

## MORRIS DUFFY ALONSO & FALEY

### NEW YORK MUNICIPAL LAW UPDATE

#### Whether Or Not a Letter Provides Adequate Prior Written Notice of a Street Defect is a Question of Fact for Trial

*Delaney v. Town of Islip*, 2009 N.Y. Slip Op 04369 (2d Dept. 2009)

The Plaintiff brought suit against the Town of Islip for injuries that he sustained after an alleged trip and fall in the street. Although the Defendant town received a letter that described the condition that existed at the location and requested for the road to be repaved, it moved for summary judgment based on a failure to provide prior written notice in accordance with the town ordinance. The trial court granted the Defendant's motion and the Plaintiff appealed.

In reversing the trial court's grant of summary judgment for the Defendant, the Appellate Division for the Second Department reasoned that there was a genuine issue of material fact as to whether or not the letter sent to the town satisfied the town ordinance, which requires that prior written notice be "actually given to the Town Clerk or the Commissioner of Public Works."

The Court strictly construed the ordinance because it is a "derogation of the common law," and opined that notice will be deemed sufficient when it "brings the particular condition which allegedly caused the subject accident to the attention of the authorities designated to receive such notice." Accordingly, whether or not the content of this particular letter provided sufficient notice of the specific condition that existed at the location was an issue of fact which should be resolved at trial.

This case suggests that whether or not a city is adequately apprised of a defective condition in the street or sidewalk is typically a genuine issue of material fact that precludes summary judgment where it is conceded that the city did receive notice of the defect, although not in total conformance with the prior written notice statute.

#### A Municipality is Not Entitled to Prior Written Notice of Sidewalk Defect When It Acts As a Private Landlord and Not in Its Governmental Capacity.

*Dick v. Town of Wappinger*, 2009 N.Y. Slip Op. 04731 (2d Dept. 2009)

After the Plaintiff allegedly tripped and fell at the entrance to the New York State Police barracks, she brought suit against the town for her injuries. The Defendant town had not received prior written notice of the defect that allegedly caused the Plaintiff to fall, and thus moved for summary judgment, relying on the typical requirement that a municipality receive prior written notice of a sidewalk defect before it can be held liable. The Defendant's motion was granted and the Plaintiff appealed.

In reversing the trial court's grant of summary judgment for the Defendant, the Appellate Division for the Second Department reasoned that the town was not entitled to prior written notice because it did not act as a municipality. The town had only leased the premises to the Police Department and did not conduct any municipal or governmental activity at the location. Rather, the town merely collected annual rent payments pursuant to a written lease.

The dissent opined that regardless of the municipality's function, the site of the accident could properly be deemed a "sidewalk," and thus prior written notice should still be required. The dissent went as far as to say that the town's leasing of the premises is a "red herring" that is far from dispositive. Ultimately, the dissent pointed to the overall policy and rationale behind the requirement of written notice, reasoning that irrespective of the city's role as a private landlord, the requirement of written notice was intended to give the municipality an opportunity to become aware of the defect and correct it. While the requirement for prior written notice is typically subject to two exceptions where (1) the municipality created the defect or hazard through an affirmative act, or (2) a "special use" confers a special benefit upon the municipality, the

dissent vigorously opined that it was beyond the Court's power to carve out a "third exception" to the prior written notice requirement where the municipality functions as a landlord.

Nonetheless, the majority decision in this case suggests that the prior written notice that is typically required to hold a municipality liable is not applicable where the municipality functions as a private landlord and does not conduct any governmental activities or functions at the leased premises.

**Despite a Plaintiff's Negligence During a Car Accident, A Municipality Can be Liable for Roadside Ditches if the Ditch Attributes to the Plaintiff's Injuries.**

*Popolizio v. County of Schenectady*, 2009 N.Y. Slip Op. 03978 (3d Dept. 2009)

The Plaintiff lost control of his car while driving on a hill during a snow fall, causing him to slide across the road and plunge "head on" into a roadside ditch that was 12 feet deep and four feet wide. Because the vehicle angled itself downward as it entered the ditch, the Plaintiff's head hit the windshield. As a result of the accident, the Plaintiff sustained severe brain damage and sued the County of Schenectady for negligent design and maintenance of the ditch.

While the road itself that the Plaintiff was traveling on was safely designed and maintained, expert testimony at trial established that the ditch deviated significantly from acceptable standards for highway design and should have been made traversable or protected by a guard rail. At the close of the trial, the jurors were instructed to skip over the liability apportionment part of the verdict sheet, even if the Plaintiff were found negligent in operating his vehicle, unless the Plaintiff's negligence was a substantial factor in causing his own injuries. After the jury delivered a Plaintiff's verdict, the trial court reduced the jury's award for future pain and suffering to \$1.25 million. Both parties appealed, with the Plaintiff arguing that the award for future pain and suffering was insufficient and the Defendant arguing that the verdict went against the weight of the evidence.

The Defendant argued that there was a lack of causation between the County's alleged negligence and the Plaintiff's accident because the Plaintiff's own

negligence caused him to veer off of the road. Further, the Defendant contended that liability for causing the accident and liability for causing the injuries suffered therefrom are two inextricably interwoven issues; thus if the County was not liable in causing the Plaintiff's accident, it could not reasonably be liable for causing his injuries.

In rejecting this argument, the Appellate Division for the Third Department affirmed the jury verdict and increased the Plaintiff's award for future pain and suffering to \$1.75 million.

The Court opined that these issues were not inextricably interwoven because the jury could find that despite the Plaintiff's fault in operating the vehicle, he would not have sustained brain damages if the ditch met requisite safety standards. In other words, even if the Plaintiff was 100% at fault for causing the crash itself, the negligent design and maintenance of the roadside ditch was what proximately caused his injuries. The Court found that causation was satisfied because the ditch did not meet requisite safety standards and the Plaintiff's medical expert testified that the Plaintiff's brain damage was caused by the impact between his head and the windshield after the vehicle plunged into the ditch. Because the jurors were charged that they were to decide whether the Defendant was a proximate cause of the Plaintiff's injuries, *not* the accident, the verdict was not against the weight of the evidence.

This decision implies that finding fault for the accident itself and fault for the injuries sustained therefrom are separate inquiries for the jury and are not interdependent upon one another in determining liability.

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