Court of Appeals of the State of New York

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DALE R. SAN MARCO and VINCENT SAN MARCO,

Plaintiffs-Appellants,

-against-

VILLAGE/TOWN OF MOUNT KISCO,

Defendant-Respondent.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

TIMOTHY J. KEANE
President of the Defense Association
of New York, Inc.

ANDREW ZAJAC
Committee on the Development of the Law
Defense Association of New York, Inc.

FIEDELMAN & McGAW
Two Jericho Plaza – Suite 300
Jericho, New York 11753
(516) 822-8900

—♦—

Of Counsel:
Andrew Zajac
Dawn C. DeSimone
Brendan T. Fitzpatrick
David B. Hamm

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SW

St. Louis West, Inc. (5119)
NY (212) 684-3117 NJ (201) 863-8133

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. ("DANY") as *amicus curiae* in support of defendant on the appeal which is before this Court in the above-referenced action.

The purposes of DANY are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases primarily for the defense, and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools, emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and

legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds. DANY's amicus briefs have regularly been accepted by this Court and other appellate courts.

Before the Court is an effort by plaintiffs to disturb established law and consistent court rulings having their foundation in the well-recognized limitation on the waiver of sovereign immunity - - the mandate adopted by subdivisions of the State, such as defendant, that they receive prior written notice of a defective condition before imposition of liability for injuries caused by that condition. Plaintiffs attempt to expand the judicially-crafted "defect creation" exception to the written notice rule to include a purported "defect" (a pile of snow) created days or weeks earlier and thereafter subject to the whim of nature's melting and freezing. By doing so, however, plaintiffs would apparently substitute, for the established bright-line test (direct and immediate defect

creation), a test so malleable as to encompass supposedly negligent conduct taking place weeks earlier, with no identified temporal boundary. What, then, per plaintiffs, is the difference between a mound of snow created January 25 - - 11 days before the accident, and an allegedly structurally weak street paving done 11 days, or months, or years before a pothole is formed and an accident occurs? If direct and immediate creation is eliminated, what replaces it?

Mount Crisco plowed a pile of snow after nine inches of snow fell on January 25, 2005. However, it is undisputed that Mount Kisco did not create the "black ice" upon which, more than ten days later on February 5, 2005, plaintiff Dale San Marco allegedly slipped.

Although it is also undisputed that on February 4, 2005 an inch of snow fell and that from February 4, 2005 until 8:15 a.m. on February 5, 2005 (when plaintiff allegedly slipped) the temperature fluctuated between 33 and 35 degrees, plaintiffs theorize that the "black ice" upon which she allegedly slipped did not result from the prior day's snow, but instead resulted from thawing in the snow pile and subsequent freezing of runoff from that pile in the parking lot.

Even if plaintiff could support her theory that the "black ice" condition upon which she allegedly slipped came from thawing of the snow pile, plaintiff cannot avoid the written notice requirement. Plaintiff did not slip on or trip over the pile of snow. Plaintiff slipped on ice in the parking lot.

On Mondays through Fridays, Mount Kisco's employees periodically checked the parking lot where plaintiff allegedly slipped and fell and looked for the very condition that plaintiff alleges caused her fall - ice. The written notice requirement exists to relieve municipalities of the extreme financial burden of continuously patrolling their properties and stationing employees throughout the town seven days a week and to protect municipalities from liability unless, prior to an injury, the municipality has written notice of the defective condition that caused a plaintiff's injury.

From another perspective, a mound of snow is not inherently dangerous or defective. Municipalities must put shoveled snow somewhere; most cannot afford to make it disappear. And plaintiff did not trip over or slip on the mound of snow. It was only the intervention of time and environmental factors that are alleged to have acted upon the inherently benign "created" mound of snow, to thereafter formulate the allegedly dangerous "black ice" upon which the injured plaintiff now claims she slipped. But defendant did not "create" that "black ice." To impose upon the municipal defendant "creation" responsibility - - without written notice - - for "black ice" created by nature from the benign mounds of shoveled snow created by municipalities, as a means of avoiding the written notice requirement, would undermine the vestigial elements of sovereign immunity retained by subdivisions of the State, at a time when new inroads into their pocketbooks could hardly be considered in

the public interest.

For these reasons, and as more fully explicated herein, the Order appealed from should be affirmed.

