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POTHOLE LAWS, APPELLATE COURTS, AND JUDICIAL DRIFT

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I. INTRODUCTION

This article begins by describing the structure of the appellate system in New York state, introducing the features of the typical New York pothole law, and summarizing the New York cases that set the substantive and procedural background for a discussion and analysis of judicial drift.

A. New York's Appellate Structure

Although the names of the primary appellate courts in New York's multi-level judicial hierarchy can puzzle those who do not practice in New York, their roles can be summed up in two statements: First, the New York Court of Appeals is the state's highest court.¹ Second, the New York Supreme Court, which is

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1. N.Y. CONST. art. VI, § 3 (addressing jurisdiction of Court of Appeals); *id.* § 2(c)–(e) (addressing judicial-selection commission and providing that governor shall make

the state's trial court of general jurisdiction,² acts through the four Departments of its Appellate Division as the state's intermediate appellate court.³

Thus, although the name of the Appellate Division of the New York Supreme Court might suggest otherwise, it is the New York Court of Appeals that “stands at the apex of a hierarchy of appellate courts” in the state.⁴ The “basic premise” underlying New York's system of appellate courts is that intermediate courts “will dispose with finality of the great majority of the appeals, leaving for further review by the State's tribunal of last resort, the Court of Appeals, only a relatively small number of selected cases worthy of such further review.”⁵ In fact, “[t]he primary function of the Court of Appeals, like that of the United States Supreme Court in the Federal sphere, is conceived to be that of developing an authoritative body of decisional law for the guidance of the lower courts, the bar and the public.”⁶

Decisions of the Court of Appeals are controlling authority as to all inferior appellate courts in New York, including the Appellate Divisions, as well as to all trial courts in the state.⁷

appointments from among candidates submitted by commission); *see also* N.Y. JUD. L §§ 62–63 (McKinney 2019).

2. N.Y. CONST. art. VI, § 4(b)–(k) (describing Supreme Court and its jurisdiction); *see also* JANET DiFIORE & LAWRENCE K. MARKS, NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE 2–3 (2016), *available at* <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/NYCcourts-IntroGuide.pdf>.

3. Each departmental Appellate Division consists of a presiding justice designated by the governor, and associate justices, also designated by the governor, with the designees selected from among elected judges of the Supreme Court. N.Y. CONST. art. VI, § 4; *see also, e.g.*, THE PRACTICE OF LAW IN NEW YORK STATE 6 (2012), *available at* http://old.ny.sba.org/Content/NavigationMenu/Publications/ThePracticeofLawinNewYorkStatemembersonly/Practice_of_Law_2012-2013.pdf.

4. ARTHUR KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 2 (3d ed. 2005).

5. *Id.* at 3.

6. *Id.* at 3–4 (footnote omitted).

7. *See, e.g.*, 28 N.Y. JUR. 2d *Courts and Judges* § 220 (2017) (explaining that “[d]ecisions of the court of appeals which have not been invalidated by changes in statute, decisional law, or constitutional requirements must be followed by . . . all lower appellate courts, such as the appellate division . . . and by all courts of original jurisdiction” (footnotes omitted)) [hereinafter *Courts and Judges*]. It bears noting, however, that the Court of Appeals has limited jurisdiction. N.Y. CONST. art. VI, § 3. It may hear an appeal only if a litigant has the right to appeal, or if the granting of permission to appeal lies within its discretionary power. N.Y. C.P.L.R. §§ 5601–5602.

