

Volume 17
Winter 2009

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

In an effort to keep our municipal clients apprised of new case law we summarize the following recent cases from the New York Court of Appeals.

A Municipality Does Not Have Actual Notice Of a Sidewalk Defect or Pothole Unless the Big Apple Map Symbol Indicates the Type of Defect that Actually Caused the Plaintiff's Injury.

Shapernovich v. The City of New York, 49 A.D. 3d 709 (N.Y. 2008);

D'Onofrio v. The City of New York, - - - N.E.2d - - - 2008 WL 5244593 (Dec. 18, 2008)

In these two cases, which were consolidated for appeal, the Court of Appeals considered whether the Plaintiff had established proper notice of a sidewalk defect in order to recover under the New York City Pothole Law.

Under the New York City Pothole Law, the City is liable for accidents caused by sidewalk defects or potholes when it has at least fifteen days written notice of the

defect that caused the Plaintiff's injury. Notice is often provided by the Big Apple Pothole and Sidewalk Protection Committee, an entity created by the New York State Trial Lawyers Association specifically for this purpose. The Big Apple Committee identifies sidewalk defects and potholes throughout the five boroughs and assigns a symbol to the defect, which is then placed on a grid map. The nature and type of symbol on the map is intended to indicate the type of defect that exists at the location.

In *Shapernovich*, the Plaintiff sought damages from the City after falling on a raised and uneven section of a Brooklyn sidewalk. A "raised and uneven" condition of the sidewalk is typically indicated on the Big Apple map by a straight line. However, the map symbol for the relevant location depicted a straight line with a symbol on the end that resembled either a poorly drawn "X," a pitchfork without a handle or the Hebrew Symbol Shin. Essentially, the symbol was ambiguous and

failed to signify any particular type of sidewalk defect. Nonetheless, a jury found the City 100% at fault. On appeal, the Appellate Division, Second Department, denied the Defendant's motion to set aside the verdict.

The Court of Appeals reversed and dismissed the complaint. The Court found that the symbol on the map failed to establish notice because it was ambiguous and practically illegible. The Court reasoned that the symbol's ambiguity was not a question of fact for the jury because the mark failed to convey any information at all. Further, the Court held that a mere symbol which could indicate any type of defect at the location was insufficient to establish the City's notice under the Pothole Law because it was not the type of defect that caused the Plaintiff's injury.

In *D'Onofrio*, the Plaintiff sought damages from the City after falling on defective subway grating. The Plaintiff testified that his feet were caught in the grating and that the grating itself began to move beneath him, causing him to fall. As the Plaintiff fell, he observed broken pieces of cement in the surrounding area. He attributed his fall to a combination of the broken

cement and the movement of the grating. The Big Apple map symbol, however, depicted a straight line indicating a "raised or uneven portion of the sidewalk" at the location.

In affirming the Second Department's dismissal of the action, the Court of Appeals found that to establish notice to the City of New York, the map symbol must indicate the type of defect that actually cause the Plaintiff's injury. No such match was present in *D'Onofrio* because the symbol indicated a raised or uneven sidewalk, but photographs of the area failed to show any surface irregularity or elevation and the injury sustained was a result of a defective grating and cement in the surrounding area.

The *Shapernovich* and *D'Onofrio* cases hold that a Plaintiff must establish that the defect depicted on the Big Apple Map is the exact defect which caused the Plaintiff's accident and that notice of any other defect will not form the basis for notice under the City's Pothole Law. This decision seems to place a higher burden on a Plaintiff in a personal injury lawsuit to establish notice against the City of New York.