STATEMENT OF FACTS

The Village/Town of Mount Kisco owned the parking lot located on South Moger Avenue within the village (R. 188) (References are to the Record on Appeal). The lot was located between South Moger Avenue and a Metro-North train station (R. 185). The parking spaces within the lot were metered and by permit (R. 186). There were about 12 rows of spaces with spaces on both sides (R. 186). The lot had three entrances/exits (R. 187).

Peter Scala was a road foreman for Mount Kisco's highway and sanitation department(R. 184). His responsibilities included supervising snow plowing and snow removal of non-county and state roads (R. 184-85). Scala's department was responsible for plowing the parking lot located on South Moger Avenue (R. 185).

Mount Kisco's workers would plow the snow in the parking lot, but not remove it. (R. 194) After plowing, they would check the lot if there was going to be thawing and freezing (R. 195). They only worked Monday through Friday (R. 195-97). Scala made most of the inspections (R. 197).

According to his records, Scala stated that snow fell on January 22 and 23, 2005 (R. 203-4). Crews came in, plowed, and spread salt and sand throughout the night and day (R. 204-5). The parking lot on South Moger was plowed (R. 206). Light snow fell on January 24, 2005 (R. 206-7). Drivers plowed and spread salt (R. 206-7). Approximately four inches fell on January 25,

2005, and Scala's workers performed snow-removal activities (R. 207). The next notation was for January 30, 2005 where additional snow fell, and salt was spread (R. 207-8).

On Saturday, February 5, 2005, Dale San Marco drove to her work at a hair salon and arrived at about eight 8:15 a.m. (R. 29-31, 39). San Marco had to be at the salon by 8:30 a.m. to open the store (R. 41). It was very cold that morning (R. 31-2). She believed that the last time it had snowed was one week before (R. 32). She had no difficulty driving to work (R. 37-8).

The parking lot for the salon was on South Moger Avenue (R. 34). She had purchased a yearly permit to park in the lot (R. 35). San Marco parked in the center aisle in the second spot (R. 39). She did not recall parking in that spot in the week before her incident, but she had parked in that lot during that time. (R. 42-43) The lot had been plowed, and she saw snow piled up (R. 46-7, 63).

The incident occurred as she got out of the car (R. 42. She opened the door and looked at the ground (R. 47-8). She saw nothing and said it was "clear" (R. 47-8). San Marco denied seeing any ice (R. 62). She could see the lines for the parking stall (R. 48-9). She put both of her feet on the running board of her SUV (R. 49-50). She put her left foot down on the ground first. (R. 51) San Marco said her foot started to slip "because it was -- you are getting out of the car quickly" (R. 52). Her right foot was coming down onto the ground at the same

time, and it also slipped (R. 52). She had not closed her door (R. 52).

San Marco claimed to have lost consciousness as a result of falling (R. 52). When she woke up, she was lying in the parking lot (R. 53-4). While she was on the ground, San Marco "saw snow piled up, the snow piled up, and I don't remember after that" (R. 62). She "didn't see ice" on the ground (R. 62). San Marco could not describe the ice that caused her to fall "because I couldn't really see it" (R. 64). No one else described any ice to her (R. 64-5). She was shown a photograph and stated that it generally depicted the area where she fell (R. 62).

San Marco was unaware of anyone that had complained to Mount Kisco about the condition of the parking lot (R. 67). Customers of the hair salon complained when they came into the salon that the snow was piled up so that they could not put money in the parking meters (R. 67). When asked if the customers had any complaints about the condition of the lot, she replied that they complained that there were not enough parking spaces (R. 68). No one from the salon complained to Mount Kisco (R. 68-9). She was not aware of anyone else previously falling in the area where the incident occurred (R. 69). While San Marco had seen some puddles in the parking lot in the week before the incident, she never observed them refreeze and create ice (R. 71).

Allegations and Motion Practice

As a result of this incident, San Marco and her husband

filed a notice of claim and then filed a lawsuit against Mount Kisco (R. 138-41, 142-47). They claimed that "black ice" caused San Marco to fall and that Mount Kisco failed to properly remove the snow that it had plowed into mounds in between the parking meters (R. 140, 144).

In its answer, Mount Kisco asserted that it lacked prior written notice as required by Mount Kisco Code § 93-47 (R. 149).

After the completion of discovery, Mount Kisco moved for summary judgment on the ground that it had no prior written notice of any dangerous condition at the location where San Marco fell (R. 9-19). Mount Kisco cited to CPLR § 9804 and Village Law § 93-47 in support of its contention that San Marco was required to present evidence of prior written notice of the defect in order to maintain the lawsuit against it. It also argued that it did not create any dangerous condition and it submitted relevant weather data (R. 155-79).

