

New Definition of 'Creation Exception' to Pothole Law

The First and Second departments have recently narrowed the "creation exemption" to the Prior Written Notice Statute as it applies to roadwork to require proof that the alleged negligent prior repair immediately resulted in the existence of a dangerous condition.

Pursuant to New York City Administrative Code §7-201(c)(2), commonly referred to as the "Pothole Law,"¹ no civil action may be maintained against the city for personal injuries caused by a street or roadway being out of repair, unsafe, dangerous or obstructed unless prior written notice of the defective condition is provided to the city. Most municipalities in the state have similar statutes.

Two Exceptions

The Court of Appeals has recognized only two exceptions to the statute's requirement of prior written notice of roadway defects: (1) where the locality created the defect or hazard through an affirmative act of negligence or, (2) where the municipality receives a "special use" or confers or receives a special benefit from the area where the defect exists.²

As recently as 2003, the city of New York has unsuccessfully argued that prior written notice was still required under the Pothole Law unless the pothole was "immediately apparent" after the city's roadwork had been performed.

In *Torres v. City of New York*,³ the plaintiff sustained injuries when the car he was driving hit a pothole in the street causing him to lose control of his car and collide with a tree. Plaintiff's expert, a professional engineer, presented evidence that the roadway was improperly constructed as the city paved over existing cobblestones and applied only one inch of asphalt. The city's position was that the defect was not affirmatively created but rather resulted from deterioration over time and that the prior written notice exception to the Pothole Law only applied where the construction created a roadway defect that "comes immediately into its dangerous existence."

The First Department rejected the city's argument that a defect caused by the city's act of negligence must be immediately apparent in order to take the case out of the ambit of the "Pothole Law" and found that "affirmative acts of negligence that cause a roadway defect will satisfy the exception even if natural deterioration plays a role in bringing that defect to light."

Two years later, the Court did a complete about face in *Bielecki v. City of New York*.⁴ In *Bielecki*, the plaintiff fell when he stepped into an ankle-deep hole in a pedestrian pathway in Central Park. No evidence of prior written notice existed.

Plaintiff's expert said that the defect did not exist immediately upon completion of the city's work, but rather developed over time as a result of water seeping and freezing. In a break with its own precedent, the Court held that the affirmative negligence exception to the notice requirement must be limited to work by the city that immediately results in the existence of a dangerous condition. "If we were to extend the affirmative negligence exception to cases like this one, where it is alleged that a dangerous condition developed over time from an allegedly negligent municipal repair, the exception to the notice requirement would swallow up the require-



Andrea Alonso



Kenneth Pitcoff

ment itself, thereby defeating the purpose of the Pothole Law."⁵ The Court specifically overruled its own decision in *Torres v. City of New York*.⁶

Second Department

Subsequent to the First Department's decision in *Bielecki*, the Second Department followed suit. In *Gold v. County of Westchester*,⁷ the plaintiff fell when her bicycle struck a pothole. The court found that the slowly evolving nature of the alleged defective condition through settlement of the pavement joint over a substantial number of years did not constitute an affirmative act of negligence as required by law. The plaintiff was "required to demonstrate that the city did something more than stand by while a roadway joint settled over a period of years."

Similarly, in *Lopez v. Town of North Hempstead*,⁸ while there was some proof that the town had repaired a hole with an asphalt patch over five years before the accident, there was no evidence that a dangerous

condition existed when the repair was completed or that the repair caused the subsequent deterioration. Thus, the requirement that the municipality's work must immediately result in the existence of a dangerous condition was not met.

Three recent cases demonstrate the expansion of the immediacy rule set forth in *Bielecki* as it applies specifically to the city of New York. In *Ocasio v. City of New York*,⁹ a First Department case, the record revealed that the city did not receive notice of the pothole that caused the plaintiff's injury and that the pothole's recurrence, two years after the repair by the city, was not the result of an affirmative act of negligence by the city.

In *Daniels v. City of New York*,¹⁰ the city of New York repaired the roadway eight years before the plaintiff's accident. The Second Department dismissed the action as the plaintiff was unable to prove that the defective condition existed immediately upon the city's completion of the repair work or that the deterioration of the roadway was caused by the city's repair, instead of developing over a period of time.

