MUNICIPAL LIABILITY 2013-2014 UPDATE

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I. COURT OF CLAIMS CASES THIS YEAR

Thomas v. New York City Housing Authority, --- N.Y.S.2d ----, 2014 WL 3870981 (1st Dep't 2014). Plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor could be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area. The notice of claim alleged generally that defendant failed to maintain stairway "A" in the vicinity of the second floor landing, causing plaintiff's injury. The bill of particulars merely amplified the allegations of negligence concerning the landing area by further specifying that defendant had failed to maintain the handrail at the landing area. To the extent claims concerning the handrail were "new," they were made well within the year 90 day limitation period and did not impede defendant's ability to conduct a meaningful investigation. In light of the Court's ruling that allegations concerning the handrail could be fairly inferred from the notice of claim, plaintiff's cross motion to amend the notice of claim was rendered academic. A dissent could "not agree with the majority's conclusion that plaintiff's allegations concerning a defective handrail could be fairly inferred from the notice of claim".

Wittorf v. City of New York --- N.Y.3d ----, 2014 WL 2515698 (2014). City DOT crew closed down east entrance to central Park, using traffic cones, at 65th street to repair a roadway defect consisting of a series of deep depressions in the westbound lane under an overpass. As the DOT worker was placing the cones, two bicyclists asked if they could use the roadway, and the worker let them. As the cyclists road under the overpass, the depressions could not be seen in the darkness, and one of them hit the depressions and was thrown from her bike. After trial against the City, a jury determined that the roadway where plaintiff's accident occurred was not in a reasonably safe condition, but that the City could not be held liable for the defect because it did not receive written notice of the condition at least 15 days prior to the accident, as required by the Pothole Law (Administrative Code of the City of New York § 7–201[c][2]). The jury also found that the City did not cause or create the condition by an affirmative act of negligence. It did, however, conclude that the DOT worker was negligent in permitting plaintiff and her companion to enter the 65th Street transverse and that such negligence was a substantial factor in causing her injuries. In considering comparative negligence, the jury apportioned fault at 40 percent to plaintiff and 60 percent to the City. The City moved to set aside the verdict on the grounds of governmental immunity or, alternatively, to set aside the verdict as against the weight of the evidence. A divided Appellate Division concluded that the underlying negligent omission occurred during the performance of a governmental rather than a proprietary function and that traffic control was discretionary, and thus the City was immune regardless of any "special duty". In discussing the issue of proprietary v. governmental, the Court noted that historically the maintenance of roads and highways was performed by both private entities and local governments, and thus such maintenance by a government was "proprietary" rather than

governmental. Thus, the DOT worker here was engaged in a proprietary function at the time he failed to warn plaintiff of the conditions in the transverse. The worker was in Central Park on the day of the accident specifically to oversee the road maintenance project in his capacity as a City Department of Transportation supervisor. At the time he failed to warn plaintiff, he was blocking the transverse to vehicular traffic in preparation for that road repair. Although the maintenance work had not yet begun, Bowles and his crew could not have repaired the roadway without having closed the road to traffic. In other words, his act of closing the entry to vehicular travel was integral to the repair job—a proprietary function. The case is distinguishable from cases where a police officer directs traffic, as "traffic control" is a governmental function. But this was not "traffic control", it was a road repair.

Williams v. Weatherstone, --- N.Y.3d ----, 2014 WL 1883945 (2014). Hyperactive, special needs 12 year old was struck by vehicle while waiting for school bus. She had been waiting for the bus by her home on a busy state highway. The student was not subject to IEPs that required the District to provide her with extra assistance during the commute to and from school. A new bus driver forgot to pick her up as he traveled past her house. The bus monitor saw the child, though, and alerted the driver as to the missed stop. The bus driver turned the bus around in a parking lot and traveled behind a car. His intention was to go past the child again, and then turn around in another parking lot so as to pick the student up on her side of the road. Meanwhile, a car with an undefrosted window had struck the child who had moved out into the road. The injured child testified that she saw the bus go by and turn around, and that she looked both ways before crossing the road to catch the bus on the other side. The School moved for summary judgment on the grounds that it owed no duty to a student not within its physical care or custody and that, in any event, its purported negligence was not a proximate cause of the student's injuries. In a split decision, the Appellate Division, Fourth Department, rejected plaintiff's claim that the District owed the student a duty of care by virtue of her being a special education student with an IEP. The court observed that the IEP "required only that [the District] provide transportation to school [and] did not place the student within [the District's] orbit of authority while she waited for the school bus, [or] give rise to a duty ... to ensure that the child was safe while waiting for the bus outside her home". Nonetheless, the Appellate Division concluded that, "under the facts presented," the student was "within the orbit of [the District's] authority such that [it] owed a duty to [her] based upon the actions of [the District]; i.e ., the bus arrived at the bus stop, passed it, and the driver turned around to pick up the child. Thus, 'the injury occurred during the act of busing itself, broadly construed' ... Where, as here, it was reasonably foreseeable that the child would be placed 'into a foreseeably hazardous setting [the District] had a hand in creating,' [the District] owed a duty to the child". The court agreed with Supreme Court that an issue of fact existed as to whether the District's alleged negligence proximately caused the accident. The Court of Appeals, in reviewing the matter, noted that the liability school bussing cases stemmed either from the fact that the injury occurred during the act of busing itself, broadly construed, or from the violation of a specific statutory duty to see children safely across the street at which the

bus is stopped, when their route took them across that street. Those facts were not present here. Further, the Court analyzed the four situations generally in which a school district can be held liable for a child being hit by a vehicle.

The act of busing, broadly construed: The Court noted that the language, "the act of busing itself, broadly construed", which the Court had used in its *Pratt* decision, imposes a duty to transport students in a careful and prudent manner to cover a child injured *just after alighting from a school bus*, which was not the case here. Here the student walked onto the highway while the bus was still moving in traffic. She was therefore never within the District's physical custody, or any time- and space-limited area of implied custody and control that may arise once a bus stops and passengers begin to board. Thus, her injuries did not "occur[ ] during the act of busing itself, broadly construed".

Creating a hazardous setting: Here the Court held that, even if the bus driver was negligent in missing the stop and turning around, negligence does not create duty. The case was distinguishable from the Court's *Ernest* case in that the *Ernest* child was in the school's physical custody when he was released "without further supervision" into an arguably hazardous setting. In other words, the school was in a position to determine the timing, place and conditions for sending the child home, and the school was under a duty to release the child from its physical custody "in a safe and anticipated manner" Ernest marks an exception to the general rule that a school's duty of care does not extend beyond school premises, and is limited to "injury that occurred ... shortly [after school hours] upon the student's departure from school". Here, by contrast, the student was not injured while going home from school; indeed, she was never in the District's physical custody. Instead, she was in her mother's custody while she waited at the foot of her driveway for the school bus.

Signaling: Plaintiff also sought to impose a duty on the District on the basis of Appellate Division case law broadly holding that a motorist who signals a pedestrian to cross a street risks liability if the pedestrian is hit by another vehicle. But all the past cases in this regard entailed some intentional hand motion or gesture directed by the motorist at the pedestrian, which did not occur here.

Special duty: Plaintiff claimed that the student was owed a "special duty" by the District as a result of a special relationship created by the IEP; specifically, the "special busing services" afforded the student in the IEP. But the IEP only directed the District to transport the student to and from school even though she lived within walking distance. Notably, the IEP did not call for an aide or escort to wait with the student at her designated bus stop. Thus, there was no special duty.

Dissent: Justice Smith, Lippman and Pigot dissented and would have found a duty.

Nash v. Port Authority of New York and New Jersey, 22 N.Y.3d 220, 3 N.E.3d 1128 (N.Y. 2013). Personal injury action was brought against Port Authority of New York and New Jersey, arising from 1993 terrorist bombing of World Trade Center. Following a jury trial, the Supreme Court entered a $4.4 million judgment in favor of plaintiff, the Appellate Division affirmed, and the Port Authority failed to appeal. The judgment became final when Port Authority failed to appeal.

Afterwards, in a related case, the Court of Appeals held that the governmental immunity doctrine insulated the Port Authority of New York and New Jersey from tortious liability for injuries sustained by another plaintiff in same bombing. The Port Authority then moved to vacate the $4.4 million judgment. The Supreme Court granted that motion and the Appellate Division affirmed. Here, the Court of Appeals holds that the Appellate Division order affirming the vacatur of plaintiff's judgment must be reversed. The majority concludes that the appropriate corrective action is to remit this case to Supreme Court to permit consideration of the Port Authority's vacatur application anew.

II. THE NOTICE OF CLAIM

A. Defects, Insufficiencies and Problems in the Notice of Claim

1. How to Calculate the 90 days:

Robayo v. Edison Price Lighting, Inc. 119 A.D.3d 763, 989 N.Y.S.2d 328 (2nd Dep't 2014). Plaintiff tripped and fell due to a defective sidewalk grate. Ninety-two days later, plaintiff served notices of claim upon the Metropolitan Transportation Authority and the New York City Transit Authority pursuant to General Municipal Law § 50–e. The issue was whether the notice of claim was filed late. Although General Municipal Law § 50–e(1) provides that a notice of claim must be served within 90 days after the plaintiff's claim arises, General Construction Law § 25–a provides that when any period of time before which an act is required to be done ends on a Saturday, Sunday or public holiday, such act may be done on the next succeeding business day. Here, the 90–day period ended on July 4, 2010, a Sunday. General Construction Law § 24 provides that if the fourth day of July occurs on a Sunday, the next day thereafter is a public holiday. Accordingly, the plaintiff's service of the notice of claim on July 6, 2010, was timely.

2. Whom To Name In the Notice of Claim

Scott v. City of New Rochelle, 44 Misc.3d 366, 986 N.Y.S.2d 819 (Westchester Co. Sup. Ct. 2014). Suspect's sister brought action against city and individual police officers to recover damages for personal injuries she sustained when the city's police officers searched her home. The defendant argued, among other things, that the case should be dismissed because the plaintiff failed to name the individual defendants, two police officers, in her notice of claim as a condition precedent to the commencement of this action insofar as asserted against them. However, since the notice requirements of GML § 50–e only applied to state law causes of action, those requirements were not applicable to the plaintiff's cause of action asserted pursuant to section 1983. As for the State-law based claims, the Court noted a split in authority between the First and Fourth Departments on this issue of whether the Notice of Claim had to name the individual defendants. In *Tannenbaum v. City of New York*, the First Department held that "General Municipal Law § 50–e makes unauthorized an action against individuals who have not

been named in a notice of claim" (30 AD3d 357, 358 [1st Dept 2006]). However, the Fourth Department in *Goodwin v. Pretorius*, held that the underlying purpose of General Municipal Law § 50–e "may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim" (105 A.D.3d 207, 216, 962 N.Y.S.2d 539 [3rd Dept 2013]). Although the Second Department had not ruled on the issue of whether, as a condition precedent to commencement of an action, a plaintiff was required to name individual employees, officers, or agents in a notice of claim, this Court followed the rationale of the Fourth Department in *Goodwin v. Pretorius*. The plaintiff was not required to name the individual officers in her notice of claim.

3. Upon Whom to Serve the Notice of Claim

Silicato v. Skanska USA Civil Northeast Inc., 112 A.D.3d 464, 977 N.Y.S.2d 205 (1st Dep't 2013). Construction worker sued city agency to recover damages for personal injuries he sustained in the course of a construction project. The statute permits service on the "person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation." The New York City Comptroller and the Corporation Counsel are persons designated to receive service of process (Administrative Code § 7–201[a]; CPLR 311[a][2]), and, as a rule, the Corporation Counsel is the "attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies" (N.Y. City Charter § 394[a]). While the courts have recognized in particular cases that an attorney who is actually representing a public corporation in the very matter in issue may be an appropriate person to receive service of a notice of claim, in the instant matter involving Labor Law and negligence causes of action, the Corporation Counsel ordinarily represented the City and service on the agency's legal department was therefore ineffective.

4. Insufficient Specificity in the Notice of Claim

Robles v. New York City Housing Authority, 113 A.D.3d 437, 978 N.Y.S.2d 172 (1st Dep't 2014). Pedestrian brought action against the New York City Housing Authority (NYCHA), claiming that he tripped and fell on a raised concrete perimeter around a tree well in a courtyard owned by NYCHA. In his notice of claim, plaintiff alleged that he was lawfully traversing the courtyard area located in front of 178 Avenue D, New York, New York, when [he] was caused to trip and fall on the raised concrete perimeter. At his General Municipal Law § 50–h hearing, plaintiff identified the specific tree well in the courtyard where he allegedly fell in photographs shown to him by defendant. Almost two years after the accident, plaintiff served a bill of particulars in which, for the first time, he identified a different tree well in another area of the courtyard as the accident site. This location was based on a report prepared by plaintiff's expert, who had inspected the courtyard. At no time did plaintiff move to amend his notice of claim to revise the location of the particular tree well that allegedly caused him to fall. The Court here dismisses the

complaint because of the vague description in the notice of claim that did not describe the location of the alleged defect with sufficient and because plaintiff gave contradictory versions of the accident location, which further rendered the notice of claim defective, since it served to obscure the correct location. Plaintiff did not advise defendant of the revised location until more than three years after the alleged accident, which prejudiced defendant's ability to conduct a meaningful and timely investigation of the claim.