James Palmer submitted an affidavit in support of the motion (R. 20-1). Palmer was the Manager-Clerk of Mount Kisco (R. 20). He received all written notices of defective, obstructive, and hazardous conditions, and he maintained an official file of all written notices received by Mount Kisco (R. 20). With respect to San Marco's alleged fall on ice in the parking lot on South Moger Avenue, Palmer reviewed the file for any written notices of defective, obstructive, or hazardous conditions (R. 21). He stated that Mount Kisco never received any written notice of a defective condition at the incident

location before February 5, 2005 (R. 21).

The weather data showed that a major snowstorm occurred between January 23 into January 25, 2005 that dropped eight inches of snow on the area (R. 165-66). Until January 29, 2005, temperatures rarely rose above freezing, resulting in little, if any natural melting of snow (R. 165-66). Small amounts of snow fell from January 26 through January 30, 2005 (R. 165-66).

On February 4, 2005, the day before the incident, one inch of snow fell (R. 167-68). The temperature rose above freezing, resulting in snow melting (R. 167-68). From that day until the morning of the accident, the temperature fluctuated between 33 to 35 degrees (R. 164). Mount Kisco argued that this meteorological evidence demonstrated that the alleged condition that caused San Marco to fall occurred in the early morning hours of February 5, 2005. Therefore, Mount Kisco did not have a sufficient amount of time from the cessation of inclement weather conditions in order to remedy the condition.

San Marco opposed the motion and argued that the prior written notice statutes were inapplicable because Mount Kisco created the dangerous condition (R. 234-49). She admitted that she never pleaded prior written notice (R. 240). She asserted that Mount Kisco's plowing allowed for the piled snow to melt and refreeze to cause ice patches.

San Marco attached the affidavit of meteorologist, Howard Altshule (R. 260-61). He concluded that nine inches of snow was present on exposed and untreated surfaces in the area on January

31, 2005 and another half inch fell on February 5, 2005 and that melting and refreezing occurred on numerous occasions in the days before the incident (R. 267). He opined that the snow and ice present on the morning of the accident had been present long before San Marco fell (R. 267).

In reply, Mount Kisco continued to argue that the evidence showed that the ice on which San Marco fell formed in the early morning hours before the incident (R. 341-47). Mount Kisco also pointed out that there was no evidence that Mount Kisco's snow-removal activities caused the incident because San Marco could not even describe the ice patch, and she did not know how it was created.

The Supreme Court's Decision

The Supreme Court denied Mount Kisco's motion (R. 3-8). The court ruled that the lack of prior written notice to Mount Kisco was not controlling as there was evidence that Mount Kisco had created the black ice condition by negligently plowing the area (R. 5-6). The court pointed to Mount Kisco's sanitation department having plowed the lot on several occasions in the two weeks before the incident, but it did not inspect it the day before or the day of the incident (R. 6). The court ruled that questions existed as to whether Mount Kisco caused or exacerbated the dangerous condition (R. 7).

Mount Kisco appealed from this order (R. 2).

The Decision and Order of the Appellate Division, Second Department

The Second Department reversed the Supreme Court's decision and dismissed the complaint. The Appellate Division ruled that the prior written notice provisions were applicable because the parking lot was considered part of a highway. Further, based upon Palmer's affidavit, the court ruled that Mount Kisco demonstrated that it had not received prior written notice of any dangerous condition as required by Village Law § 6-628 and Mount Kisco Code § 93-47.

The court continued that because Mount Kisco satisfied its initial summary judgment burden, San Marco was required to come forward with evidence that its negligence "immediately resulted in the existence of a dangerous condition." The Appellate Division gave San Marco the benefit of every inference that Mount Kisco created the snow piles in the parking lot, but held that San Marco failed to raise an issue of fact that Mount Kisco affirmatively created the dangerous condition. The Appellate Division relied upon Scala's testimony that Mount Kisco plowed the lot on January 25, 2005. The melting and refreezing, however, would not have occurred until January 29, 2005. According to the Appellate Division, these "facts do not rise to immediate creation, as it was the environmental factors of time and temperature fluctuations that caused the allegedly hazardous condition, not the allegedly negligent creation of snow piles". The court noted that to the extent prior precedent of the court

could be read to hold otherwise, that precedent should not be followed.

San Marco moved for leave to appeal to this Court, and the motion was granted.