Decisions of any Appellate Division are controlling authority in all Supreme Courts within that judicial department.⁸

B. New York's Pothole Laws

In New York, “[p]rior written notice statutes create conditions precedent to commencement of a negligence action against a municipality,” providing that “before a person may begin an action against a municipality . . . for a defect in a roadway or sidewalk which caused injury, the entity must have prior written notice of that defect or the action may not be maintained.”⁹ Colloquially known as pothole laws, these statutes “were enacted to limit municipal liability, and to reduce the amount of money paid out in sidewalk and roadway claims.”¹⁰

C. Two Relevant New York Precedents: Yarborough and Indig

In *Yarborough v. City of New York*,¹¹ the Court of Appeals held that once a municipality establishes in a pothole case that there is a lack of written notice, “the burden shifts to the plaintiff to demonstrate . . . that the municipality affirmatively created the defect . . . or that a special use resulted in a special benefit to the locality.”¹² And in *Indig v. Finkelstein*,¹³ the Court of Appeals held that the plaintiff’s burden on summary judgment is not met by an allegation in a pleading.¹⁴ Facts and evidence are required.¹⁵

8. *Courts and Judges*, *supra* note 7, at § 220 (analogizing effect of Appellate Division decisions to that of Court of Appeals decisions and noting that Appellate Division decisions “must be followed by the appellate term and by courts of original jurisdiction”).

9. Lewis J. Lubell, Note, *Prior Written Notice Statutes in New York State: The Resurrection of Sovereign Immunity*, 10 *TOURO L. REV.* 705, 705 (1994).

10. *Id.* at 724 (footnotes omitted).

11. 10 N.Y.3d 726, 853 N.Y.S.2d 261 (2008).

12. *Id.* at 728, 853 N.Y.S.2d at 262.

13. 23 N.Y.2d 728, 296 N.Y.S.2d 370 (1968).

14. *Id.* at 729–30, 296 N.Y.S.2d at 371–72.

15. *Id.*

II. JUDICIAL DRIFT IN THE SECOND DEPARTMENT

A. Judicial Drift Defined

Judicial drift can occur in two ways. One is when a statement in a court's decision, appropriately applied in that case, is applied out of context as controlling authority in another case. The second is if a case sets forth a holding that is appropriate for its given facts, but is then applied in further cases in which the underlying facts become over time less and less on point with the original case.

Justice Dillon of the Appellate Division, Second Department, has recognized the danger of judicial drift, describing it as a concept that,

while not discussed openly anywhere in New York's case law, is considered behind closed doors at appellate courts. It is a concept about which appellate courts are concerned and guard against. "Judicial drift" regards the unintended expansion of case law by applying one innocuous sentence of a decision to a broader set of circumstances in a later case that was never initially intended or foreseen.¹⁶

This article addresses an example of judicial drift in Justice Dillon's own court—drift that has resulted in the Second Department's contradicting the Court of Appeals and has also led to a split among the departments of the Appellate Division.

After drifting into this change, the Second Department is now essentially trapped by a growing body of its own precedent. Because the Court of Appeals may not, other than in circumstances not implicated here, review non-final orders, the change in the law into which the Second Department has drifted is unreviewable.¹⁷ It will remain unreviewed unless either the Second Department itself certifies the issue for review or a plaintiff in a case from another department risks asking the Court of Appeals to impose the Second Department's formulation on the other departments.

16. Mark C. Dillon, *The Extent to Which "Yellowstone Injunctions" Apply in Favor of Residential Tenants: Who Will See Red, Who Can Earn Green, and Who May Feel Blue?* 9 CARDOZO PUB. L. POL'Y & ETHICS J. 287, 358 (2011).

17. See N.Y. CONST. art. VI, § 3; N.Y. C.P.L.R. §§ 5601–5602.

This change in the law can be traced through a series of decisions¹⁸ in which the Second Department has taken a remark in *Winegrad v. New York University Medical Center*¹⁹ about the evidentiary standard for summary judgment in medical-malpractice cases, and

- changed and expanded it,
- given it new burden-shifting significance,
- applied it to personal-injury actions against third parties who contract with landowners alleged to have created or maintained dangerous conditions on their properties, and only then
- applied it, as expanded, to pothole actions against municipalities.

These Second Department decisions have effectively countermanded the rule recognized by the Court of Appeals in *Yarborough*, shrinking the safe harbor created by pothole laws.

