# Court of Appeals Holds That Conditions Involving Snow or Ice Need Not Be Immediately Created in Order to Hold a Municipality Liable Under the Affirmative Creation Exception to the Prior Written Notice

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It is well established under the "prior written notice rule" that municipalities cannot be liable for injuries stemming from an allegedly dangerous and/or defective street or sidewalk condition, even where negligent, if it does not have prior written notice of the condition which allegedly caused plaintiff's injuries.[1] Equally well established are the two exceptions to this rule: (1) where the municipality receives a special use or confers or receives a special benefit from the area where the defect exists ("special use" exception), or, more commonly, (2) where the municipality created the defect or hazard through an affirmative act of negligence ("affirmative creation" exception). In the recent case of ***San Marco v. Village of Mount Kisco***, the Court of Appeals chipped away at the latter exception.[2]

In ***San Marco***, the plaintiff slipped and fell on an accumulation of black ice in a parking lot owned by the Village/Town of Mount Kisco ("the Village") while on her way to work on Saturday morning. While the Village treated the parking lot for snow and icy conditions Monday through Friday, the lot was not maintained or monitored on the weekends. At an unspecified time before the plaintiff's accident, the Village plowed snow in the parking lot into a large pile, which was adjacent to the parking spaced where plaintiff fell. While is was undisputed that the very day before plaintiff's accident (a Friday), the Village had salted the lot and inspected it for icy conditions, it was also undisputed that the temperature had risen above and then fell below freezing between the Village's last inspection on Friday and plaintiff's fall early Saturday.

In response to plaintiff's claim that the Village was negligent in piling snow so close to patron parking spaces and failing to remedy any icy conditions that developed as a result, the Village sought protection under its Local Law which required prior written notice of a dangerous and/or defective condition as a prerequisite to its liability. The trail Court rejected this

argument and found a question of fact as to whether the Village's act of piling the snow near the parking lot put it within the "affirmative creation exception" to the prior written notice rule. The Appellate Division for the Second Department reversed and granted summary judgment for the Village. The Court of Appeals then reversed in a 5-4 decision delivered by Justice Lippman.

As discussed herein, while the Court of Appeals reaffirmed that the prior written notice rules function to shield municipalities from limitless liability for slip and falls where there is no prior written notice of the injury-producing condition, it then proceeded to place a new limit on the affirmative creation exception to prior written notice rules.

The Appellate Division decisions of ***Yarborough*** and ***Oboler*** establish that where a plaintiff seeks to rely on the "affirmative creation" exception to negate the prior written notice rule and hold a municipality ***affirmatively*** created the condition that caused plaintiff's injuries and that this defective and/or dangerous condition was ***immediately*** created and not the mere result of gradual wear and tear (commonly known as the "immediacy requirement").[3] The First Department held in ***Yarborough*** that the "mere ***eventual*** emergency of a dangerous condition as a result of wear and tear and environmental factors…does not constitute an affirmative act of negligence that abrogates the need to comply with prior written notice requirements."

Typically, the "immediacy requirement" has been applied to claims involving potholes, loosened drain covers and various sidewalk conditions. In most of these cases, the immediacy requirement has shielded municipalities from liability because the condition that caused plaintiff's injury was the result of a gradual culmination of environmental factors and/or basic wear and tear from pedestrian and/or motor vehicle traffic. However, the Courts have not so often gauged whether the immediacy requirement applies where the injury-producing condition is snow or ice. This was the very issue that the Court dealt with in ***San Marco***.

The Second Department found in San Marco that while the Village's had created the large pile of snow adjacent to the area where the plaintiff fell, it did not "immediately" create the injury-producing hazard; rather, it was the eventual interplay of environmental factors such as time and temperature which caused the black ice at issue. The Second Department thus held that because the black ice was not present immediately after the Village's plowing, the affirmative creation exception to the prior written notice rule did not apply.

However, the Court of Appeals opined that the typical requirement that an affirmatively created condition be "immediately" created does not apply to conditions involving snow and/or ice. In limiting the creation exception to the prior written notice statutes in this way, the Court drew the following distinctions between street and sidewalk conditions as compared to conditions involving snow and ice:

[U]nlike a pothole, which is ordinarily a product of wear and tear of traffic or long-term melting and freezing on pavement that at one time was safe and served and important purpose, a pile of plowed snow in a parking lot is a cost-saving, pragmatic solution to the problem of an

accumulation of snow that presents the foreseeable, indeed known, risk of melting and refreezing.