POINT I

MOUNT KISCO NEITHER CREATED NOR HAD WRITTEN NOTICE OF BLACK ICE UPON WHICH PLAINTIFF ALLEGEDLY SLIPPED

The Second Department's dismissal of plaintiffs' suit in the absence of any evidence that the alleged ice condition upon which she claims to have slipped was immediately created by Mount Kisco's plowing of the South Moger Avenue Lot was proper and should be affirmed. A municipal entity's relinquishment of its immunity from suit is attended by strict preconditions. MacMullen v. City of Middletown, 187 N.Y. 37, 47 (1907). That such preconditions can be imposed is beyond question. Amabile v. City of Buffalo, 93 N.Y.2d 471, 473, 693 N.Y.S.2d 77 (1999). "The power to grant, or to deny, a remedy by private action for the breach of a duty, imposed upon [a municipality] for governmental purposes, and to affix conditions, where the right of action is given, is not one which should be called into question." MacMullen, supra at 41 (holding that the imposition of a prior written notice requirement was a constitutional exercise of a municipality's powers). Relinquishment of immunity with respect to conditions existing in, for example, a municipal parking lot, is accompanied by a right to impose the requirement that the municipality be provided with notice of the allegedly defective condition in writing prior to the incident giving rise to any claim. Amabile, supra, 93 N.Y.2d at 473) (holding that such requirements are "a valid exercise of

legislative authority."). In the absence of such prior written notice, an injured party may only recover if he or she can establish that the municipality affirmatively created the injury-causing condition, or where a special use of the premises by the municipality confers some benefit to it. Yarborough v. City of New York, 10 N.Y.3d 726, 728, 853 N.Y.S.2d 261 (2008); Oboler v. City of New York, 8 N.Y.3d 888, 889, 832 N.Y.S.2d 871 (2007); Amabile, 93 N.Y.2d at 474 (holding that constructive notice of a defect was insufficient to overcome a lack of prior written notice); c.f. Gorman v. Town of Huntington, 12 N.Y.3d 275, 279, 879 N.Y.S.2d 379 (2009)(dismissing claim where prior written notice was provided to the wrong municipal designee).

This Court's jurisprudence clearly establishes that where a plaintiff seeks to avoid the consequences of a lack of prior written notice by arguing that the municipality affirmatively created the injury-causing condition, the municipality's affirmative act must have led to the immediate creation of the condition. Yarborough, 10 N.Y.2d at 728; Oboler, 8 N.Y.3d at 890. The passage of time between the affirmative act and the resultant condition is fatal to a plaintiff's attempt to avoid dismissal where there is no written notice prior to the loss. Yarborough, 10 N.Y.2d at 728; Oboler, 8 N.Y.3d at 890.

For example, in Oboler, this Court considered a plaintiff's efforts to argue that prior written notice of a height differential between a manhole cover and the road surface was not necessary because the City had created the condition. The

plaintiff's efforts were rejected because, as this Court noted, there was no evidence of, inter alia, "the condition of the asphalt abutting the manhole cover immediately after any such resurfacing." 8 N.Y.3d at 890. The very next year, in Yarborough, this Court held that a poorly patched pothole, which deteriorated as a result of "wear, tear and environmental factors", was not a condition created "immediately" by the City's allegedly negligent patching of the pothole, again spelling doom for a plaintiff who could not establish that written notice of the condition had been provided before he tripped and fell. 10 N.Y.2d at 728.

In Oboler, this Court cited to the Appellate Division, First Department's decision in Bielecki v. City of New York as a basis for so holding. 8 N.Y.3d at 889-890. In Bielecki, the plaintiff was injured when he stepped into a hole in a pathway in Central Park. 14 A.D.3d 301, 788 N.Y.S.2d 67 (1st Dep't 2005). The plaintiff's expert opined that the hole developed over time following an allegedly negligent patch repair of the pathway, resulting from the freezing of water which had seeped into the patch. Id. In relying on Bielecki, this Court implicitly affirmed the First Department's "understand[ing that] the affirmative negligence exception to the notice requirement [is] limited to work by the City that immediately results in the existence of a dangerous condition." 14 A.D.3d at 301.