This situation may prove intractable for some time. All of the pothole cases in which the Court of Appeals has addressed the issue involved summary judgments dismissing plaintiffs' complaints, so in every one of them a plaintiff was seeking review of a final order. But the Second Department's new doctrine will always result in non-final orders (denials of summary judgment motions filed by municipal defendants), which will keep pothole cases active. Review by the Court of Appeals will in consequence be difficult to secure.²⁰

18. See Section II(B)–(E), *infra*.

19. 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318 (1985); see also §II(D)(1), *infra* (discussing *Winegrad*).

20. Pursuant to N.Y. C.P.L.R. § 5602(b)(2)(i), the Appellate Division can certify a question of law to the Court of Appeals raised by its own non-final order. Pursuant to sections 5601(d) and 5602(a) of the N.Y. C.P.L.R., however, the Court of Appeals does not have the power on its own volition to review a non-final Appellate Division order. The willingness of the Second Department to allow review would be the only check on its own otherwise unreviewable power, at least until such time as—and in the unlikely event that—the issue is raised in a final order issued by the Second Department. See generally KARGER, *supra* note 4, at chs. 3–4, 10.

*B. The Second Department's Drift into Changing the Law:
The Decision in Fornuto*

The plaintiff in *Fornuto v. County of Nassau*²¹ was injured when he fell off his bicycle after slipping on loose pebbles left on a paved trail weeks after a pothole repair by the municipality. The Second Department held that because affirmative creation is an exception to the pothole law, once the plaintiff alleged that the municipality had affirmatively created the condition, it was the municipality's burden on summary judgment to come forward with evidence to disprove the allegation.²² When asked to allow the Court of Appeals to review this determination, the Second Department refused.²³

*C. Behind the Decision in Fornuto:
The Decisions in Beiner and Loghry*

Shortly before *Fornuto*, the Second Department had decided *Beiner v. Village of Scarsdale*²⁴ and *Loghry v. Village of Scarsdale*.²⁵ Each made clear that the sort of allegation later confirmed in *Fornuto* as shifting the burden on summary judgment in a pothole case was made in a pleading alone. Using virtually identical language in each opinion, the Second Department concluded in both cases that “the 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.”²⁶ Its analysis was brief:

The plaintiff alleged, in her pleadings, that the defendant negligently maintained and repaired the sidewalk and affirmatively created the defective condition that caused the accident. Thus, to establish its prima facie entitlement to

21. 149 A.D.3d 910, 52 N.Y.S.3d 435 (2d Dep't 2017).

22. *Id.* at 911, 35 N.Y.S. at 436.

23. *Fornuto v. County of Nassau*, 2017 N.Y. Slip Op 82045(U) (N.Y. App. Div., 2d Dep't Aug. 7, 2017) (denying motion for leave to reargue appeal or, in the alternative, for leave to appeal to Court of Appeals).

24. 149 A.D.3d 679, 51 N.Y.S.3d 578 (2d Dep't 2017).

25. 149 A.D.3d 714, 53 N.Y.S.3d 318 (2d Dep't 2017).

26. *Beiner*, 149 A.D.3d at 680, 51 N.Y.S.3d at 580–81 (quoting *Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 905 N.Y.S.2d 226 (2d Dep't 2010)) (citations omitted); *Loghry*, 149 A.D.3d at 715, 53 N.Y.S.3d at 320 (same).

judgment as a matter of law, the defendant was required to demonstrate, *prima facie*, both that it did not have prior written notice of the alleged defect, and that it did not create the alleged defect.²⁷

Because the primary authority relied upon in *Beiner* and *Loghry*—which, like *Formuto*, contradict *Yarborough* and *Isrig*—was *Foster v. Herbert Slepoy Corp.*,²⁸ a review of the cases preceding *Foster* is necessary to an understanding of how judicial drift brought the law in the Second Department to this point.