The Court went on:

[A] patch of pavement my gradually and unpredictably deteriorate, making the point at which the efficacy of the initial repair ceases, unknown to the municipality. It is therefore, understandable that the hazard may escape detection until the municipality receives prior written notice of the problem. However, in the case of black ice that forms from plowing snow…a municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.

In other words, the Court help that the purpose of the immediacy requirement is to shield municipalities from liability where a once safe condition becomes unsafe because of slow, gradual and/or uncontrollable factors which are either outside of the municipality's control or which could easily go undetected for a prolonged period of time. The Court indicated that a pothole, sidewalk defect or loosed drain cover fits squarely within this scenario, but that snow and ice are not typically the type of conditions which go easily undetected or arise only after gradual passage of time. The Court seems to be classifying the dangers associated with snow and ice as open and obvious, not needing to be immediately created to raise a red flag for municipalities. Therefore, the Court held that while dangerous conditions involving potholes, man covers, sidewalks and the like must be ***immediately*** created in order to impose liability upon municipalities under the affirmative creation exception to the prior written notice rule, snow and ice conditions are an entirely different animal which need not be immediately created. In support of this proposition, the Court referred to a 1949 case where the Court of Appeals held that a municipality could be liable for a slip and fall on ice in its parking lot without prior written notice.[4] Further, the Court pointed to a 2008 decision from the Second Department where the Court found a triable issue of fact as to whether the County's snow removal methods created the ice on which plaintiff fell.[5]

Applying its freshly carved out exception to the exception to the ***San Marco*** facts, the Court found that because the Village had salted and inspected the lot on the eve of plaintiff's accident to eliminate black ice, the determinative factor of the Village's liability was whether its snow removal efforts created the icy condition on which plaintiff fell. The Court found that there was an issue of fact as to whether the Village exercised its duty in a reasonably safe manner by plowing high piles of snow adjacent to an active parking lot. In reversing the Second Department and denying the Village's motion for summary judgment, the Court emphasized that the Village neglected to employ snow and ice removal services on the weekend (when plaintiff's accident occurred), despite the fact that the parking lot remained open seven days a week.

In light of a strong dissent, the majority attempted to justify its decision by opining that it was not creating a new burden on municipalities with respect to snow and ice removal and that it was not deeming municipalities to be insurers of pedestrians.

The dissenting opinion by Justice Smith disagreed. Justice Smith noted that the majority's decision was tantamount to holding that "no written notice is required because the municipality was negligent." According to Justice Smith, the majority's decision is at odds with the very purpose of the prior written notice requirement, namely to protect municipalities, even when they ***are*** negligent, unless they have written notice of the defective and/or dangerous condition at issue.

In addressing the majority's contention that dangerous potholes and pavement conditions are more likely to go undetected and/or result from gradual or environmental changes, the dissent held that a municipality would not need to rely on the prior written notice rule if a danger was truly ***unforeseeable*** and ***unknown***. Rather, as the dissent opined, it is where the risk is foreseeable, and the municipality is negligent in ***failing to foresee*** the danger, that the prior written notice rule takes effect and shields municipalities from perpetual slip and fall lawsuits.

The dissent found that neither the terms of the prior written notice rule nor the legislative intent behind it leave room for a distinction between snow and ice cases as compared to pavement and sidewalk cases. Further, the dissent forewarned that extending the affirmative creation exception to snow and ice cases such as the present one would serve to swallow up the protection afforded to municipalities by the prior written notice rule and effectively defeat the rule's purpose.

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Endnotes:

1. Village Law §6-628; Town Law §65(a); Second Class City Law §244; New York City Admin. Code §7-201(c)(2).

2. *San Marco v. Village of Mount Kisco*, 2010 N.Y. Slip Op. 09197.

3. *Yarborough v. City of N.Y.*, 813 N.Y.S.2d 511 (2d Dept. 2003); *Oboler v. City of N.Y.*, 8 N.Y.3d 888 (2d Dept. 2007).

4. *Zahn v. City of N.Y.,* 299 N.Y. 581 (1949).

5. *Smith v. County of Orange*, 858 N.Y.S.2d 385 (2d Dept. 2008).


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