Plaintiffs concede that the condition causing San Marco's injury, "black ice" in the South Moger Avenue Parking Lot, did

not exist immediately after the Town plowed the lot. (Appellant's Brief at pages 4 - 6). Mount Kisco personnel plowed the South Moger Avenue Parking Lot on January 23 and 25, 2005 (R. 206-207). San Marco fell on February 5, 2005. (R. 29-31, 39, 42). In an effort to avoid the consequences of the lack of any prior written notice of the allegedly icy condition, plaintiffs argue that because the condition was "directly traceable to the piles of snow plowed" by Mount Kisco, the immediate affirmative creation exception "cannot fairly or logically be applied[.]" (Appellants' Brief at 16). Plaintiffs attempts to distinguish a "melt and refreeze" condition from an "environmental wear and tear" condition, however, are unavailing. Plaintiffs acknowledge the validity of this Court's holdings in Yarborough and Oboler which entitle a municipality to receive prior written notice of a condition which develops as a result of a superficially acceptable repair of, for example, a pothole, but assert that the situation presented by a similarly acceptable procedure for removing snowfall is not subject to the same rule of law. The same environmental factors which erode a pothole lead to the formation of ice from melted snow.

Accordingly, the failure to raise a triable issue of fact with respect to a municipality's affirmative and immediate creation of an allegedly defective condition is fatal to a plaintiff's case in the absence of prior written notice of the condition. See, Stallone v. Long Island Rail Road, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 114380 (2d Dep't 2010)("no

evidence that [municipality] plowing efforts immediately resulted in a dangerous condition or exacerbated a previously existing dangerous condition"); Rudden v. Bernstein, 61 A.D.3d 736, 738 - 739, 878 N.Y.S.2d 373 (2d Dep't 2009)(where the court found no evidence that municipality affirmatively created a dangerous condition where Town allegedly failed to plow snow); Carlo v. Town of Babylon, 55 A.D.3d 769, 769-770, 869 N.Y.S.2d 549 (2d Dep't 2008)(considering plaintiff's claim that overgrown grass and weeds obscured the height differential between a brick pathway and abutting landscaped area); Lincourt v. Village of West Winfield, 55 A.D.3d 1438, 1439, 864 N.Y.S.2d 825 (4th Dep't 2008) (dismissing claim based on creation of icy condition through snow removal); Gagnon v. City of Saratoga Springs, 51 A.D.3d 1096, 1097, 858 N.Y.S.2d 797 (3d Dep't 2008)(dismissing plaintiff's claim where she failed to establish that the City's affirmative acts created a differential between a curb and an adjacent lawn over which she allegedly tripped); Lyoshir v. County of Suffolk, 10 A.D.3d 638, 639, 781 N.Y.S.2d 693 (2d Dep't 2004)(holding plaintiff failed to establish that defendant had affirmatively created ice on sidewalk in front of its police station).

Much as the intrusion of water and other environmental factors can, over time, cause the deterioration of asphalt and concrete, the passage of time results in the unchecked growth of flora, the settling of dirt, and the melting (and subsequent refreezing) of snow. That prior written notice is required

where the passage of time allegedly reveals a defective asphalt patch or pothole repair is beyond cavil. Yarborough; Oboler. No difference exists between the impact of subsequent environmental conditions in those circumstances and the impact of subsequent environmental conditions on snow which has been plowed by a municipality. Therefore, there is no reason to except a case involving a "melt and refreeze", such as the one at bar, from the requirement that the municipality's affirmative act must have immediately resulted in the existence of the injury-causing condition. To do so would eliminate the direct and immediate creation test and would substitute a standard so uncertain as to encompass conduct taking place significantly earlier, with no identified temporal boundary. This would result in an additional logistical and financial burden on municipalities. Most municipalities must put snow somewhere; most cannot afford to make it disappear.

As plaintiffs concede that the ice came into existence days after Mount Kisco plowed the snow in the South Moger Avenue Parking Lot, it cannot be said that Mount Kisco affirmatively and immediately created the ice upon which plaintiff allegedly fell, and thus, the decision of the Appellate Division, Second Department should be affirmed.

CONCLUSION

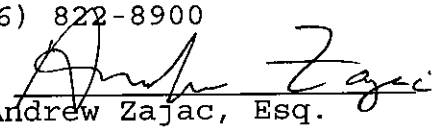
For the foregoing reasons, this decision and order of the Appellate Division should be affirmed.

Dated: Jericho, New York
February 8, 2010

Respectfully submitted,

Timothy J. Keane, Esq.
President of the Defense Association of New York, Inc.

Andrew Zajac, Esq.
Defense Association of New York, Inc.
c/o Fiedelman & McGaw
Two Jericho Plaza, Ste. 300
Jericho, New York 11753-1681
(516) 822-8900

By: 
Andrew Zajac, Esq.

Of Counsel

Andrew Zajac, Esq.
Dawn C. DeSimone, Esq.
Brendan T. Fitzpatrick, Esq.
David B. Hamm, Esq.