



**VILLAGE DID NOT DEMONSTRATE IT DID NOT CREATE THE DEFECT IN THIS SIDEWALK/TREE-WELL SLIP AND FALL CASE; THEREFORE THE VILLAGE’S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).**

The Second Department, reversing Supreme Court, determined the village’s motion for summary judgment in this sidewalk/tree-well slip and fall case should not have been granted. The Village demonstrated it did not have the required written notice of the defect, but did not demonstrate it did not create the defect:

” A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” ... . “Two exceptions to the prior written notice requirement have been recognized, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality” ... .

“[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings” ... . Here, the plaintiff alleged in her complaint and bill of particulars that the Village affirmatively created the defect that caused the accident. Therefore, in order to establish its prima facie entitlement to judgment as a matter of law, the Village had to demonstrate both that it did not have prior written notice of the defect and that it did not create the defect ... . The Village established, prima facie, that it did not have prior written notice of the defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect ... . [Nigro v Village of Mamaroneck, 2020 NY Slip Op 03518, Second Dept 6-24-20](#)