Davis v. New York City Transit Authority, 117 A.D.3d 586, 986 N.Y.S.2d 449 (1st Dep't 2014). Administratrix of bus passenger's estate brought action against city's transit authority for personal injuries that passenger sustained when bus driver failed to properly secure her wheelchair and drove at negligently high speed, causing passenger to fall over and into stairwell of bus. In her initial notice of claim, plaintiff alleged that the accident happened at or near 124th Street near Marcus Garvey Park and that the decedent was thrown out of her wheelchair because the bus driver was negligently driving at a high speed and had failed to properly secure her wheelchair to the interior of the bus. This was also alleged in the amended complaint and the bill of particulars. Plaintiff subsequently amended her notice of claim to allege that the accident occurred at 120th Street. However, at trial, the decedent's husband testified that the accident happened at the intersection of 124th Street and Mount Morris West, when Lewis failed to stop at a blinking red light and two stop signs, and continued through the intersection as the decedent fell over and into the stairwell of the bus. He also testified that, had Lewis stopped at the traffic signals, the accident would not have happened. The court instructed the jury, inter alia, that, if it determined that Lewis had failed to stop at an intersection marked by two stop signs and a blinking red light, then it could use that failure to determine that he was driving negligently in the seconds preceding the accident. The Court set aside the jury's verdict because the evidence presented at trial substantially altered the theory of liability set forth in the notice of claim. While the change of location of the accident was not itself substantive, the additional testimony, i.e., that the decedent's injuries were caused by the driver's failure to stop at a stop sign or a blinking red light, was not alleged in the notice of claim, and thereby substantially altered the nature of the claim.

Foster v. City of New York, 112 A.D.3d 783, 977 N.Y.S.2d 287 (2nd Dep't 2013). The plaintiff's failure to allege with sufficient particularity the time when his claim arose frustrated the defendants' ability to conduct a meaningful investigation into his claim and to assess the merits of that claim.

Cambio v. City of New York, 118 A.D.3d 577, 988 N.Y.S.2d 176 (1st Dep't 2014). Plaintiff, who was legally blind, alleged in his notice of claim that he fell at a street corner because of defects in the roadway that the City negligently failed to prevent from becoming a "traplike condition." In his complaint, however, plaintiff alleged that the City negligently failed to maintain the sidewalk, curb and roadway, negligently caused and permitted damage thereto, rendering the location

dangerous, and failed to properly inspect and repair the location. At the General Municipal Law § 50–h hearing, plaintiff testified that the curb was higher than he expected, and in his bill of particulars he alleged that the accident occurred because, when he "stepped off the curb, he was caused to fall into the roadway due to the improper unexpected sudden and excessive drop of the curb to the roadway." Court held that plaintiff raised a new theory of liability in the complaint and bill of particulars by alleging that the City caused and created the defect, and that the notice of claim alleged mere negligent maintenance and did not alert the City that plaintiff would allege a theory of affirmative negligence, or negligent design. Plaintiff's time to seek leave to file a late notice of claim had expired, and thus those claims had to be dismissed. In any event, the Court noted, plaintiff failed to raise an issue of fact as to the City's negligence or malpractice in the design of the subject curb. Plaintiff's expert relied on the Department of Transportation's Standard Details of Construction (see, 34 RCNY 2–09[a][2]) in asserting that curbs must be seven inches over the adjacent roadway. However, that publication does not impose "a "particularized mandate or a clear legal duty".

B. AMENDING THE NOTICE OF CLAIM

Perez v. City of New York, 110 A.D.3d 777, 972 N.Y.S.2d 662 (2nd Dep't 2013). Court held that Supreme Court erroneously granted that branch of the City's motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that the plaintiff had failed to plead prior written notice of the alleged sidewalk defect. Instead, under the facts of this case, the Supreme Court should have granted the plaintiff's cross motion and permitted him to amend the pleadings and the notice of claim to add an allegation that the City received prior written notice of the alleged sidewalk defect where, as here, the amendment would not prejudice or surprise the City.

Murtha v. Town of Huntington, --- N.Y.S.2d ----, 2014 WL 3843928 (2nd Dep't 2014). Plaintiff served a notice of claim alleging she tripped and fell in a particular area. In her verified complaint filed approximately eight months after service of the notice of claim, she again alleged that she was injured at that same specific location. The plaintiff subsequently moved for leave to serve an amended notice of claim, conceding that the original notice of claim contained incorrect information as to the location of her accident. The defendant County of Suffolk opposed the motion, contending that the incorrect information about the location of the accident in the notice of claim and verified complaint prejudiced the County by depriving it of the opportunity to conduct a proper and meaningful investigation "while the facts surrounding the incident were still fresh". The Court noted that it had discretion to grant a motion for leave to amend a notice of claim which has been served where it determines that two conditions have been met: first, the mistake, omission, irregularity, or defect must have been made in good faith; and second, it must appear that the public corporation has not been prejudiced thereby. Since bad faith by the plaintiff was not asserted, the only issue remaining was whether service of the amended notice of claim would prejudice the County. The record indicated that the plaintiff's incorrect information as to the accident location prejudiced the County in its ability to conduct a prompt and meaningful investigation of the accident site, especially since the County notified the plaintiff by

a letter that it did not own or maintain the crosswalk located on Larkfield Road, the location of the accident provided in the notice of claim. Moreover, the record did not support the plaintiff's assertion that the notice of claim, which included attached photographs of an unidentified crosswalk and a circular pavement defect, as well as her testimony at the General Municipal Law § 50–h hearing, provided the County with accurate information sufficient to allow for a proper inspection . Case dismissed.

Ahmed v. New York City Housing Authority, 119 A.D.3d 494, 989 N.Y.S.2d 105 (2nd Dep't 2014). Plaintiff served a timely notice of claim alleging that, on July 25, 2011, he sustained injuries as a result of tripping and falling due to a sidewalk defect adjacent to property owned by the defendant New York City Housing Authority. In November 2012, in response to the defendant's motion to dismiss the complaint it on the ground that the notice of claim was inadequate, the plaintiff cross-moved for leave to serve and file an amended notice of claim. The proposed amendments to the notice of claim included allegations that the plaintiff was injured when, as an employee of a contractor, he was working at the Housing Authority's property and fell after he climbed a ladder to go over a fence. He also interposed additional causes of action pursuant to the Labor Law. The Court here noted that amendments to notices of claim are appropriate only to correct good faith and nonprejudicial "technical mistakes, defects, or omissions, not substantive changes in the theory of liability". The proposed amendments to the notice of claim here included substantive changes to the facts, adding that the plaintiff was injured after he climbed a ladder to go over a fence, changing the situs of the accident, and identifying the plaintiff as a worker at the site. The proposed amendments to the notice of claim also added a theory of liability under the Labor Law. Such changes are not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50–e(6). Granting leave to serve and file the proposed amended notice of claim would prejudice the Housing Authority by depriving it of the opportunity to promptly and meaningfully investigate the claim. Moreover, the notice of claim was inadequate. A notice of claim must provide timely notice of the essential facts and legal theories supporting the claims alleged in the complaint. The test of the sufficiency of a notice of claim is whether it includes enough information to enable the defendant to promptly investigate the allegations at issue. The plaintiff's original notice of claim did not sufficiently apprise the Housing Authority of the relevant facts or legal theories supporting the plaintiff's claims to enable the Housing Authority to promptly and adequately investigate the allegations at issue in the complaint, resulting in prejudice to the Housing Department.

Ciaravino v.City of New York, 110 A.D.3d 511, 973 N.Y.S.2d 159 (1st Dep't 2013). Plaintiff whose notice of claim in action against city indicated that decedent was injured when she tripped and fell in a depressed area in the street 20-30 feet from a subway exit was entitled to correct the notice of claim to name the correct subway exit; mistake was not made in bad faith and city was not prejudiced by the defective notice, since city had not sent anyone to investigate the scene of

the accident either before or after the correct location had become apparent approximately 8 months after the accident at the 50-h hearing.

III. LATE SERVICE OF THE NOTICE OF CLAIM

A. Late Service without Permission is a Nullity

Stiff v. City of New York, 114 A.D.3d 843, 980 N.Y.S.2d 550 (2nd Dep't 2014). The plaintiff did not serve his notice of claim until three days after the expiration of the statutory period. Moreover, he never sought leave to serve a late notice of claim, or to deem his notice of claim timely filed nunc pro tunc, within the one–year–and–90–day statute of limitations period. Case dismissed.

B. Factors Considered in Granting/Denying Application for Permission to Late-Serve

1. Actual Knowledge of Essential Facts With 90 Days or a Reasonable Time Thereafter (the most important factor!)

Claud v. West Babylon Union Free School Dist., 110 A.D.3d 663, 972 N.Y.S.2d 611 (2nd Dep't 2013). Student and her mother sued school district to recover damages for personal injuries student sustained when her finger got caught in her classroom door. Plaintiff was allowed to serve a late notice of claim on behalf of the infant plaintiff. The plaintiffs demonstrated that the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter. Specifically, the infant plaintiff alleged that she was instructed by her teacher to go into the girls' bathroom to tell some students in the bathroom to keep quiet, and that, in the course of complying with that request, her finger got caught in her classroom door and was injured. Before the infant plaintiff was taken to the hospital by ambulance, her teacher told her that he would give her a dollar for every stitch she had, and he later called the infant plaintiff's home to inquire about her. The comments demonstrated some awareness that a problem with a door at the school might have contributed to the accident. Additionally, the school nurse completed a medical claim form, detailing the accident, the injury, and the treatment provided. Dissent says there was no actual knowledge of the facts of the claim because the manner in which the infant plaintiff was injured did not suggest in any way a theory of how the School District was liable, whether based on negligent supervision, negligent hiring/training, or the existence of a dangerous or defective condition in the door. In addition, the school nurse's report detailed only the occurrence of an accident, stating "pinky of right hand accidently got caught in door and was closed on it." A report merely describing the circumstances surrounding the accident, with no connection between the infant plaintiff's injuries and the allegedly negligent conduct of the School District, is insufficient to provide actual knowledge of the essential facts.

Thomas v. City of New York, 118 A.D.3d 537, 988 N.Y.S.2d 152 (1st Dep't 2014). Plaintiff filed application for leave to file a late notice of claim against city arising from traffic accident between plaintiff's vehicle and a police vehicle. Leave to late-serve was granted because defendant had actual knowledge of the pertinent facts constituting the claim-namely, that a New York City Police Department vehicle had been involved in a traffic accident with petitioner's vehicle. Indeed, respondents' agent, a New York City police officer, was driving the police car involved in the accident. In addition, plaintiff attempted to serve the notice of claim only 30 days after expiration of the statutory 90–day period for filing a notice of claim against a municipality. This short delay did not prejudice defendant's ability to investigate and defend the claim, as such a short passage of time was unlikely to have affected witnesses' memories of the relevant events. Further, the police report attached to the notice of claim set forth the name, rank and identity of the officer driving the police car. The brief delay also presented no issue with respect to preserving the condition of physical evidence. Petitioner did not, for example, allege that the traffic light malfunctioned; rather, petitioner simply alleged that the driver of the police vehicle acted negligently.

Fennell v. City School Dist. of City of Long Beach, 118 A.D.3d 784, 987 N.Y.S.2d 185 (2nd Dep't 2014) . Here the City School District and City acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. An accident/incident report and a written statement were prepared on the date of the accident by the District's security officer, and an OSHA form reporting the plaintiff's injury was prepared two days after the accident. These documents, which were admitted to have been filed with the District, its insurance carrier, and its attorneys, described the time and date of the accident, the injury, and how the accident occurred, indicated that the plaintiff was transported to the hospital, and provided actual knowledge of the essential facts constituting the petitioner's claim, inter alia, that the District had violated Labor Law § 240(1). The District's conclusory assertions of prejudice, based solely on the plaintiff's six-week delay in serving the notice of claim, were insufficient to rebut the petitioner's showing. The absence of a reasonable excuse is not fatal where, as here, there was actual notice and an absence of prejudice.

