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EXPERT OPINION

The Expansion of Prior Written Notice Protection

The protection afforded to municipalities by prior written notice statutes continues to grow. It is clear from recent court rulings, discussed in this article, that expansion of this governmental immunity is the judicial trend.

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By Kenneth E. Pitcoff and Andrea M. Alonso | July 18, 2023 at 10:00 AM

A municipality that has a prior written notice law cannot be held liable for a defect within the scope of the law unless the requisite written notice has been given. The New York Village law for prior written notice applies to six surfaces and the Town law applies to three. Recently courts have continued to expand the definition to apply to other surfaces that "functionally fulfill the same purpose as a statutory surface."

New York Statutes

New York Village Law §6-628 provides, that: "no civil action shall be maintained" against a defendant village for personal injury sustained as a result of a defect in "any street, highway, bridge, culvert, sidewalk or crosswalk" unless prior written notice of the alleged defect is provided.

New York Town Law §65-a provides, that: "No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways."

Establishing the 'Functional Equivalence' Test

The scope of the prior written notice requirement has expanded beyond the six areas enumerated in Village Law §6-628 and the three areas enumerated in Town Law §65-a. Courts have applied what is now referred to as the "functional equivalence" test when determining whether prior notice of a defect is required.

The Court of Appeals in *Walker v. Town of Hempstead*, 84 N.Y.2d 360 (1994) determined a village did not need prior written notice of a defect on a paddleball, since a paddleball court is not one of the six listed locations listed in the municipal law.

The court stated that ruling that the paddleball court needed prior written notice would be “flatly inconsistent with the plain language of [the statute] mandating that “no other or further notice … shall be required as a condition to the commencement of an action,” subject to an exception for notices of defect for six specific kinds of locations, none of which is applicable here.”

The court then went further saying “we can only construe the Legislature’s enumeration of six, specific locations in the exception (i.e., streets, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned.”

The Court of Appeals in *Woodson v. City of New York* 93 N.Y.2d 936 (1999) established the “functional equivalence” test when deciding that a staircase served as the functional equivalent to a sidewalk.

The plaintiff in *Woodson* was injured when he fell on a defective concrete stairway leading from a sidewalk up to a park. The stairway was made with the same concrete material as the sidewalk and then directly connected to a pathway in the park. The plaintiff argued that if the city found prior written notice necessary for stairways, they would have added “stairways” to the six enumerated locations.

The court found the plaintiff’s argument unpersuasive. The court ruled that the staircase was essentially a sidewalk, the only difference is that the sidewalk is horizontal where a staircase is vertical, and that prior written notice is required. *Woodson* began a trend of expanding the protection of prior written notice beyond the six locations enumerated in the statute.

Applying the “Functional Equivalence” Test

The Court of Appeals in *Groninger v. Village of Mamaroneck*, 17 N.Y.3d 125 (2011), greatly expanded the application of prior written notice when they ruled that a parking lot served as the functional equivalent of a highway, because both are used for vehicular travel.

Groninger broadened the definition of “functionally equivalent.” Three dissenting judges noticed that highways are used for moving vehicles whereas parking lots are used for stationary vehicles, making them opposites when it comes to their functions. Despite the strong dissents the Court of Appeals continued to expand the protections of prior written notice.

In *Hinton v. Village of Pulaski*, 33 N.Y.3d 931 (2019) the Court of Appeals again pushed the limits of the functional equivalence test. The plaintiff was heading from a public road down to a local fishing hole. To get to the world famous “Black Hole” in the Salmon River the plaintiff had to descend “stairs” that had been constructed by the Village.

Judge Rowan Wilson in his dissent described the stairs as a “’railway tie’ stairway, made of compacted earth nosed with recycled railway ties, many of which still include the rusted nails they once had. The stairs are steep, irregularly spaced, with the space between the nosings made of grasses and muddy strands with potholes and muddy clumps (which were exacerbated due to a recent heavy rain). The railings were rickety and wooden, and at a low height; there was also less railing on one side than the other.” While descending the “stairs,” the plaintiff tripped over a rut/spike protruding from the stairs and fell, injuring his knee and breaking his ankle.