*D. Behind the Decisions in Foster, Beiner, and Loghry:
The Decisions in Winegrad and Alvarez*

1. The Winegrad Decision

The Second Department purported in *Foster* to rely on *Winegrad*²⁹ when giving allegations in pleadings a significance at odds with the established rule that a plaintiff's burden on summary judgment is not met by mere allegations. But *Winegrad* stands only for the proposition that when a pleading in a medical-malpractice case apprises the defendants of the elements of the plaintiff's claim, the defendants must, in order to make out a *prima facie* case for summary judgment, address those pleaded facts instead of resting on "bare conclusory assertions."³⁰ Thus, if the injured patient has described harm "purportedly caused by the negligence of defendants" and the defendants have "acknowledged that at least in some part the alleged injury actually occurred," the defendants' contending only that that the treatment at issue "did not deviate from good and accepted medical practices, with no factual relationship to

27. *Beiner*, 149 A.D.3d at 680, 51 N.Y.S.3d at 580–81 (citations omitted); *Loghry*, 149 A.D.3d at 715, 53 N.Y.S.3d at 320 (same); see also *Nachamie v. County of Nassau*, 147 A.D.3d 770, 772, 47 N.Y.S.3d 58, 62 (2d Dep't 2017) (noting that the defendant "failed to show that it was entitled to summary judgment based on its prior written notice statute . . . as the plaintiffs alleged in their respective pleadings that it affirmatively created the alleged defect that caused their damages, and it failed to establish, *prima facie*, that it did not do so" (citation omitted)).

28. 76 A.D.3d 210, 905 N.Y.S.2d 226 (2d Dep't 2010).

29. 64 N.Y.2d 851, 487 N.Y.S.2d 316.

30. *Id.* at 853, 487 N.Y.S.2d at 318.

the alleged injury,” does not entitle the defendants to a grant of summary judgment.³¹ This is the rule of *Winegrad*.

2. *The Alvarez Decision*

In *Alvarez v. Prospect Hospital*,³² which the Second Department also cited in *Foster*, the Court of Appeals emphasized the narrow impact it expected *Winegrad* to have:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

* * * *

Winegrad . . . is not to the contrary. There, the plaintiff alleged, among other things, that the defendant doctors had misrepresented that the surgery was completed when in fact they had failed to complete the surgery and alleged further that they were not qualified to treat plaintiff. All that was tendered by the doctors in support of their summary judgment motion was an affidavit by each which did no more than simply state, in conclusory fashion, that they had acted in conformity with the appropriate standard of care. On the record in that case, we held that the “bare conclusory assertions echoed by all three defendants that they did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, do not establish that the cause of action has no merit so as to entitle defendants to summary judgment.” . . . By contrast, [the] papers here refute by specific factual

31. *Id.*, 487 N.Y.S.2d at 318.

32. 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

reference the allegations of malpractice made by plaintiff in her amended complaint and bill of particulars.³³

This enunciation by the *Alvarez* court of an evidentiary standard applicable to a defendant's motion for summary judgment in a medical-malpractice action did not reverse *Indig* or alter the summary-judgment standard articulated there, did not change the import of pleadings on motions for summary judgment, and did not purport to shift any burden of proof. It was in fact never read as having made any of these changes until the Second Department gave it a new interpretation in *Foster* a quarter of a century later.

E. The Foster Decision and Judicial Drift in the Second Department

In *Foster*, the Second Department construed *Espinal v. Melville Snow Contractors, Inc.*,³⁴ a negligence action against a contractor who had undertaken to perform work at a premises. The general rule in those circumstances is that the contractor has no duty to third parties, and so cannot be made a target of an action for injuries that a third party suffers on the premises. However, there are exceptions, including one that is at least superficially similar to the affirmative-creation exception in actions brought under a pothole law: the situation in which the contractor has "launched a force or instrument of harm."³⁵ The Court of Appeals discussed that exception in *Espinal*, which affirmed the Appellate Division's grant of summary judgment for the defendant contractor.³⁶

The plaintiff's unsupported assertions in *Espinal* that Melville created a dangerous and hazardous condition when

33. *Id.* at 325–26, 508 N.Y.S.2d at 925–26 (citing *Winegrad*) (citations omitted); see also *Pullman v. Silverman*, 28 N.Y.3d 1060, 1062, 43 N.Y.S.3d 793, 795 (2016) (relying on *Alvarez* and *Winegrad*).