Iglesias v. Brentwood Union Free School Dist., 118 A.D.3d 785, 987 N.Y.S.2d 195 (2nd Dep't 2014). Plaintiff failed to show defendant had actual knowledge of the essential facts constituting the claim within 90 days of the incident or a reasonable time thereafter. Although the school district knew that the infant plaintiff had been injured, the plaintiff failed to demonstrate that the school district had actual knowledge that the infant plaintiff allegedly had been permitted to participate in wrestling without medical clearance after a prior injury in another sport. Further, the plaintiff failed to demonstrate a reasonable excuse for failing to serve a timely notice of claim. In addition, the petitioners did not show a nexus between the infancy of the infant petitioner and the delay.

Bakioglu v. Tornabene, 117 A.D.3d 658, 985 N.Y.S.2d 270 (2nd Dep't 2014). Police officer brought action against city, police department, and others to recover for injuries sustained in motor vehicle accident. Court allowed plaintiff to late-serve the notice of claim because the City defendants had actual notice of the essential facts constituting the claim well within the 90–day period for serving a notice of claim. The NYPD responded to the scene of the accident and conducted an immediate investigation. As the accident directly involved an NYPD vehicle and employee, and the NYPD conducted a prompt investigation into the matter and possessed pertinent records from the investigation, the overall circumstances of this matter support an inference that the City defendants effectively received actual notice of the essential facts constituting the claim.

Manuel v. Riverhead Cent. School Dist., 116 A.D.3d 1048, 984 N.Y.S.2d 409 (N.Y. 2014). Student was injured during physical education class when he hurt his knee during two-hand touch football. Over four months later, Zachary and his mother commenced a proceeding for leave to serve a late notice of claim. Permission to late-serve the n/c was denied because plaintiffs did not establish a reasonable excuse for their failure to serve a timely notice of claim, there was no showing of a nexus between the infancy and the delay, and most importantly the school incident report and medical claim forms merely indicated that the child hurt his right knee playing two-hand touch football during physical education class, and did not establish that the school had actual knowledge within 90 days of the incident or a reasonable time thereafter, of the essential facts underlying the claims of negligent supervision and that the school field constituted a defective and dangerous condition.

Snyder v. County of Suffolk, 116 A.D.3d 1052, 985 N.Y.S.2d 126 (2nd Dep't 2014). Plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim upon the Fire District. The plaintiff's ignorance of the law did not constitute a reasonable excuse. The plaintiff failed to submit any medical evidence to support her assertion that she was incapacitated to such an extent that she could not have complied with the statutory requirement to serve a timely notice of claim. Also, plaintiff failed to demonstrate that the Fire District obtained timely, actual knowledge of the essential facts constituting the claim. Although the plaintiff asserted that the Fire District's representatives responded to the scene of the accident, there was no evidence that they were aware of the facts constituting the plaintiff's potential claims of medical malpractice and negligence against the Fire District. Additionally, the plaintiff failed to establish that any medical record sufficed to convey to the Fire District actual knowledge of the essential facts constituting the claims against it.

Sanchez v. City of New York, 116 A.D.3d 703, 983 N.Y.S.2d 303 (2nd Dep't 2014). Even if the Court were to excuse the plaintiff's initial one-month delay, after the expiration of the 90–day period, in serving a notice of claim, based upon her assertion that she was unaware of the severity of her left wrist injury, the plaintiff failed to demonstrate a reasonable excuse for the additional five-month delay between the time that the City disallowed the claim as untimely and

the commencement of the motion to late-serve. The late notice of claim served upon the City, more than one month after the 90–day statutory period had elapsed, did not provide the City with actual knowledge of the essential facts constituting the claim. The City did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The alleged defects indicated on a map filed with the New York City Department of Transportation by the Big Apple Pothole and Sidewalk Protection Corporation did not suffice to give the City actual knowledge of the essential facts underlying the petitioner's present claim or her theory of liability against the City.

Zapata v. New York City Housing Authority, 115 A.D.3d 606, 982 N.Y.S.2d 130 (1st Dep't 2014). In this action for personal injuries sustained by plaintiff when he was assaulted on premises owned by defendant NYCHA, plaintiff failed to establish that defendant had actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter or to demonstrate that defendant was not prejudiced by the delay. Plaintiff's counsel's averment that, upon a routine review of case files, it was discovered that a notice of claim had not been filed does not constitute a reasonable excuse for failing to timely serve the notice of claim. While the absence of a reasonable excuse does not itself compel denial of the motion, as noted, plaintiff also failed to show that NYCHA acquired actual knowledge of the facts constituting his claim within 90 days, or a reasonable time thereafter. Even if NYCHA was aware that plaintiff reported an assault to the police during the statutory period, knowledge of the report does not constitute notice to NYCHA of plaintiff's intention to file a civil suit based on a claim of negligent security. Further, the delay of more than six months between the alleged assault and the filing of the notice of claim compromised [NYCHA's] ability to identify witnesses and collect their testimony based upon fresh memories. Motion to late-serve denied.

Candino v. Starpoint Central School Dist., 115 A.D.3d 1170, 982 N.Y.S.2d 210 (4th Dep't 2014). Former student brought action against two school districts and their boards of education, and two high schools, alleging that student was exposed to highly contagious virus when he participated in wrestling tournament. In seeking leave of the court to file a late notice of claim, claimant offered no excuse, reasonable or otherwise, for failing to serve a timely notice of claim. In support of his application, however, claimant asserted that the schools had actual knowledge of the facts underlying his claim because another student who allegedly contracted herpes from the same wrestler at the tournament had served a timely notice of claim against Starpoint High School and Iroquois Central High School. Claimant further asserted that the schools had actual knowledge based on Health Advisory # 279a, issued by the Erie County Department of Health (DOH) to all school districts in Erie and Niagara Counties. The advisory stated that DOH was investigating "several cases of skin infection in high school wrestlers" who had participated in the tournament, and it also identified all schools that had participated in the tournament. Finally, claimant contended that the schools had suffered no prejudice from his failure to serve a timely notice of claim. Plaintiffs asserted that, until plaintiffs made the instant application, they had no knowledge that plaintiff infant had contracted herpes or otherwise had been injured at the

tournament. Although claimant offered no evidence to the contrary, he essentially contended that the schools should have known of his injury because another wrestler had filed a timely notice of claim regarding an identical injury and because the schools had received Health Advisory # 279a. But there was nothing in the notice of claim filed by the other wrestler who was infected at the tournament or in Health Advisory # 279a that gave the schools actual knowledge that *claimant* was similarly injured. Two dissenters would have allowed late-service of the notice of claim. The schools had actual knowledge of the facts surrounding the claim within 90 days of its accrual because of the Health Advisory and the significant news coverage. More importantly, another wrestler infected at the tournament served a timely notice of claim against the schools, which substantially similar to plaintiff's claim.

Abad ex rel. Morales v. New York City Health and Hospitals Corp., 114 A.D.3d 564, 980 N.Y.S.2d 450 (1st Dep't 2014). Plaintiff moved to late-serve a notice of claim on defendant for obstetrical malpractice more than seven years after the claim accrued upon his discharge from defendant's hospital days after his birth. Motion denied because the plaintiff's nearly seven-year delay in seeking leave to serve a notice of claim prejudiced defendant and plaintiff had failed to show otherwise. Neither the contemporaneous hospital records nor any subsequent event served to notify defendant of the facts constituting the claim because the records did not link defendant's actions with plaintiff's injury, which was diagnosed nearly two years after defendant last treated plaintiff. Nothing in the hospital records would have alerted defendant to any claim of malpractice during the delivery or of any lasting injury. Plaintiff's infancy favored his application, but that factor was outweighed by plaintiff's lack of a reasonable excuse for waiting seven years before he applied for late service, coupled with defendant's lack of knowledge of the claim.

Hampson v. Connetquot Cent. School Dist., 114 A.D.3d 790, 980 N.Y.S.2d 132 (2nd Dep't 2014). Infant-plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for failure to make timely motion to late-serve. Her ignorance of the law did not constitute a reasonable excuse. Further, her failure to submit any medical evidence to support her allegations that she was more concerned and preoccupied with her daughter's alleged injuries than with retaining an attorney or that she did not readily appreciate the severity of her daughter's injuries. In addition, the plaintiff failed to explain the additional lapse of approximately two months between the time she served the late notice of claim without court authorization and the commencement of the instant proceeding, inter alia, to deem the late notice of claim timely served nunc pro tunc. Plaintiff also failed to demonstrate that defendant obtained timely, actual knowledge of the essential facts constituting the claim that the defendant failed to properly instruct, supervise, monitor, and control students during school recess. The late notice of claim served upon the appellant approximately two months after the 90–day statutory period had elapsed did not provide the defendant with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period. Moreover, the parent notification form prepared by the school's nurse informing the parents of the incident was

insufficient to apprise the appellant of the petitioner's claim of negligent supervision. Motion to late-serve denied.

McGinness v. City of New York, 113 A.D.3d 566, 979 N.Y.S.2d 518 (1st Dep't 2014). While plaintiffs claim that the plaintiff's incapacity prevented him from obtaining counsel from the date of the incident until his surgery, they do not explain the approximately two-month delay in filing the notice of claim after they obtained counsel, or the further delay in seeking leave to file an untimely notice. Further, plaintiff did not show defendant acquired actual knowledge of the essential facts constituting their claim. There were no factual allegations in the contemporaneous written statements of the injured plaintiff's coworkers or plaintiff's own written statement that would constitute a claim of negligence on defendants' part.

Flores–Vasquez v. New York City Health & Hospitals Corp., 112 A.D.3d 540, 977 N.Y.S.2d 246 (1st Dep't 2013). The record showed that infant plaintiff was born at defendant hospital in June 2004 and that plaintiffs' allegations of medical malpractice were based on the hospital's treatment of plaintiff mother and the child both before and after delivery. Plaintiffs did not serve a notice of claim on defendant until September 2006 and did not move to deem the notice timely or for leave to file a late notice of claim until June 2010. Plaintiffs submitted expert affidavits showing that defendant had actual knowledge of the facts underlying their theory of a departure from the accepted standard of pediatric care with regard to the diagnosis and treatment of the child's fetal distress and the existence of a causally related injury, and their opinions were not refuted by defendant's pediatric defense expert. Motion to late-serve granted.

Mehra v. City of New York, 112 A.D.3d 417, 976 N.Y.S.2d 55 (1st Dep't 2013). Plaintiff's contention that he failed to file a notice of claim because he was not aware of the extent of his injuries is also unavailing, because the record demonstrates he stopped working the day he sustained his injury and subsequently filed a claim for Workers' Compensation. Also, plaintiff did not show that the NYCSCA acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter. The report prepared shortly after the accident does not give NYCSCA actual knowledge of the essential facts constituting the claim alleging liability under the Labor Law. The report failed to connect the incident to any claim against NYCSCA because it only stated that plaintiff was injured while lifting plywood at the school.

Destine v. City of New York, 111 A.D.3d 629, 974 N.Y.S.2d 123 (2nd Dep't 2013). Plaintiff did not demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for the delay in filing the petition and his ignorance of the law did not constitute a reasonable excuse. Further, he failed to explain the additional lapse of six months between his attempt to serve the late notice of claim without the required court authorization and the commencement of the instant proceeding, inter alia, to deem the late notice of claim timely served nunc pro tunc. Moreover, the City of New York did not acquire timely, actual knowledge of the essential facts constituting the claims (false arrest, false imprisonment, malicious prosecution, assault) within

90 days following their accrual or a reasonable time thereafter. In addition, the disallowed late notice of claim served upon the City's Comptroller more than 4 1/2 months after the 90–day statutory period had elapsed did not provide the City with actual knowledge of the essential facts constituting the claims within a reasonable time after the expiration of the statutory period. Motion to late-serve denied.

Ryan v. New York City Transit Authority, 110 A.D.3d 902, 973 N.Y.S.2d 312 (2nd Dep't 2013). Plaintiffs failed to demonstrate a reasonable excuse for the five-month delay after the expiration of the 90–day statutory period in serving the petition and proposed notice of claim. The injured plaintiff's assertion that he did not immediately appreciate the nature and severity of his injuries until approximately five months after the subject accident is unavailing without supporting medical evidence explaining why the severity of the injuries took so long to become apparent and to be diagnosed. The injured plaintiff also failed to proffer any excuse for the further three-month delay between the time that he retained his attorneys and the time that he served the notice of claim. He also failed to show NYCTA acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or within a reasonable time thereafter. The police accident report prepared by the responding police officer at the scene of the subject vehicular accident did not provide the NYCTA with actual knowledge of the injured plaintiff's accident and injury, or that a potentially actionable wrong had been committed by the NYCTA against the injured petitioner. Furthermore, the motor vehicle accident report prepared by the injured petitioner 16 days after the accident and filed with the New York State Department of Motor Vehicles (hereinafter the DMV) did not provide the NYCTA with timely, actual knowledge of the petitioners' claim. The fact that the DMV had knowledge of the injured petitioner's accident, without more, cannot be considered actual knowledge by the NYCTA regarding the essential facts constituting the claim against it.