In *Yarborough v. City of New York*,¹¹ plaintiff was injured when he stepped into a playground pothole. Plaintiff's engineer submitted no evidence that the prior repair immediately resulted in a dangerous condition. The Second Department held:

The mere eventual emergence of a dangerous condition as a result of wear and tear and environmental factors, as described by one of the plaintiff's experts, does not constitute an affirmative act of negligence that abrogates the need to comply with prior written notice requirements.¹²

Interestingly, the Third Department has refused to adopt the precise rationale of *Bielecki* (although it did dismiss the plaintiff's complaint). In *Kushner v. City of Albany*,¹³ a bicyclist brought an action against the city to recover for injuries sustained when he struck a pothole. Plaintiff's proof at trial was that the city used a cold patch (an admittedly temporary cold weather remedy) to fill the pothole without first excavating it which resulted in the patch being dissipated prior to the accident. In other words, the pothole gradually became a pothole again.

The court, in affirming the dismissal of plaintiff's complaint, found that an ineffectual pothole repair, which

New Definition of 'Creation Exception' to Pothole Law

Continued from page 4

does not make the condition any worse, cannot constitute an affirmative act of negligence such that the defendant is precluded from relying on the prior notice law. However, the court made clear that it was not relying on the *Bielecki* case in dismissing the action.

Court of Appeals

The Court of Appeals has yet to rule on the immediacy requirement to the "creation exemption" of the prior Written Notice Law or to reconcile the First and Second departments' opinion with that of the Third Department (i.e., conduct which does not exacerbate a hazardous condition is not negligence).

It appears that the *Bielecki* case, and the line of cases that follow, is a continuation of the trend to relieve the city from its enormous burden of sidewalk injury liability which began with the changes to the New York City Administrative Code §7-210, §7-211 and §7-212.¹⁴ Those statutes, effective Sept. 15, 2003, radically shifted tort liability for sidewalk injuries from the city to property owners of dwellings of greater than three family units. They represent an effort to stem the flow of municipal funds to plaintiffs for injuries that may occur on city property where liability is based on the mere circumstance of ownership alone.

The courts are recognizing the impossible task that municipalities bear in maintaining their infrastructure in perfect condition. The economic burden upon municipalities is no longer sustainable. The legislative intent of insulating municipalities from liability absent written notice is supported by the new immediacy requirement set forth by the case law coming from the First and Second departments.

Advantage Defendants?

As with the new changes in the narrowing judicial interpretation of Labor Law §240(1),¹⁵ as set forth in the *Blake*¹⁶ case, and the recent strict interpretation of the no-fault statute in the *Pommells*¹⁷ decision, plaintiff's burden of proving liability in personal injury claims has become increasingly difficult. The legal climate appears to have changed and the pendulum is swinging in favor of the defendants. The question remains: has it reached the top of its arc or is there more to come?

.....●.....
1. N.Y. City Admin. Code §7-201(c)(2), provides in part:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments

thereto, 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, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

2. *Amabile v. City of Buffalo*, 93 NY2d 471, 474, 715 N.E.2d 104, 106, 693 N.Y.S.2d 77, 79 (1999).

3. *Torres v. City of New York*, 306 AD2d 191, 762 N.Y.S.2d 67 (1st Dep't 2003).

4. *Bielecki v. City of New York*, 14 AD3d 301, 788 N.Y.S.2d 67 (1st Dept. 2005).

5. *Id.* at 301.

6. *Id.*

7. *Gold v. County of Westchester*, 15 AD3d 439, 790 N.Y.S.2d 675 (2nd Dept. 2005).

8. *Lopez v. Town of North Hempstead*, 20 AD3d 511, 799 N.Y.S.2d 254 (2nd Dept. 2005).

9. *Ocasio v. City of New York*, 28 AD3d 311, 813 N.Y.S.2d 408 (1st Dept. 2006).

10. *Daniels v. City of New York*, 29 AD3d 514, 214 N.Y.S.2d 258 (2nd Dept. 2006).

11. *Yarborough v. City of New York*, 28 AD3d 650, 813 N.Y.S.2d 511 (1st Dept. 2006).

12. *Id.*

13. *Kushner v. City of Albany*, 27 AD3d 851, 811 N.Y.S.2d 796 (3rd Dept. 2006).

14. N.Y. City Admin. Code §7-210 to §7-212.

15. N.Y. Labor Law §§240 - 241(6)(2006).

16. *Blake v. Neighborhood Housing Services of New York City Inc.* 1 NY3d 280, 771 N.Y.S.2d 44 (2003).

17. *Pommells v. Perez*, 4 NY3d 566, 830 N.E.2d 278 (2005).