of an inch above the surface. This minor height differential alone is insufficient to establish the existence of a dangerous or defective condition.... Plaintiff has not come forward with any evidence to show that this trivial defect could have been 'a trap or snare by reason of its location, adverse weather or lighting conditions....'" The dissenters said there is no rule that a defect must be of a minimum dimension to be actionable and the issue should generally be left to a jury, citing Trincere v County of Suffolk (90 NY2d 976). They said, "[A]n issue of fact remains as to whether the protruding piece of metal may be characterized as a trap or a snare such as could, without warning, snag a passerby's shoe."

In 2010, Matvey Zelichenko was descending a staircase in the lobby of a Brooklyn apartment building owned by 301 Oriental Boulevard, LLC, when he stepped on a stair with a chip -- 3¼ inches wide by ½ inch deep -- missing from its nosing. He said his leg twisted and he fell, breaking both bones in his lower right leg. Supreme Court denied Oriental's motion for summary judgment, saying there was a question of fact whether "the alleged defect was de minimis." The Appellate Division, Second Department reversed and dismissed the suit. Noting the size and location of the chip, "almost entirely on the edge ... and not on the walking surface," it found the defect "was trivial" and "did not possess the characteristics of a trap or nuisance."

Maureen Adler fractured her knee in 2010, when she fell down a stairway in her Queens apartment building owned by QPI-VIII, LLC. She said she tripped on "a big clump" in the middle of a step that had been painted over. Supreme Court denied QPI's summary judgment motion, saying "the bare statement by [QPI's] attorney" that the alleged defect was trivial "is unsupported by any evidence in the record." The Second Department reversed and dismissed the suit. It said photographs submitted by QPI, along with Adler's deposition testimony that they accurately depicted the step and the "clump," "established that the alleged defect was trivial as a matter of law."

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## **No. 147 People v Christopher E. Walker**

Christopher Walker was charged with murder for fatally stabbing Bobby Simmons in Rochester in May 2007. Walker's girlfriend and his brother, Antonio Rutledge, had been walking by Simmons' house and got into an argument with him, which escalated into a fight on his porch. Prosecution witnesses said the fight was underway when Walker arrived at the scene. Walker's ex-wife testified as a defense witness that she saw Simmons hitting Rutledge with a hammer and she went up the street to tell Walker. Walker testified that he grabbed a kitchen knife, ran down the street to stop the fight, and saw Simmons striking his brother on the head with a hammer. Walker said he ran onto the porch to intervene and, when Simmons swung the hammer at him, he stabbed Simmons in the side of the chest.

Supreme Court agreed to instruct the jury on the defense of justification, but denied Walker's request to omit the initial aggressor rule. The court generally followed the language of the Criminal Jury Instructions on the rule, saying, "[T]he defendant would not be justified [in using deadly physical force] if he was the initial aggressor. Initial aggressor means the person who first attacks or threatens to attack. That is the first person who uses or threatens the imminent use of offensive physical force." It then added in further explanation, "Where there is a reasonable view of the evidence that the defendant initiates non-deadly offensive force and is met with deadly physical force, the defendant may be justified in the use of defensive deadly physical force and that in such cases the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force." The jury acquitted Walker of murder, but convicted him of first-degree manslaughter. He was sentenced to 25 years in prison.

The Appellate Division, Fourth Department affirmed, saying, "The use of the 'initial aggressor' language is warranted where, as here, there is an issue of fact whether defendant was the first person to use deadly physical force in the encounter.... With that language, 'the court's justification charge adequately conveyed to the jury that defendant could be justified in the use of deadly physical force to defend himself [or another] against deadly physical force initiated by' the victim.... Furthermore, the court's justification instruction, viewed as a whole, properly stated 'the material legal principles applicable to the particular case, and, so far as practicable, explain[ed] the application of the law to the facts!....'"

Walker argues the jury charge, relating to self-defense in "a one-on-one confrontation," did not properly explain the law of justification as it applies to his claim that he acted in defense of his brother, especially since he arrived after the fight was well underway. "It was likely that the jury would harbor a reasonable doubt that Mr. Walker acted reasonably to defend his brother" and he "would therefore be entitled to an acquittal.... However, under the erroneous charge given by the trial court, the jury could well have concluded that Mr. Walker's actions made him the initial aggressor based only on his physical contact with Mr. Simmons" and that the justification defense was not available to him.

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