Sparrow v. Hewlett–Woodmere Union Free School Dist., 110 A.D.3d 905, 973 N.Y.S.2d 308 (2nd Dep't 2013). Father whose daughter was allegedly injured when she fell from monkey bars on school playground during recess brought action against school district. Here, the the failure to serve a timely notice of claim and the lengthy delay in seeking leave to serve a late notice of claim were not the product of the injured person's infancy. Further, the excuse proffered for the delay in commencing this proceeding, that the plaintiff, the infant's father, was not aware of the extent of his daughter's injury and disability until 4 1/2 years after the accident, was unacceptable without supporting medical evidence explaining why the extent of the injury and disability took so long to become apparent. Moreover, the defendant did not acquire actual knowledge of the essential facts constituting the petitioner's claim within 90 days after the accident or a reasonable time thereafter. While a student incident report and a medical claim form were prepared by the school's nurse and principal on the date of the accident, these papers, which merely indicated that the infant was injured when she fell from the monkey bars on the school's playground during recess, did not provide the respondent with actual knowledge of the essential facts underlying the

claim that the monkey bars were dangerous, unsafe, and negligently maintained, or that the respondent did not adequately supervise their use.

Murray v. Village of Malverne, 118 A.D.3d 798, 987 N.Y.S.2d 229 (2nd Dep't 2014). While the petitioner's error in serving the County of Nassau rather than the Village of Malverne may have excused the initial delay between the time that he served the notice of claim upon Nassau County and the discovery of the error, the plaintiff failed to proffer a reasonable excuse for the additional delay between the time that he discovered the error and the filing of the application to late serve. Furthermore, the defendants did not acquire timely, actual knowledge of the essential facts constituting the claims. The evidence submitted did not establish actual knowledge of the essential facts constituting his claims of, inter alia, false arrest, false imprisonment, malicious prosecution, assault, and battery within 90 days following their accrual or a reasonable time thereafter. Moreover, the late notice of claim served on the Village approximately one month after the 90–day statutory period had elapsed was served too late to provide the Village with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period. The defendants maintained that they did not conduct any investigation of this claim prior to being served with the application to late serve. The plaintiff failed to submit evidence sufficient to rebut the defendant's contention that the nearly two-month delay in applying for permission to late serve, after the expiration of the 90–day statutory period, substantially prejudiced their ability to conduct an investigation of the claim.

Andrews v. Long Island R.R., 110 A.D.3d 653, 972 N.Y.S.2d 633 (2nd Dep't 2013). Plaintiff failed to demonstrate that the third-party defendant, the Incorporated Village of Patchogue, acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or a reasonable time thereafter. Even though the plaintiff served a notice of claim upon the defendants in the main action approximately three months after the accident, there was no showing that the Village had any knowledge of the plaintiff's accident or injury, or the legal theory upon which liability against it was predicated, prior to being served with the third-party summons and complaint more than eight months after the accident. Relying upon photographs admittedly taken more than nine months after the accident, the plaintiff contended that the Village had notice of the condition because the sidewalk was subsequently repaired. Even if these unauthenticated photographs showed that the defective condition was subsequently repaired, the plaintiff nonetheless failed to demonstrate that the Village repaired the subject defect within 90 days after the accident or a reasonable time thereafter.

Lewis v. East Ramapo Cent. School Dist., 110 A.D.3d 720, 972 N.Y.S.2d 326 (2nd Dep't 2013). Former high school student petitioned for leave to file late notice of claim upon school district, alleging that, while she was in high school, she was assaulted by another student in school's bus boarding area due to district's negligent supervision and failure to respond. The only excuse offered by the petitioner for her failure to serve a timely notice of claim was that her parents did not take any steps to enforce her rights or remedies. Even if the petitioner's assertions were

sufficient to establish a nexus between her infancy and the failure to serve a timely notice of claim, plaintiff failed to explain the 15–month delay between the time she reached the age of majority and her commencement of this proceeding. Further, plaintiff failed to show the defendant acquired timely, actual knowledge of the essential facts constituting her claim that as a result of the appellant's negligent supervision and failure to respond, the plaintiff, then a student at a high school owned and operated by the defendant, was assaulted by another student in the area of the school where the students boarded the buses. There was no evidence in the record to support the petitioner's hearsay allegation that her parents made this claim to the assistant principal of the school directly after the incident. Plaintiff contended that the defendant acquired actual knowledge of the essential facts constituting the claim when, directly after the incident, she informed the appellant's social worker and nurse that there were no school personnel in the boarding area when she was assaulted. However, even if the petitioner informed the defendant's social worker and nurse that there were no school personnel in the boarding area, this does not establish that the plaintiff reported her claim to a school official with a duty to investigate the alleged negligence. The parent notification form prepared by the school's nurse informing the plaintiff's parents of the his injury was insufficient to apprise the defendant of the plaintiff's claim of negligent supervision and failure to respond.

Grasso v. Nassau County, 109 A.D.3d 579, 970 N.Y.S.2d 608 (2nd Dep't 2013). Medical malpractice plaintiffs properly brought their application for leave to serve a late notice of claim as a cross motion in the course of this pending action, rather than as a special proceeding. Nevertheless, plaintiff's cross-motion for leave to serve a late notice of claim upon the Fire Department was denied. No proposed notice of claim was submitted with the cross motion, as is required, and the plaintiffs did not demonstrate a reasonable excuse for their failure to serve a timely notice of claim upon the Fire Department. Further, plaintiffs did not establish that the Fire Department had actual knowledge of the essential facts constituting the claim within the time specified in General Municipal Law § 50–e(1)(a) or a reasonable time thereafter. While the plaintiffs asserted that the Fire Department's representatives were present at the scene at the time of the accident, there was no evidence that they were aware of the facts constituting the plaintiffs' claims of medical malpractice and wrongful death against the Fire Department. Plaitniffs failed to establish that any accident report, medical record, or media report sufficed to convey to the Fire Department actual knowledge of the essential facts constituting the claims against it.

Gunsam v. Eastern Suffolk Bd. of Co-op. Educational Services, 109 A.D.3d 542, 970 N.Y.S.2d 587 (2nd Dep't 2013). Student and his mother sued school after another student struck him with his lunch bag. Even if the plaintiffs demonstrated that the delay in serving a notice of claim was directly attributable to the medical condition of the injured plaintiff, and that his mother was more concerned with his health than with commencing legal action plaintiffs failed to proffer any excuse for their additional five-month delay after counsel was retained. While the principal and the nurse of the learning center, and the injured plaintiff's aide, were aware that the injured plaintiff was injured when he was struck by the lunch bag, the plaintiffs did not establish that the

defendant had timely, actual knowledge of the essential facts underlying their claim that another student assaulted the injured plaintiff as a result of the defendant's employees' negligent supervision.

Manuel v. Riverhead Cent. School Dist., 116 A.D.3d 1048, 984 N.Y.S.2d 409 (2nd Dep't 2014). While school official prepared an accident claim form the day of the incident and a school medical claim form was filled out the day following the incident, those reports, which merely indicated that the plaintiff's hurt his right knee playing two-hand touch football during physical education class, did not establish that the defendant had actual knowledge within 90 days of the incident or a reasonable time thereafter, of the essential facts underlying the claims of negligent supervision and that the school field constituted a defective and dangerous condition. Further, plaintiffs failed to establish that the approximately one-month delay after the expiration of the 90–day statutory period would not substantially prejudice the defendant in maintaining a defense on the merits.

Babcock v. Walton Cent. School Dist., 119 A.D.3d 1061, 989 N.Y.S.2d 172 (3rd Dep't 2014). Plaintiff alleges that while she was a student at defendant High School, a teacher sexually harassed and/or abused her. Plaintiff testified to a total of six sexual encounters with the teacher —including one act of sexual intercourse— between January 2011 and March 2011. Although physical contact between the teacher and plaintiff ceased in March 2011, the teacher allegedly continued to text plaintiff until he graduated in June 2012. In the interim, in October 2011, another teacher at the high school overheard a conversation between two students intimating that there was some sort of an inappropriate sexual relationship between the (accused) teacher and plaintiff. The teacher who heard the comments reported them to the high school principal, who, in turn, spoke separately with the accused teacher and plaintiff. Both the accused teacher and plaintiff adamantly denied that any such encounter had taken place or relationship existed. The principal also spoke with the two students in question, both of whom indicated that they did not have any proof to substantiate their claim. Then, in June 2012 or July 2012, plaintiff approached the principal, admitted that he previously had, and disclosed the underlying abuse. The teacher was convicted of the crime, and in February 2013, plaintiff commenced an action against the school district by filing and serving a summons with notice and, in conjunction therewith, applied for leave to serve a late notice of claim. Leave to late-serve was denied because, even assuming that other teachers possessed more than a generalized awareness of plaintiff's sexual relationship with the teacher, as plaintiff now claimed, such knowledge, could not be imputed to defendants and because "as long as [plaintiff] continued to deny having been a victim, ... [defendants] had no reason to engage in further investigation" that potentially could have disclosed the nature of—and the essential facts underlying—the claim now asserted. Under these circumstances, plaintiff failed to establish that defendants acquired actual knowledge of the essential facts within 90 days of the accrual of plaintiff's claim or a reasonable time thereafter. Further, even assuming that plaintiff's infancy—coupled with the teacher's alleged threats of suicide if plaintiff disclosed the abuse—were sufficient to excuse plaintiff's failure to report the

underlying abuse and timely file his notice of claim in the first instance, plaintiff offered no persuasive explanation for either the nearly one-year delay between the time he reached the age of majority in March 2012 and his application for leave to file a late notice of claim in February or the at least seven-month delay between his disclosure of the abuse to the principal at the end of the 2012 school year and his filing of the underlying application the following spring. Accordingly, even assuming that defendants had not been substantially prejudiced by the resulting delay, such delay—together with defendants' lack of actual knowledge of the essential facts constituting the claim within a reasonable time of the accrual thereof led this Court to conclude that leave to late-serve should be denied.

2. "Reasonable Excuse" for delay

a. "I Didn't Think My Injury Was That Bad"

Guga v. Watertown Bd. of Educ., 113 A.D.3d 1108, 977 N.Y.S.2d 855 (4th Dep't 2014). According to the notice of claim, the school assumed the affirmative duty of ensuring that claimant's daughter would be placed on a school bus after school and transported home in order to avoid a potential confrontation with two students who had threatened claimant's older child. The school then breached that duty by failing to instruct the daughter to take the bus home or even to make her aware of the potential danger, as a result of which the daughter walked home and was assaulted by the two students off school property. Claimant established a reasonable excuse for the delay, i.e., she was unaware of the serious nature of her daughter's injury and its permanency during the 90–day period and submitted medical records demonstrating the progressive and worsening nature of the injury. The daughter's infancy weighed in favor of allowing service of a late notice of claim, and the six-month period between the assault and claimant's application was "a comparatively short period of delay".

b. Oops, I Served The Wrong Entity!

Placido v. County of Orange, 112 A.D.3d 722, 977 N.Y.S.2d 64 (2nd Dep't 2013). Plaintiff did not show actual knowledge of the facts of the claim, and also failed to provide a reasonable excuse for the failure to serve a timely notice of claim. Although one of the factors contained in General Municipal Law § 50–e(5) is "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted," the petitioner's failure to ascertain the County's ownership of the bus allegedly involved in the accident was due to a lack of due diligence in investigating the matter. Motion to late-serve denied.

Dailey v. New York State Thruway Authority, 118 A.D.3d 662, 986 N.Y.S.2d 854 (2nd Dep't 2014). Court held that New York State Thruway Authority could not be held liable for an

accident on a bridge that crossed the Thruway. The responsibility for maintaining and repairing the bridge reverted by operation of law to the Village of Nyack upon completion of the construction of the bridge. The municipality's responsibility for the maintenance of the bridge was further confirmed by correspondence and was consistent with Public Authorities Law § 359(4), which provides that highways carried over a thruway section "shall, upon completion of the work, revert to and become the responsibility, with regard to maintenance and repair, of the ... municipality ... formerly having jurisdiction there over" (Public Authorities Law § 359[4].