The plaintiff filed a lawsuit against the Village of Pulaski. The defendant moved to dismiss as the Village of Pulaski did not have prior written notice of the defect in the stairway as required by statute.

The court determined that the exterior stairway functionally fulfilled the same purpose as a sidewalk- therefore prior written notice was necessary. Despite the stairway not having the traditional attributes of a sidewalk (constructed evenly with concrete/asphalt) the court determined that it served the functional equivalent of a sidewalk because it “provided a passageway for the public.”

The court went on to argue that since the legislature has not shown any disapproval of this interpretation, this was no longer a matter of statutory interpretation, and applied precedent established by *Woodson*.

The dissent in *Hinton* is significantly longer than the opinion. Judge Wilson accused the majority of rewriting the statute instead of interpreting it. Wilson criticized the majority's use of "one of these things is/is not like the other" reasoning, instead of actual legal principles that can help lower courts apply the specific list enumerated in Village Law §6-628 and its sister statutes Wilson referenced *Walker* stating that "we can only construe the Legislature's enumeration of six, specific locations in the exception (i.e., streets, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned."

Wilson further stated that he feared the ruling in *Hinton* would discourage judges in the future from examining facts of the case instead of simply relying on *Hinton* for prior written notice.

DeMaioribus v. Town of Cheektowaga 188 A.D.3d 1643 (4th dept. 2020), relied on *Hinton* to strike down a plaintiff's claim that prior written notice was not needed because she fell in an entranceway to a municipal building and not a sidewalk.

The court rejected the plaintiff's argument stating that the "plaintiff slipped on the final step of the stairway, which served the same purpose as the preceding steps or landing which, together with the sidewalk below that led to the bottom of the stairway, provided passage for the public from a parking lot to the building." The court ruled that the entrance way did in fact serve the functional equivalence of a sidewalk.

Mitchel v. Village of Monroe, 2021 NY Slip Op 33318 (U) (Sup. Ct.), referred to the decision in *Hinton* to require prior written notice for a plaintiff that was injured when she fell on the grassy part next to a sidewalk.

The plaintiff stepped off the sidewalk intending to walk on the grass next to the sidewalk. Upon stepping off the sidewalk the plaintiff stepped in a depression next to the sidewalk, twisted her ankle, and fell on the sidewalk fracturing her elbow.

The court did not discuss the question of prior written notice, but simply stated that the grass next to the sidewalk was a part of the sidewalk therefore requiring prior written notice.

In March of this year, *Langsam v. Consolidated Edison of New York, et al.*, No. 765, 58990/2019 (Sup. Ct. WC, March 14, 2023), further expanded the definition of "sidewalk" as defined in Village Law § 6-628.

In *Langsam*, the plaintiff brought an action against the defendants seeking damages for personal injuries as a result of a slip and fall over a guy wire extending from a utility pole and anchored to the ground. Though the area in which the guy wire was located was characterized as a park, the court determined that it served the functional purpose of a sidewalk. This was partly established using the plaintiff's own testimony, as they kept referring to the area as a "path."

Since the court determined that the park served the functional purpose of a sidewalk, prior written notice was required in order to bring civil action against the Village. Since prior written notice was not provided, the Village was granted summary judgment. The plaintiffs in *Langsam* have filed a notice of appeal to the Second Department.

What Does Expansion Mean for Litigation?

In the 20 years since *Woodson* the Legislature has not changed the prior written notice law. The precedent established by *Woodson* resulted in case law in which stairways and parks can be sidewalks and parking lots can be highways. The protection afforded to municipalities by prior written notice statutes continues to grow. It is clear from recent court rulings that expansion of this governmental immunity is the judicial trend.

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