34. 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002).

35. *Id.* at 139, 746 N.Y.S.2d at 122 (quoting *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168 (1928) (recognizing that a contractual obligation alone does not in general lead to liability in tort because imposing it "under such circumstances could render the contracting parties liable in tort to 'an indefinite number of potential beneficiaries'" (internal citation omitted))).

36. *Espinal*, 98 N.Y.2d at 143, 746 N.Y.S.2d at 125 (affirming Second Department's decision below).

plowing snow on defendant's property, causing her to slip and fall, were insufficient to sustain the action because Melville "simply cleared the snow as required by the contract."³⁷ As the Court of Appeals concluded, "the plaintiff's fall on the ice was not the result of Melville having 'launched a force or instrument of harm.'"³⁸

Yet although *Espinal* affirmed the grant of summary judgment dismissing the plaintiff's action, the Second Department determined in *Foster* that *Espinal* stands for the principle that if the plaintiff had made at least some allegations against Melville in her pleadings, summary judgment might not have been granted.³⁹ Adding this construction of *Espinal* to the burden-shifting statement in *Winegrad* about conclusory assertions from doctors being sued for malpractice, the *Foster* court determined that despite the longstanding rule of *Indig*, a bare pleading was sufficient to shift the burden of proof on a motion for summary judgment.⁴⁰ Combining an out-of-context statement from *Winegrad*, a medical-malpractice case, with an out-of-context assessment of what might have been in *Espinal*, a contractor-negligence case, to reach a new result applicable in pothole cases is judicial drift.

III. THE SPLIT BETWEEN DEPARTMENTS

It appears that the migration of the *Winegrad* statement through the decisions of the Second Department while growing from a guideline into a burden-shifting principle and moving from medical-malpractice cases into a contractor-negligence case and then expanding into cases involving pothole laws has all occurred without discussion or attention from courts and commentators.⁴¹ In fact, litigants in the Second Department do

37. *Id.* at 142, 746 N.Y.S.2d at 124 (citation omitted).

38. *Id.*

39. *Foster*, 76 A.D.3d at 214, 905 N.Y.S.2d at 228–29 (asserting that "the 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" (citing cases, including *Winegrad*)).

40. *Id.*

41. *See, e.g.*, Kevin G. Faley & Kenneth E. Pitcoff, *The "Creation Exception" to the Pothole Law: Difficult to Prove*, N.Y. L.J., June 14, 2017, at 4 (recognizing established rule that burden is initially on defendant to show lack of prior written notice, but that

not seem to have had an opportunity to address the spread and expansion of the *Winegrad* statement.

Now essentially trapped by its own body of burden-shifting precedent, the Second Department seems unlikely either to reconsider its analysis or subject it voluntarily to scrutiny by the Court of Appeals. Yet municipal defendants are unlikely to be able to invoke the appellate process to challenge denials of summary judgment made under the Second Department's misapplication of the *Winegrad* statement to pothole cases.⁴² This will leave the Second Department at odds with the other departments of the Appellate Division.

The Second Department's new interpretation notwithstanding, the Third Department applied the traditional *Yarborough* standard in *Chance v. County of Ulster*,⁴³ pointing out that "[w]hen a defendant establishes that it did not receive prior written notice of the alleged defect, the burden shifts to the plaintiff to raise issues of fact as to the applicability of an exception to the written notice requirement."⁴⁴ The *Chance* court also explicitly rejected an argument that echoes the Second Department's new position:

Plaintiffs argue that a defendant cannot shift the burden on such a motion for summary judgment absent proof that no issues of fact exist as to the application of any exception to the written notice requirement. We disagree, as such an argument is contrary to Court of Appeals precedent establishing the aforementioned general rule as to defendant's initial burden.⁴⁵

In accordance with its rejection in *Chance* of the Second Department's developing *Biener-Loghry-Fornuto* doctrine, the Third Department has continued to apply the usual *Yarborough* rule when considering a summary-judgment motion seeking to

burden then shifts to plaintiff to demonstrate defendant's immediate creation of dangerous condition through affidavits, depositions, or expert testimony instead of "mere pleadings," but failing to note that this is no longer the law in the Second Department).