3. Merits of Claim Generally Not Considered on Motion to Late-Serve

Williams v. Gonzalez, 113 A.D.3d 757, 979 N.Y.S.2d 363 (2nd Dep't 2014). Student was struck by motor vehicle while crossing public road on his way to school. Plaintiffs' motion to late-serve was granted, even though the Town argued that leave to serve a late notice of claim should be denied because the proposed claim has no merit. While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit. Here, contrary to the Town's contention, it failed to demonstrate at this stage of the proceedings that the underlying claim against it was patently without merit. The School District, however, established its prima facie entitlement to judgment as a matter of law dismissing the complaint because it had no duty to supervise the infant plaintiff, who was injured while not within the District's custody and control

4. "Equitable Estoppel" as Argument against Motion to Dismiss for Late Service

Glasheen v. Valera, 116 A.D.3d 505, 984 N.Y.S.2d 25 (1st Dep't 2014). Plaintiff timely filed a notice of claim on the City by using its online form, provided by the Comptroller's Office, which allowed plaintiff to specify that the claim was against the New York City Transit Authority. The complaint, served and filed more than one year and 30 days after the accident, alleged that a notice of claim had been timely served on the City, but did not allege service upon NYCTA or the Metropolitan Transportation Authority (MTA)(Public Authorities Law §§ 1212[2] and 1276 [2]). It is well settled that service of a notice of claim on the City through the Comptroller's Office is not service upon a separate public authority (see Castro–Castillo v. City of New York, 78 A.D.3d 406, 910 N.Y.S.2d 68 [1st Dept.2010]; Ringgold v. New York City Transit Authority, 286 App.Div. 806, 141 N.Y.S.2d 365 [1st Dept.1955]). Since plaintiff did not comply with the condition precedent of service of a notice of claim upon the Transit Authority defendants, and they denied having received the notice of claim from the Comptroller's Office, dismissal was required. The Court noted that while the electronic notice of claim form provided by the City Comptroller's Office had the potential to confuse claimants, at least as to NYCTA, the facts here did not present the kind of unusual situation that would warrant application of the doctrine of equitable estoppel since there is no basis for finding that the Transit Authority defendants

"wrongfully or negligently" induced plaintiff to believe that service upon the Comptroller's office would be acceptable as against them. Moreover, there was no basis for finding that the Transit Authority defendants received actual notice of the essential facts constituting plaintiff's claim within 90 days of the accident.

C. SOL is Limit for Moving to Late serve

Thompson v. Metropolitan Transp. Authority, 112 A.D.3d 912, 977 N.Y.S.2d 386 (2nd Dep't 2013). Plaintiff's decedent fell onto the tracks of a railway operated by the Staten Island Rapid Transit Operating Authority and was hit by a train. Defendants moved for summary judgment dismissing the complaint on the ground that it was barred by the 1–year–and–30–day statute of limitations provided for in Public Authorities Law former § 1276(2). While that motion was pending, the plaintiff's decedent died and the administrator of his estate filed opposition papers, asserting that the statute of limitations was tolled pursuant to CPLR 208, popularly known as the "insanity" toll, during the period of her decedent's hospitalization. She submitted an affirmation from an expert, who stated that he examined the hospital records of the decedent, and determined that, "to a reasonable degree of medical certainty" the plaintiff's decedent "faced an overall inability to function in society and protect his legal rights during his 49–day hospitalization," based upon the fact that he underwent numerous surgical procedures under general anesthesia, was "overmedicated" with analgesic substances, and had ingested methadone for his opiate dependency. The plaintiff's expert further noted that the plaintiff's decedent had a "documented history of a severe depression with suicidal ideation, and the effects of nicotine withdrawal," which required observation. In deciding the case, the Court noted that the provision of CPLR 208 tolling the Statute of Limitations period for insanity, a concept equated with unsoundness of mind, should not be read to include the temporary effects of medications administered in the treatment of physical injuries". Further, the fact that the plaintiff's decedent was able to retain an attorney, and arrange for the service of notices of claim during his hospital stay, indicated that he was not mentally incapacitated during that period. Accordingly, the defendants established the action was time-barred.

IV. GOVERNMENTAL IMMUNITY

A. Governmental v. Proprietary functions

Wittorf v. City of New York --- N.Y.3d ----, 2014 WL 2515698 (N.Y. 2014). City DOT crew closed down east entrance to central Park, using traffic cones, at 65th street to repair a roadway defect consisting of a series of deep depressions in the westbound lane under an overpass. As the DOT worker was placing the cones, two bicyclists asked if they could use the roadway, and the worker let them. As the cyclists road under the overpass, the depressions could not be seen in the darkness, and one of them hit the depressions and was thrown from her bike. After trial

against the City, a jury determined that the roadway where plaintiff's accident occurred was not in a reasonably safe condition, but that the City could not be held liable for the defect because it did not receive written notice of the condition at least 15 days prior to the accident, as required by the Pothole Law (Administrative Code of the City of New York § 7–201[c][2]). The jury also found that the City did not cause or create the condition by an affirmative act of negligence. It did, however, conclude that the DOT worker was negligent in permitting plaintiff and her companion to enter the 65th Street transverse and that such negligence was a substantial factor in causing her injuries. In considering comparative negligence, the jury apportioned fault at 40 percent to plaintiff and 60 percent to the City. The City moved to set aside the verdict on the grounds of governmental immunity or, alternatively, to set aside the verdict as against the weight of the evidence. A divided Appellate Division concluded that the underlying negligent omission occurred during the performance of a governmental rather than a proprietary function and that traffic control was discretionary, and thus the City was immune regardless of any "special duty". In discussing the issue of proprietary v. governmental, the Court noted that historically the maintenance of roads and highways was performed by both private entities and local governments, and thus such maintenance by a government was "proprietary" rather than governmental. Thus, the DOT worker here was engaged in a proprietary function at the time he failed to warn plaintiff of the conditions in the transverse. The worker was in Central Park on the day of the accident specifically to oversee the road maintenance project in his capacity as a City Department of Transportation supervisor. At the time he failed to warn plaintiff, he was blocking the transverse to vehicular traffic in preparation for that road repair. Although the maintenance work had not yet begun, Bowles and his crew could not have repaired the roadway without having closed the road to traffic. In other words, his act of closing the entry to vehicular travel was integral to the repair job—a proprietary function. The case is distinguishable from cases where a police officer directs traffic, as "traffic control" is a governmental function. But this was not "traffic control", it was a road repair.

Torres v. City of New York, 116 A.D.3d 947, 983 N.Y.S.2d 855 (2nd Dep't 2014). The plaintiff's sister called 911 to obtain assistance for the plaintiff, who had a history of schizophrenia. After emergency medical technicians and the police arrived at the plaintiff's residence, the police left the scene and the EMTs sought to transport the plaintiff to a hospital. However, the plaintiff ran away from his residence, jumped over a nearby overpass, and fell to the highway below, sustaining injuries. The plaintiff sued, among others, the City of New York alleging, inter alia, that the City was negligent in failing to adequately protect and restrain him. The Court held that the conduct of the EMTs and the police constituted governmental functions (*citing, Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420,) and, therefore, the City could not be liable unless it owed a special duty to the plaintiff apart from any duty to the public in general. Plaintiff failed to show an issue of fact regarding a special relationship and thus his complaint was dismissed.

Nash v. Port Authority of New York and New Jersey, 22 N.Y.3d 220, 3 N.E.3d 1128 (N.Y. 2013). Personal injury action was brought against Port Authority of New York and New Jersey, arising

from 1993 terrorist bombing of World Trade Center. Following a jury trial, the Supreme Court entered a $4.4 million judgment in favor of plaintiff, the Appellate Division affirmed, and the Port Authority failed to appeal. The judgment became final when Port Authority failed to appeal. Afterwards, in a related case, the Court of Appeals held that the governmental immunity doctrine insulated the Port Authority of New York and New Jersey from tortious liability for injuries sustained by another plaintiff in same bombing. The Port Authority then moved to vacate the $4.4 million judgment. The Supreme Court granted that motion and the Appellate Division affirmed. Here, the Court of Appeals holds that the Appellate Division order affirming the vacatur of plaintiff's judgment must be reversed. The majority concludes that the appropriate corrective action is to remit this case to Supreme Court to permit consideration of the Port Authority's vacatur application anew.

Mare v. City of New York, 112 A.D.3d 793, 977 N.Y.S.2d 342 (2nd Dep't 2013). The crux of plaintiff's common-law negligence claim was that, in light of the steepness and grade of the relevant portion of the County road, the County was negligent with respect to the manner in which it conducted paving operations, including its decision to pave in a downward fashion and the manner in which it instructed asphalt to be loaded into the paver. Plaintiff asserted that, as a result of such negligence, great stress was placed on the brakes of his truck, which ultimately caused them to fail. While the County oversaw the construction operations and, in so doing, determined the manner in which the paver would be operated and the method by which the asphalt would be dumped into the paver, plaintiff failed to submit any competent evidence, expert or otherwise, establishing that the work was being performed in an unsafe manner. Thus, there was no proof that the County acted negligently with respect to its decisions concerning the manner in which the paving operations were being performed. With regard to its alleged negligence in permitting civilian traffic to continue while construction was underway, plaintiff testified that, after his brakes failed, he swerved into the left-hand lane to avoid the paver and other construction vehicles parked in the right-hand lane, and then saw three cars coming towards him in that left-hand lane which were forced to pull off the road in order to avoid his vehicle. There was thus an issue of fact exists as to whether the alleged negligence of the County in permitting public traffic on Hurricane Road, while construction was ongoing, was a substantial factor in causing or exacerbating plaintiff's injuries.

B. Discretionary v. Ministerial

Dimeo v. Rotterdam Emergency Medical Services, Inc., 110 A.D.3d 1423, 974 N.Y.S.2d 178 (3rd Dep't 2013). Wife called 911 after her husband (decedent) awoke complaining of shortness of breath and chest pain. The dispatcher sent a paramedic, employed by defendant Town of Rotterdam, and an ambulance, that was owned by defendant Rotterdam Emergency Medical Services, Inc. (a not-for-profit corporation) and staffed by two EMT's trained to provide basic life support services. After taking a history and examining decedent, the paramedic encouraged

him to go to the hospital. The family requested that decedent go to a hospital in the City of Albany, rather than one that was closer to decedent's home in the Town of Rotterdam. The paramedic determined that decedent was stable enough to go to the farther hospital and that advanced life support services were not necessary during the transport, so the paramedic turned decedent over to the EMTs and left. About half way to the hospital, decedent's condition worsened. The EMTs unsuccessfully attempted to arrange for advanced life support assistance en route. Decedent was in cardiac arrest when they arrived at the hospital. He died the following week. The Court noted that the record here at least arguably contained factual issues concerning whether the Town voluntarily assumed a duty to decedent or plaintiff, thereby creating a special duty, but that was irrelevant because the Town's actions were discretionary and thus were immune regardless of special duty. The Town's paramedic exercised his *discretion* in making medical determinations concerning decedent's condition, such as the type of examination and tests to perform, whether decedent was stable enough to be transported to a hospital that was farther away, and whether he could be transported with basic life support services or if the paramedic needed to ride in the ambulance to be available to provide advanced life support services en route to that hospital. In a footnote, the Court noted that the Court of Appeals' recent decision in Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 972 N.Y.S.2d 169, 995 N.E.2d 131 [2013] does not mandate a contrary result. In Applewhite, the municipal defendant did not challenge the Appellate Division's finding that the responding EMTs were "acting in a ministerial capacity". Here, however, the nature of the challenged governmental action was actively contested and, based upon this Court's review of the record, the actions of the Town's paramedic constituted discretionary actions. As for the claim against the EMT's, who were not municipal employees and thus not entitled to immunity, the Court found that since the municipally employed paramedic—who was the person with the highest level of certification—had the ultimate authority over decisions concerning the care provided, the EMTs could not be held responsible for deciding that decedent could be transported to the farther hospital and that the paramedic did not need to accompany the ambulance. While the EMTs could have requested that the paramedic accompany them, they could not compel him and he was not required to do so.

Mosey v. County of Erie, 117 A.D.3d 1381, 984 N.Y.S.2d 706 (4th Dep't 2014). Following the death of plaintiff's decedent, who was tortured and killed at the hands of her mother and half-brother, plaintiff filed two notices of claim with the County of Erie (County), for wrongful death and tort, respectively. Plaintiff alleged that the County, through its child protective services (CPS) and adult protective services (APS), was negligent in repeatedly failing to investigate adequately reports of abuse concerning decedent and thereby breached a duty to protect her from further abuse, and that a deputy sheriff knew or should have known of the abuse but failed to prevent it. On summary judgment motion, the Court refused to dismiss the complaints based on defendants' assertions that they were entitled to governmental immunity for their acts. Whether the acts in question were discretionary and thus immune from liability was "a factual question

which cannot be determined at the pleading stage". The court did grant defendants' motions insofar as defendants asserted that they were not vicariously liable for the conduct of the deputy sheriff. "A county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility." Here, the County did not assume such responsibility by local law. Further, a Sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that principle precludes vicarious liability for the torts of a deputy. Thus, the court dismissed the causes of action based on the Sheriff's vicarious liability for the alleged tortious conduct of the deputy sheriff.

