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Judicial Exceptions to Prior Written Notice

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A recent change in our local law (§§ 7-210 & 7-211) will no doubt reduce the number of actions commenced against the City of New York due to the transfer of sidewalk liability from the City to the abutting property owner (with few exceptions). I will reserve commenting on the appropriateness of the law as written and whether victims of accidents will be adequately protected and compensated for their personal injuries where, for example, the abutting property owners are uninsured. Instead, the focus will be to highlight not one but two of the judicially recognized exceptions to the existing prior written notice law.

As I previously wrote on September 7, 1999 for Outside Counsel, the prior written notice law exists to limit liability of a municipal property owner because the City cannot be on constructive notice of each and every defect. Thus, in order to sustain a prima facie case we were left with a law requiring actual written notice of an injury causing defective condition served a certain period of time beforehand. The rationale was that where the City had actual notice of a defect and nevertheless allowed it to remain uncorrected (for

what the legislature deemed to be a greater that reasonable period of time) and which defect resulted in injury, the City may be liable.

Many decision have written about the different methods of providing actual notice of a defect, probably the most widely written about more so than any other-The Big Apple Map. What happens under our new law, however, where a victim's lawyer is unable to obtain the necessary evidence to establish prior written notice, in cases where same is still applicable? Is the claim over before it began making the injured party victimized a second time? Not necessarily.

Most of us are or should be aware of the "cause and create" exception to prior written notice. In fact, majority of cases discuss this exception which is why it should be widely known. A recent case handed down by the First department, Torres v. City, 306 A.D.2d 191, 762 N.Y.S.2d 67, reversed Justice Bowman of Supreme Bronx following a grant of JNOV. In Torres prior written notice was not claimed. Through an expert at trial, however, evidence was established that the roadway had been negligently constructed in the first instance by having laid only one inch of asphalt on top of the original cobblestone resulting in recurring potholes. The expert testified that good engineering practice required, instead, removal of the cobblestone, using an approved fill of eighteen inches and then a cover of four inches of asphalt. The First Department cautioned us that passive negligence or nonfeasance, in and of themselves, do not satisfy the cause and create exception. Notwithstanding, the lower Court was reversed because plaintiff established that the City's affirmative act of negligence had been in the original improper covering of the cobblestone street. The Court went on to say that no requirement existed that must make the negligent acts immediately apparent and the City could be held liable even where natural deterioration over time contributed in "bringing that defect to light." Thus, by causing and creating the subject defective condition the City does not need to have notice to be aware of the condition because of their negligent involvement at it's inception.

In addition to this well recognized "cause and create" theory a lesser known specific exception also exists which circumvents any prior written notice requirement. Many are familiar with this doctrine but may have been unaware that it acts as an exception to prior

written notice. Where the City has not received actual written notice a victim may still have a viable cause of action where a special benefit was derived arising from a "special use" of the subject property/land. This exception can apply to a municipality and to a private abutting landowner. Most if not all special use cases reveal that a fixture was embedded in the sidewalk or street or that somehow the sidewalk or street was altered in some way for the specific benefit of the abutting user. Often times we read about lower court decisions involving trip and falls in driveways Brancato v. City of White Plains, Supreme Court, Westchester Count, Judge: Murphy, QDS: 92455598, NYLJ 1/8/01, Moraco v. City of New York, Supreme Court, Kings County, Judge: Bruno, QDS: 42268812, NYLJ 12/5/00, Winkler v. City of New York, Supreme Court, Kings County, Judge: Bruno, QDS: 42268810, NYLJ 12/19/00. According to dicta in comments to PJI 2:111, the question of what is or is not a special use is typically a question of law, not fact.

In a well reasoned and explained 1997 decision, the Court of Appeals in Kaufman v. Silver 90 N.Y.2d 204, 681 N.E.2d 417, 659 N.Y.S.2d 250, reviewed the historical basis of special use in stating "The doctrine of special use was fashioned in New York in the previous century, to authorize the imposition of liability upon an adjacent occupier of land for injuries arising out of circumstances where 'permission [has been] given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use'" id at 207. The extension and application since that historical time can be found in another Court of Appeals decision but two years earlier, in Poirier v. City, 85 N.Y.2d 310, 648 N.E.2d 1318, 624 N.Y.S.2d 555. The Poirier Court ruled that the abutting landowner is required to maintain the specially used portion of property, unrelated to the public's use, from which a special benefit was derived. A review of reported decisions produce varying results based upon the particular facts. For example, in Torres v. Central, --A.D.--, 770 N.Y.S.2d 629 plaintiff's complaint was dismissed after a jury verdict in her favor for failing to establish that defendant's driveway constituted a special use of the public roadway that caused the underlying defect. Compare, however, Dos Santos v. Peixoto, 293 A.D.2d 566, 742 N.Y.S.2d 66 and Rosario v. City, 289 A.D.2d 133; 735 N.Y.S.2d 50 where it was held to be a question of

fact whether the defect was caused by the defendant's use of the driveway portion of the sidewalk. See also Cole v. City, 80 A.D.2d 656; 436 N.Y.S.2d 413 involving a hospital's driveway.

Again, we must keep in mind that special use is an exception to the common law and also to prior written notice. Consequently, a plaintiff's attorney must establish prima facie that the gas pipe, vending machine, valve, sidewalk vault cover, survey monument, oil filler cap, trap door, driveway, or other various embedded items in property were specially used or installed by the abutting owner towit some benefit was derived, and that the dangerous condition was known or should have reasonably been discovered and corrected. It is also particularly interesting to note that in PJI 2:111, the standard is equivalent to absolute liability in the care and maintenance imposed upon the special user. The charge does not specifically include, for example, that the abutting property owner keep the subject defect in reasonably safe condition.

Now, with a dwindling area of our City still subject to prior written notice, it is even more important to be aware of exceptions when going through a checklist of elements necessary to establish liability as was done successfully in Torres v. City, supra.

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