42. See text accompanying note 20, *supra* (discussing predicament of municipal defendants in pothole cases arising in the Second Department).

43. 144 A.D.3d 1257, 41 N.Y.S.3d 313 (3d Dep't 2016).

44. *Id.* at 1258–59, 41 N.Y.S.3d at 315 (citing *Yarborough*) (footnote omitted).

45. *Id.* at 1259 n.1, 41 N.Y.S.3d at 315 n.1 (citing *Yarborough*).

dismiss the plaintiff's case in a pothole action.⁴⁶ The Second Department's divergent path, based on a newly minted interpretation of a twenty-five-year-old case, has thus created a conflict that deserves the attention of the Court of Appeals and perhaps the Legislature.

IV. CONCLUSION

Judicial drift in the Second Department of the New York Appellate Division has had, and will continue to have, real-world consequences. The situation in New York City is illustrative. At present, pothole cases against the City of New York are likely to result in summary judgment for the City in Manhattan and the Bronx, which are in the First Department. But the City must take pothole cases brought on the same facts and pleadings to trial—or settle them—in Brooklyn, Staten Island, and Queens, which are in the Second Department. Simple fairness suggests that this is inappropriate, particularly because it appears that the same dichotomy will exist with respect to pothole cases brought against municipalities in the Second Department counties of Dutchess and Orange, as opposed to those brought in the adjoining Third Department counties of Sullivan, Ulster, and Columbia.

Eventually, the Second Department's *Foster*-based alteration of the controlling *Yarborough* standard for summary judgment may triumph and be accepted by the other judicial departments, or the Second Department may eventually revert to an interpretation that is consistent with the rest of the state's conceptualization of the relevant law. But either approach will require—at best—years of litigation before the conflict between departments is resolved, and there is in fact no reason to believe that the other departments of the Appellate Division will ever adopt the Second Department's new rule or that the Second Department will ever revert to the majority position.

In these circumstances, the only ways in which this split can be resolved are

46. See, e.g., *Hockett v. City of Ithaca*, 149 A.D.3d 1378, 52 N.Y.S.3d 575 (3d Dep't 2017) (granting summary judgment for failure to comply with notice provision in pothole law despite plaintiff's allegations that defect was created by defendant municipality).

- if the issue is raised on a final order from a pothole case in the Second Department, so that the Court of Appeals has the power to review it;
- if a plaintiff against whom summary judgment has been granted in another Department secures permission to appeal a pothole case to the Court of Appeals on the ground that the Second Department's conception is correct, and that the other Departments should apply its new rule; or
- if the Legislature takes action.

Unless and until one of these possibilities occurs, the judicial drift in the Second Department will make it an outlier in pothole cases.

It is worth remembering in these circumstances that the decision originally articulating the immediacy requirement in a pothole case, *Bielecki v. City of New York*,⁴⁷ reflected the First Department's refusal to institute a new rule in a similar situation. It explained instead that extending the affirmative-negligence exception to cases in which the plaintiff "alleged that a dangerous condition developed over time from an allegedly negligent municipal repair" would allow that exception to "swallow up the requirement itself, thereby defeating the purpose of the Pothole Law."⁴⁸ The Second Department's judicial drift now poses the same sort of threat to the traditional allocation of burdens of proof on summary judgment in pothole cases. The long-established *Yarborough* rule may now be swallowed up in the Second Department by its new *Beiner-Loghry-Fornuto* rule. This would, as the Court of Appeals recognized on analogous facts in *Bielecki*, defeat the purpose of the pothole law.



47. 14 A.D.3d 301, 788 N.Y.S.2d 67 (1st Dep't 2005).

48. *Id.* at 302, 788 N.Y.S.2d at 68 (overruling *Torres v. City of New York*, 306 A.D.2d 191, 762 N.Y.S.2d 67 (2003)).