Casale v. City of New York, 117 A.D.3d 414, 984 N.Y.S.2d 373 (1st Dep't 2014). Plaintiff was injured when the vehicle he was riding was struck while proceeding through a green light by another vehicle that a police officer had waved through a red. The Court threw out the case based on the governmental immunity defense since traffic control is a discretionary governmental function.

Miller v. City of New York, 116 A.D.3d 829, 983 N.Y.S.2d 428 (2nd Dep't 2014). Another case in which a police officer directs a vehicle through red light, causes a collision, but can't be sued because of governmental immunity.

Benn v. New York Presbyterian Hosp., --- N.Y.S.2d ----, 2014 WL 3844026 (2nd Dep't 2014). 13 year old plaintiff exited a city bus and had to cross a busy City street to get to school. She began to cross a busy street with the "walk" light in her favor, but half way across, the light turned in favor of traffic coming from her left and right. A school crossing guard, employed by the defendant New York City Police Department, was assigned to the intersection. As she was in the process of crossing, and just after the light had turned in favor of the traffic approaching from her left and right, an ambulance went through the green light and into the cross walk and struck her. There was no question that the child had the right of way, since she had begun her crossing with a green "walk" light in her favor. As for the case against the City crossing guard, the issue was whether the guard had formed a "special relationship" with the crossing student and whether the crossing guard's actions were "discretionary" or "ministerial". City defendants submitted the crossing guard's deposition testimony, in which she averred that she observed the injured plaintiff get off the bus the morning of the accident just as the crossing guard observed every morning, that she was "[r]ight there watching" the injured plaintiff when the accident occurred, that she observed the injured plaintiff crossing the street slowly with the light in her favor when the crossing guard heard the ambulance coming and knew that she "needed to stop the kid" so she "blew [her] whistle," and when the injured plaintiff failed to stop, the crossing guard put up her right hand. Based on the City defendants' submissions, the Court found that they failed to demonstrate, prima facie, the absence of a special relationship with the injured plaintiff. (The Court's theory apparently was that the child justifiably relied on the presence of the traffic guard to protect her while crossing). As for whether the guard's actions were discretionary or

ministerial, the Court found a question of fact as to whether the crossing guard's actions constituted ministerial or discretionary.

Plumitallo v. County of Nassau, 109 A.D.3d 652, 970 N.Y.S.2d 810 (2nd Dep't 2013). The infant plaintiff, who was sitting on her father's lap during the fireworks display, was burned when a "ball of fire" struck her thighs. The plaintiffs subsequently commenced this action against, among others, the Village. The plaintiffs argued that the Village could be held liable for the infant plaintiff's injuries on the theory that it was "negligent by failing to enforce the permit requirements of Penal Law § 405.00." That statute provides that a municipality "may" grant a permit for the display of fireworks to persons or entities "that submit an application in writing" (Penal Law § 405.00[2]). A person or entity that obtains a permit pursuant to section 405.00 is exempted from criminal liability for unlawfully dealing with fireworks and dangerous fireworks in violation of Penal Law § 270.00 (see Penal Law § 270.00[2]). The only "requirements" in section 405.00 that could be "enforced" by a municipality are those regarding the content and timing of an application and the provision of a bond or insurance coverage by the applicant, and those requirements only arise when an application is made. Here, the Village demonstrated that no person or entity applied to the Village for a fireworks display permit for the date of July 4, 2008. Thus, even if the Village owed the plaintiffs a duty to enforce Penal Law § 405.00, the Village established that there was no such failure, and, in opposition, the plaintiffs failed to raise a triable issue of fact.

Mosey v. County of Erie, 117 A.D.3d 1381, 984 N.Y.S.2d 706 (4th Dep't 2014). Following the death of plaintiff's decedent, who was tortured and killed at the hands of her mother and half-brother, plaintiff filed two notices of claim with the County of Erie (County) and the Sheriff's office, for wrongful death and tort, respectively. Motions to dismissed based on governmental immunity were denied. Whether the acts in question were discretionary and thus immune from liability was "a factual question which cannot be determined at the pleading stage". The court, however, properly granted the County's motion insofar as it asserted that it was not vicariously liable for the conduct of the deputy sheriff. "[A] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility". Here, inasmuch as the County did not assume such responsibility by local law, the County could not be held vicariously liable.

Luckey v. City of New York, --- N.Y.S.2d ----, 2014 WL 3870818 (1st Dep't 2014). Plaintiffs' decedent was an inmate at Rikers Island who was treated for chronic asthma during the few weeks in which she was incarcerated before her death. Here, there were triable issues of fact about whether the response of its correction officers breached a duty to protect decedent from reasonably foreseeable harm in providing emergency medical assistance once she complained of difficulty breathing and otherwise exhibited signs of an asthma attack. Dozens of eyewitnesses provided conflicting accounts regarding, among other things, the timing of the officers' calls for medical assistance, and whether resuscitative efforts undertaken before medical personnel

arrived were performed by the officers or whether other inmates took such measures in the face of inaction by the officers. Plaintiffs' expert affirmation raised triable issues of fact as to the adequacy of the officers' response and the soundness of defendants' expert's opinions. The City's reliance on governmental immunity was unavailing, since there were triable issues of fact as to whether the death was caused in part by a negligent failure to comply with mandatory rules and regulations (i.e., the actions of the corrections offices were ministerial and not discretionary) of the New York City Department of Corrections (DOC), requiring, among other things, that correction officers respond immediately in a medical emergency, and that officers who are trained and certified in CPR administer CPR where appropriate. The court also allowed plaintiffs' 42 USC § 1983 claims to proceed against the CO since there were triable issues of fact about whether the CO's conduct constituted "deliberate indifference" to decedent's "serious medical needs".

C. Special Duty Formed by Defendant "Affirmatively Assuming" a Duty

Freeman v. City of New York, 111 A.D.3d 780, 975 N.Y.S.2d 141 (2nd Dep't 2013). In the aftermath of a major blizzard, the plaintiff's decedent began to experience difficulty breathing while at her home in Queens, which she shared with the plaintiff, her adult daughter. According to the original complaint, the plaintiff attempted "but was unable to communicate with an operator or personnel of the 911 emergency telephone system" to request assistance for her mother. Later that morning, the decedent died at home. The defendants moved to dismiss the complaint for failure to state a cause of action, arguing, inter alia, that since it was conceded in the complaint that there had been no communication with 911 personnel, the plaintiff could not demonstrate a "special relationship" necessary to hold them liable in this case. In opposition to the defendants' motion, the plaintiff submitted affidavits from others stating that, when plaintiff's decedent had begun to experience difficulty breathing, they had called and spoken to 911 operators, that they had informed the operators of the "medical emergency," that they were told by the 911 operators that an ambulance would be sent to the decedent's house, and that no ambulance arrived. The plaintiff also submitted a proposed amended complaint which, inter alia, incorporated these allegations. Here, the Appellate Court found that the original complaint failed to allege any facts tending to show that there was any "direct contact" between the decedent and the defendants or that there was any "justifiable reliance" on any promise made to the decedent by the defendants. Accordingly, the complaint did not state facts from which it could be found that there was a special relationship between the decedent and the defendants necessary to assert a negligence cause of action against the defendants. In the absence of any allegation of such a relationship, the complaint could not state a viable cause of action against the City based on its alleged negligence in failing to send an ambulance to the decedent's home. Thus, defendant's CPLR 3211 motion to dismiss was granted. Furthermore, the allegations in the original complaint that the defendants were negligent in preparing for and responding to the subject snowstorm, like the allegation regarding the 911 emergency response, also implicated the

exercise of a governmental function. The defendants were similarly immune from liability in connection with their exercise of such function in the absence of a special relationship, which was not sufficiently pleaded. The Court also denied plaintiff's cross-motion to serve the amended complaint because it was palpably insufficient since, even if the additional allegations were considered and accepted as true, there was no basis for concluding that they sufficiently alleged facts from which it could be found that a special relationship was somehow created between the defendants and the decedent. Significantly, the plaintiff failed to allege sufficient facts to show "reliance".

Radvin v. City of New York, 119 A.D.3d 730, --- N.Y.S.2d ---- (2nd Dep't 2014). Plaintiff's decedent was having difficulty breathing and so her grown daughters made repeated telephone calls to the 911 emergency number for an ambulance. Initially, a 911 operator could not locate an ambulance to respond to the call as a result of recent snowfall that was blocking the streets. The daughters were twice told that "there was nothing available in the area." Eventually, an ambulance was located and the 911 operator indicated to the decedent's daughters that the ambulance would be there "as fast as they can." An ambulance with emergency services personnel subsequently arrived and took the decedent to the hospital, where she was pronounced dead a short time later. The subsequent lawsuit alleged that the defendants were negligent in responding to the plaintiffs' 911 call and failed to prepare for, and respond to, the snowstorm. The defendants moved to dismiss pursuant to CPLR 3211(a). The causes of action for negligence in responding to the plaintiffs' 911 call were dismissed because the complaint failed to allege any facts tending to show that there was any "justifiable reliance" on any promise made to the decedent by the defendants. Thus, there was no special relationship between the decedent. As for the causes of action for failure to prepare for, and respond to, the snowstorm, again this was a "governmental" function, and there was no showing of justifiable reliance.

Ferguson v. City of New York, 118 A.D.3d 849, 988 N.Y.S.2d 207 (2nd Dep't 2014). The plaintiff school social worker was injured when two kindergarten students collided with her in a school hallway. The plaintiff alleged negligent supervision. Court noted that, under the doctrine that a school district acts in loco parentis with respect to its minor students, a school district owes a "special duty" to the students themselves. Accordingly, a school district may be held liable to a student when it breaches that duty, so long as all other necessary elements of a negligence cause of action are established. The special duty owed to the students themselves does not, however, extend, as a general matter, to teachers, administrators, and other adults on or off of school premises. Here, the defendants established, prima facie, that they did not owe the plaintiff a special duty. Plaintiff failed to raise a triable issue of fact. Thus, the Court did not have to even reach the issue of whether, in supervising their students, the defendants were performing a ministerial, as opposed to a discretionary, function.

McCarthy v. City of New York, 118 A.D.3d 963, 988 N.Y.S.2d 667 (2nd Dep't 2014). The plaintiff was injured when a wall on the property line between his property and the adjoining

property fell onto his property and struck him. The plaintiff previously had reported the allegedly defective condition of the wall to the municipal defendants. An inspector for the City defendants visited the site and inspected the wall, and, finding that the wall did not pose a hazard, took no action. Here, in support of their motion, the City defendants established they did not owe a special duty to the plaintiff based on their actions, inter alia, in having an inspector inspect the wall, and that therefore they had not breached any special duty. They did not voluntarily assume a duty which generated justifiable reliance on the part of the plaintiff.

Ewadi v. City of New York, 117 A.D.3d 439, 985 N.Y.S.2d 233 (1st Dep't 2014). Plaintiff testified at his deposition that the only words spoken to her by firefighters arriving to extinguish the fire at the building in which she was trapped were, "Hold on." These words were too vague to manifest an assumption by firefighters of a voluntary duty to plaintiff beyond that owed to the general public. Further, the balance of plaintiff's assertions are insufficient to raise an issue that the fire department assumed direction and control in the face of a "known[ ] blatant" danger, and affirmatively placed plaintiff in harm's way. Plaintiff's argument that misfeasance (as opposed to non-feasance) does not require a special relationship to create a duty was unavailing in light of recent Court of Appeals case law (*see, Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d 420, 426 n. 1, 972 N.Y.S.2d 169, 995 N.E.2d 131 [2013]).

Holdman v. Office of Court Admin., 118 A.D.3d 447, 987 N.Y.S.2d 363 (1st Dep't 2014). Former judge brought action seeking reinstatement to New York State Health Insurance Program (NYSHIP) and money damages after he resigned from his former positions, relying on erroneous advice of Office of Court Administration (OCA) employees that he was vested in NYSHIP. Although the giving of advice by the OCA employees was ministerial in nature, which might subject the governmental body to liability, claimant did not allege a sufficient special duty owed to him, as opposed to any other employee seeking advice from OCA.

Freeman v. City of New York, 111 A.D.3d 780, 975 N.Y.S.2d 141 (2nd Dep't 2013). Adult daughter of woman who died during snowstorm after ambulance services failed to arrive brought wrongful death action against city, alleging negligent failure to provide emergency services and negligence failure to prepare and respond to snowstorm. The plaintiff's decedent had experienced difficulty breathing, and the adult daughter had attempted "but was unable to communicate with an operator or personnel of the 911 emergency telephone system" to request assistance for her mother. Later that morning, the decedent died at home. The defendants moved to dismiss the complaint for failure to state a cause of action, arguing, inter alia, that since it was conceded in the complaint that there had been no communication with 911 personnel, the plaintiff could not demonstrate a "special relationship" necessary to hold them liable in this case. In opposition, plaintiff submitted affidavits from various individuals stating that they had called and spoken to 911 operators on the day of the incident, that they had informed the operators of the "medical emergency," and that they were told by the 911 operators that an ambulance would be sent to the decedent's house, but that no ambulance arrived. Case dismissed because the

complaint failed to allege any facts tending to show that there was any "direct contact" between the decedent and the defendants or that there was any "justifiable reliance" on any promise made to the decedent by the defendants. Furthermore, the allegations in the complaint that the defendants were negligent in preparing for and responding to the subject snowstorm, like the allegation regarding the 911 emergency response, also implicate the exercise of a governmental function. The defendants are immune from liability in connection with their exercise of such function in the absence of a special relationship, which was not sufficiently pleaded.

Stora v. City of New York, 117 A.D.3d 557, 986 N.Y.S.2d 81 (1st Dep't 2014). The provision of adequate security to prevent attacks by third parties at a homeless shelter is a governmental function, for the performance of which the governmental entity cannot be held liable unless it owes a special duty to the plaintiff. Since the record contained no evidence that the City owed a special duty to plaintiff, the City could not be held liable for the injuries plaintiff sustained when homeless man shot plaintiff on shelter premises.

Ferreira v. Cellco Partnership, 111 A.D.3d 777, 976 N.Y.S.2d 488 (2nd Dep't 2013). Owners of homes located near a commercial facility brought action against village and facility owner, seeking to recover damages for injuries allegedly sustained by exposure to noise, smoke, and odor emanating from the facility, and alleging that village was negligent in failing to enforce building codes. Case dismissed on a CPLR 3211(a)(7) motion. The complaint did not allege that the Village had knowledge that inaction on its part could lead to harm and there was nothing in the complaint to show that the "problems" allegedly created by Verizon were anything more than a substantial annoyance to the plaintiffs. Further, plaintiffs failed to allege justifiable reliance. The plaintiffs did not plead that they detrimentally failed to pursue other avenues of redress in reliance on the alleged promise of the Village to address the situation.

Angona v. City of Syracuse, 118 A.D.3d 1318, 987 N.Y.S.2d 761 (4th Dep't 2014). Plaintiff was an off-duty firefighter for defendant City of Syracuse who sustained a heart attack. Firefighters from the City's Fire Department responded first to the emergency call, and shortly following their arrival they set up a defibrillator. The firefighters were unable, however, to connect the electrodes to the defibrillator. Employees of a private ambulance company arrived at the scene and, using their company's defibrillator and electrodes, were able to defibrillate plaintiff. He was resuscitated but suffered severe neurological damage. In his lawsuit, plaintiff alleged the defibulator failed because of a bent pin or misshapen connector housing of one of the electrodes. He sued the manufacturers and also the City based upon the City's alleged failure to respond to the scene of plaintiff's heart attack with operable and functional equipment. But since the claims of negligence arose from the City's exercise of governmental functions, and plaintiff failed to show a triable issue of fact regarding special duty, case against City was dismissed.

Fitzgerald v. City of New York, 119 A.D.3d 520, 987 N.Y.S.2d 877 (2nd Dep't 2014). Plaintiff nurse was injured at Elmhurst Hospital by an inmate who was escorted to the hospital by two

officers employed by the New York City Department of Correction. She alleged the City's negligence in supervising the inmate was a proximate cause of her injuries. The City failed to demonstrate the absence of material issues of fact regarding whether there was a special relationship formed (assumption of duty, justifiable reliance, etc.), and thus SJ was denied.

Bower v. City of Lockport, 115 A.D.3d 1201, 982 N.Y.S.2d 621 (4th Dep't 2014). A homeowner's guest brought negligence, battery, and § 1983 excessive force claims against a municipality and police officers, claiming that the officers pushed or failed to prevent him from falling down a flight of stairs. Specifically, plaintiff alleged he fell or was pushed down a set of stairs in his uncle's home, where he had been staying, while police officers investigated a possible burglary there. As for the negligence claims, defendants met their burden on the motion by establishing that there was no voluntary assumption of a duty of care, and plaintiff failed to raise a triable issue of fact whether the police officers who came to the house assumed, through promise or action, any duty to act on his behalf. Even assuming, *arguendo*, that plaintiff raised a triable issue of fact with respect to that requirement, plaintiff also failed to raise a triable issue of fact with respect to the fourth requirement of special duty, i.e., whether he justifiably relied on any such assumption of duty by the police officers. Further, in any event, the defense of governmental function immunity constituted a separate and independent ground for dismissal of the negligence cause of action. That's because the police were providing police protection and engaging in the investigation of possible criminal behavior and "[p]olice and fire protection are examples of long-recognized, quintessential governmental functions". The causes of action for battery and violation of 43 USC § 1983 and battery were also dismissed because "the elements of battery are bodily contact, made with intent, and offensive in nature" were not met. All the officers testified he stumbled and fell down the stairs because of his highly intoxicated condition, and thus defendants met their burden on the motion of establishing that plaintiff was not pushed down the stairs, since plaintiff testified at his deposition that he did not recall most of the events of the evening, including what caused him to fall.

D. "Special Duty" Formed by Statute

Sutton v. City of New York, 119 A.D.3d 851, ---N.Y.S.2d--- (2nd Dep't 2104). Plaintiff was attacked and killed by two dogs in his own backyard. His estate alleged the City's negligence in failing to adequately respond to the numerous complaints made about the subject dogs in the three months prior to the incident. The City for summary judgment dismissing the complaint, contending that it could not be liable for any negligence because there was no special relationship between the City and the decedent. Plaintiff alleged that Agriculture and Markets Law (hereinafter AML) § 123 (*see Pelaez v Seide,* 2 NY3d at 200) granted him a private right of action but the Court found that a private right of action would be inconsistent with the legislative scheme underlying AML § 23. Accordingly, no special relationship was created between the City and the decedent through the breach of a statutory duty. As for the second way of forming a special relationship, the City met its prima facie burden of demonstrating its entitlement to

judgment by submitting evidence that it did not voluntarily assume a duty toward the decedent. Plaintiff concedes that the decedent never made direct contact with the City, and the circumstances here did not give rise to one of the narrow exceptions to this requirement. The absence of direct contact negates the existence of a special relationship pursuant to the City's voluntary assumption of a duty to the decedent. As for the third way of forming a special relationship, which has been recognized in only rare circumstances, the City must affirmatively act to place the plaintiff in harm's way. Contrary to the plaintiff's contention, the evidence established, prima facie, that the City did not take positive direction and control in the face of a known, blatant, and dangerous safety violation. In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff did not allege that the City affirmatively acted to place the decedent in harm's way, for instance by falsely representing to the decedent that the subject dogs had been confiscated when they had not. Rather, the plaintiff alleged only that the City failed to act, conduct which is insufficient to create a special relationship under this analysis. Case dismissed.

Justice v. State, 116 A.D.3d 1196, 985 N.Y.S.2d 294 (3rd Dep't 2014). Claimant, an incarcerated insanity acquittee, alleged that while he was incarcerated, the Commissioner of Mental Health failed to, among other things, monitor his compliance with an order of conditions imposed pursuant to CPL 330.20(12). Claimant asserted that CPL 330.20 created a statutory duty for the benefit of the class of which he is a member, i.e., insanity acquittees, but CPL 330.20 did not confer upon insanity acquittees, even impliedly, the right to seek civil damages for any failure by the Commissioner to follow the statute's provision, and thus his case was dismissed.

Flagstar Bank, FSB v. State, 114 A.D.3d 138, 978 N.Y.S.2d 266 (2nd Dep't 2013). Judgment creditor brought action against the State, seeking damages for county clerk's alleged negligence in docketing federal judgment against judgment debtor, which resulted in the loss of its judgment liens against debtor's real property. Court here held that a private right of action by a judgment creditor against the State may not be implied by the statutes governing the docketing of judgments. It was undisputed that the statutes governing the docketing of judgments do not expressly provide for a private right of action to recover damages for the negligence of a County Clerk. CPLR 5018(b) provides that "[a] transcript of the judgment of a court of the United States rendered or filed within the state may be filed in the office of the clerk of any county and upon such filing the clerk shall docket the judgment in the same manner and with the same effect as a judgment entered in the supreme court within the county." CPLR 5203(a) provides that "[n]o transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor ... from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll." These two statutes provide that a judgment, once docketed, becomes a lien on the real property of the judgment debtor in the county of docketing. For these statutes to imply a private right of action, all three prerequisites of Pelaez must be met. These prerequisites have not been met, and, thus, a private right of action may not be fairly implied by these statutes. To satisfy the first and second prerequisites, the claimant must be "one

of the class for whose particular benefit the statute was enacted," and it must be shown that "recognition of a private right of action would promote the legislative purpose" of the governing statutes. Here, this was not the case.

E. Qualified Immunity for Highway Design and Other Designs.

Mare v. City of New York, 112 A.D.3d 793, 977 N.Y.S.2d 342 (2nd Dep't 2013). Pedestrian brought negligence action against city alleging unsafe design of crosswalk to recover for injuries sustained after being struck by a vehicle near an intersection. The plaintiff was injured when he was struck by a vehicle at or near the intersection of Francis Lewis Boulevard and 172nd Street in Queens. The City failed to establish, on its summary judgment motion, a reasonable basis for its traffic plan at the subject intersection. In particular, the evidence presented by the City failed to establish that it undertook a study which entertained and passed on the very same question of risk that is at issue in this case.

Politi v. State, 112 A.D.3d 1257, 978 N.Y.S.2d 396 (3rd Dep't 2013). Claimant was riding his motorcycle in a line of other motorcyclists on a rural state road when he alone failed to negotiate a curve and was injured. He sued the State alleging it negligently posted confusing signs that were not in accordance with the Manual of Uniform Traffic Control Devices (hereinafter MUTCD) and allowed excessive amounts of sand and gravel to be present on the road. At trial on the issue of liability, claimant also alleged that defendant was negligent in the design of the curve's superelevation, its radius and the drop-off beyond its shoulder. The Court held that the allegations regarding the design of the curve were not properly before it because claimant did not state them in the claim as required by Court of Claims Act § 11(b). In any event, the weight of the evidence supported the trial court's decision finding that claimant failed to prove that the curve.

Mare v. City of New York, 112 A.D.3d 793, 977 N.Y.S.2d 342 (2nd Dep't 2013). Pedestrian was struck by a vehicle at or near the intersection of Francis Lewis Boulevard and 172nd Street in Queens. City failed to establish, prima facie, that there was a reasonable basis for its traffic plan at the subject intersection. In particular, the evidence presented by the City failed to establish that it undertook a study which entertained and passed on the very same question of risk that is at issue in this case or that the design of the intersection and crosswalk was reasonably safe.

Aragona v. Ionis, 41 Misc.3d 1202, 977 N.Y.S.2d 665 (Richmond Co. Sup. Ct. 2013). Case involving alleged negligent highway design in which Court states, in a footnote, that "in deciding this motion, the Court is well aware of the recent decisions by the Court of Appeals suggesting that when a municipality is sued in tort arising out of the performance of a governmental function, the first question normally to be decided is whether the municipality owed a "special duty" to the injured party (*see e.g. Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 972 N.Y.S.2d 169, 995 N.E.2d 131 [2013]), *i.e.*, whether the duty allegedly breached is "more than one owed

[to] the public generally" (*id.* at 4, quoting *Valdez v. City of New York, 18 NY3d 69,* 75; *Metz v. State of New York, 20 NY3d 175,* 179). "However, these recent cases have yet to afford that Court any occasion to consider the requirement of 'special duty' in the context of purportedly negligent roadway design, where the duty allegedly breached by the municipality is that owed to the public generally to maintain its roads in a reasonably safe condition, and where the burden of demonstrating the existence of a special duty will prove virtually insurmountable. Lacking specific guidance on this issue, the Court has relied upon the doctrine of "qualified immunity" heretofore applied routinely in matters of this sort".

F. Highway Maintenance, Unlike Highway Design, Does Not Get "Qualified Immunity"

Gilberti v. Town of Spafford, 117 A.D.3d 1547, 985 N.Y.S.2d 787 (4th Dep't 2014). Homeowner brought action alleging that town was negligent in design, installation, construction, and maintenance of storm water system in vicinity of his house. Court refused to dismiss plaintiff's negligent maintenance causes of action in their entirety on the ground that the Town's alleged negligence arose from a governmental function. With respect to municipal sewer malfunctions, it is well settled that a municipality's **design** of a sewer system constitutes a governmental function while a municipality's "**operation, maintenance and repair** of th[at] sewer system is a proprietary function, and thus the Town's liability in that respect is not contingent upon the existence of a special relationship. The Court here concluded that plaintiff's causes of action sounded in negligent **maintenance** in some of its claims, and those claims were allowed to proceed. The Court also rejected the Town's argument that the negligent maintenance claims must be dismissed for lack of prior notice of problems with its storm water system. As the movant, the Town had the burden of establishing that it lacked constructive notice of the allegedly dangerous and it failed to meet that burden here. The deposition testimony of the Town's maintenance workers did not address the frequency of the inspection of the subject pipes or the method of inspection. Moreover, those workers did not deny that the pipes were clogged before the flood, that the ditches were unnecessarily deep, or that the pipes were not properly aligned with those ditches. Further, the maintenance records offered in support of the motion did not establish when the pipes were last inspected.

Austin v Town of Southampton, 113 A.D.3d 711, 979 N.Y.S.2d 127 (2nd Dep't 2014). Plaintiff was engaged in a repaving project, operating a paving truck on a tree-lined road located in the Town of Southampton, when a piece of wood, apparently a piece of a tree branch, became embedded in his forehead. A municipality has a duty to maintain its roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers. However, the municipality will not be held liable unless it had actual or constructive notice of the dangerous condition. Under the circumstances presented here, the Town failed to establish, prima facie, that it did not have notice of the alleged defect. In support of its motion, the Town submitted a transcript of the deposition testimony of the foreman of the Town's

Highway Department, wherein he testified that, when he inspected the road in anticipation of the repaving project to ensure that the trees were adequately trimmed in order to accommodate the passage of the paving trucks, he did not take into account the fact that it was customary for paving trucks to drive on the left side of the road, with the driver sitting close to the curb. Motion for SJ denied.

V. PRIOR WRITTEN NOTICE AND OTHER SIDEWALK/STREET LIABILITY ISSUES

A. Prior Written Notice Required; Actual Notice Not Enough

Dutka v. Odierno, 116 A.D.3d 823, 983 N.Y.S.2d 405 (2nd Dep't 2014). Plaintiff's vehicle was traveling southbound when it was struck by a vehicle operated by the defendant who was traveling eastbound. The intersection was controlled by stop signs for traffic traveling as defendant was traveling. Defendant ran the stop sign. Plaintiff sued the Town alleging negligence in failing to maintain the roadways and traffic control devices and in allowing overgrown vegetation to obscure the drivers' views of the intersection and of traffic on the intersecting roadways. The Town moved, inter alia, pursuant to CPLR 3211(a) to dismiss any claim which alleged a theory of liability for which prior written notice was required in accordance with Town Law. Specifically, the Town argued that any claim concerning the obstruction of the sight lines at the intersection was subject to dismissal because the plaintiffs had failed to plead that the Town had prior written notice of that condition as required by section 160-1(A) of the Code of the Town of Oyster Bay. Court held that claim that vegetation obstructed a driver's view of the intersection and of traffic on the intersecting roadways was indeed subject to its prior written notice statute. Since the plaintiffs did not allege that the Town had received prior written notice of any obstructed sight lines in and around the subject intersection, that claim was dismissed.

Hume v. Town of Jerusalem, 114 A.D.3d 1141, 980 N.Y.S.2d 183 (4th Dep't 2014). Plaintiff was injured when her leg fell into a hole on the shoulder of the gravel road located approximately 75 to 100 feet south of the driveway to her residence. At the time of the accident, plaintiff was watching defendant's highway crew clean out the ditches around the area of a culvert that was going to be replaced the following week. According to plaintiff, the gravel along the edge of the road where she was walking suddenly gave way and caused her to slide down the road into a hole. There was no prior written notice, so the burden thus shifted to plaintiff "to demonstrate the applicability of one of two recognized exceptions to the rule-that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality". On appeal, plaintiff contended only that defendant had *actual notice* of the allegedly dangerous condition, abandoning her contention that defendant *created* the condition. However, actual notice of a defect is not an exception to the prior written notice requirement and thus the case was dismissed.

Sola v. Village of Great Neck Plaza, 115 A.D.3d 661, 981 N.Y.S.2d 545 (2nd Dep't 2014). Plaintiff tripped and fell on a median located on Great Neck Road in the Village of Great Neck Plaza as a result of a height differential between a concrete patch and the deteriorating asphalt surrounding the patch. The Village and the County got summary judgment since it was undisputed that they did not receive prior written notice of the alleged defect.

Hume v. Town of Jerusalem, 114 A.D.3d 1141, 980 N.Y.S.2d 183 (4th Dep't 2014). Plaintiff's right leg fell into a hole on the shoulder of the gravel road located approximately 75 to 100 feet south of the driveway to her residence. Plaintiff showed only "actual notice" of the dangerous condition by the Town's construction crew, but no prior ***written*** notice, and no affirmative act of negligence, and thus summary judgment was granted to defendant

Velho v. Village of Sleepy Hollow, 119 A.D.3d 551, 987 N.Y.S.2d 879 (2nd Dep't 2014). Plaintiff tripped on sidewalk raised by the roots of a curbside tree. Prior to the accident, one of the abutting homeowners went to the Village office that accepts payment for water bills and taxes, and made a verbal complaint that the roots of the abutting tree were lifting the sidewalk abutting her property. Her verbal complaint was reduced to a writing in the form of an application for a tree removal permit. The Village Architect informed the abutting owner that the tree would not be removed but that the Village would repair the sidewalk. The sidewalk was not repaired prior to the accident. The Village established its prima facie entitlement to judgment by submitting, inter alia, the affidavit of its Village Clerk, who averred that her search of the Village's records revealed no prior written notice of any hazardous condition on the sidewalk where the accident occurred. In opposition, the plaintiff and the homeowners failed to show that the Village affirmatively created the alleged hazardous condition or caused the alleged hazardous condition to occur by its special use of the sidewalk. Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect.

Reyes v. City of New York, 118 A.D.3d 770, 987 N.Y.S.2d 180 (2nd Dep't 2014). Plaintiff was injured when the car she was driving hydroplaned on an accumulation of water on Furman Street in Brooklyn. The plaintiff alleged that the street had caved in where the accident occurred due to an underground sewer condition, which resulted in a depression in the street and an accumulation of water. At trial, the Supreme Court agreed that question one of the verdict sheet would state: "Did the City of New York receive written notice of a condition affecting the roadway of Furman Street at Montague Street which occurred as the result of known depressions, cave-ins or sinkholes at least 15 days before plaintiff's accident in order for the City of New York to have made repairs, taken suitable precautions or to have given adequate warning?" The Supreme Court agreed with the plaintiff that the question should not be limited to whether the City had notice of a "water condition." The jury was then so charged. The jury returned its verdict in favor of the City and it was revealed that question one on the verdict sheet submitted to the jury contained the words "water condition." The plaintiff subsequently moved pursuant to CPLR 4404(a) to set aside the verdict and for a new trial, contending, inter alia, that she was prejudiced by the Supreme Court's submission of the wrong question to the jury. Appellate Court held it was error for the Supreme Court to submit the question containing the words "water condition" to the

jury. Accordingly, the Supreme Court erred in denying that branch of the plaintiff's motion which was pursuant to CPLR 4404(a) to set aside the jury verdict insofar as it was in favor of the City and against her on the issue of liability.

B. "Big Apple Map" Notice

Chia v. City of New York, 109 A.D.3d 865, 971 N.Y.S.2d 460 (2nd Dep't 2013). Plaintiff sued the City and the City's DOT when his bicycle hit a pot hole causing him to fall. The defendants failed to establish, prima facie, that they did not have prior written notice of the alleged defect. Where, as here, "there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the alleged defect is designated on the map, the question should be resolved by the jury".

C. "Affirmatively Created" Exception to the Prior Written Notice Rule

Cebron v. Tuncoglu, 109 A.D.3d 631, 970 N.Y.S.2d 826 (2nd Dep't 2013). In two related actions, school bus driver and monitor on bus brought action against town, driver and owner of colliding vehicle, and owners of property that was alleged source of icy road conditions. The plaintiffs alleged, among other things, that the icy condition was caused as a result of the natural flow of surface water artificially diverted by the owners of the abutting property as well as negligent design, construction, and/or maintenance of the drainage system by the Town. As to the claims against the Town, although there was no prior written notice, they raised an issue as to affirmative creation of the hazard. the Town testified at their depositions that a contractor hired by the Town conducted a water main installation project in 2001 in the subject road, and, at the Town's direction, restored the road upon completion of the project. Experts retained by the plaintiffs submitted affidavits, inter alia, asserting that they found the road had inadequate crowning that did not have the 2% pitch recommended by the New York State Department of Transportation. As a result, water run-off from the properties of abutting landowners into the roadway was susceptible to freezing in cold weather. The plaintiffs raised a triable issue of fact in their allegations against both sets of defendants

Guimond v. Village of Keeseville, 113 A.D.3d 895, 978 N.Y.S.2d 431 (3rd Dep't 2014). Pedestrian tripped and fell on raised area of pavement on the approach to a pedestrian bridge over the Ausable River in the Village of Keeseville, Essex County. Plaintiff raised an issue of fact regarding the Village's affirmative creation of the defect by submitting the report of an expert engineer and land surveyor. This expert opined that the raised area where plaintiff fell was an asphalt patch that had been applied to the bridge approach to cover cracks and buckling in its paved surface, and that this raised patch produced an uneven walking surface that proximately caused plaintiff's fall. Although the Village claimed that the County, rather than the Village, was responsible for maintaining this area of pavement, after plaintiff's accident the Village made repairs there, which constituted evidence of its control over the subject pavement area. Also, the County submitted a survey revealing that the bridge approach lies wholly within the marked boundaries of a Village street. But the County did not get out of the case either – there was a question of fact regarding which entity was responsible for maintenance of that area.

Rosario v. City of New York, 113 A.D.3d 492, 979 N.Y.S.2d 42 (1st Dep't 2014). Pedestrian fell after stepping into a 3-inch deep hole in a tree well (with no tree in it) because the dirt was not even with sidewalk. Plaintiff made no claim that the City had prior written notice of the claimed defect. Plaintiff argued that, by removing the tree from the tree well without replacing it, the City created a hazard because it created an optical illusion obscuring the tree well. But the only photograph of the condition, taken from some distance away, showed that the tree stump was above sidewalk level and visible. There was thus no view of this evidence to support a conclusion that the City, by cutting down a dead tree and leaving a tree stump, created a dangerous condition by obscuring the visibility of the tree well.

Guimond v. Village of Keeseville, 113 A.D.3d 895, 978 N.Y.S.2d 431 (3rd Dep't 2014). Pedestrian tripped and fell on raised area of pavement on the approach to a pedestrian bridge. In opposition to defendant's motion for summary judgment, plaintiff's expert opined that the raised area where plaintiff fell was an asphalt patch that had been applied to the bridge approach to cover cracks and buckling in its paved surface, and that this raised patch produced an uneven walking surface that proximately caused plaintiff's fall. He further testified that that the dangerously raised surface was created as soon as the patch was applied. Thus there was an issue of fact as to whether defendant created the dangerous condition.

Pulver v. City of Fulton Dept. of Public Works, 113 A.D.3d 1066, 979 N.Y.S.2d 431 (4th Dep't 2014). Plaintiff tripped and fell in a hole in the grassy area between the curb and the paved portion of the sidewalk. The hole was covered with a piece of plywood and was located adjacent to a catch basin that was part of the storm water drainage system owned and maintained by defendant City of Fulton. The Court held that the City's prior written notice requirement applies inasmuch as the area where the accident occurred is part of the sidewalk. Since there was no prior written notice, the burden shifted to plaintiff to demonstrate the applicability of an exception to that requirement. Although plaintiff submitted a pre-accident "work order" to the City for the location in question, she failed to adduce any evidence that the City placed the plywood over the hole in which she fell. Further, the City established that, in response to the "work order," it dispatched an employee who testified that he inspected the area in question, found nothing wrong with it, and performed no work. Thus, plaintiff failed to raise an issue of fact whether the City created a defective condition. Summary judgment granted to defendant. A dissenter believed the evidence showed the defendant might have placed the plywood over the hole and thus found a question of fact.

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D. "Affirmatively Created" Exception Requires that the Defect Be "Immediately Apparent"

Benson v. City of Tonawanda, 114 A.D.3d 1262, 980 N.Y.S.2d 683 (4th Dep't 2014). Pedestrian brought action against city for injuries she sustained when her foot was caught in a gap between two wooden planks on a pedestrian bridge located within a park maintained by city. Plaintiff raised an issue of fact with respect to the applicability of one of the two recognized exceptions to the prior written notice requirement, i.e., "that the municipality affirmatively created the defect through an act of negligence" by constructing the bridge with half-inch gaps between the wooden planks instead of the quarter-inch gaps specified in the design plans for the bridge.

Lipari v. Town of Oyster Bay, 116 A.D.3d 927, 983 N.Y.S.2d 852 (N.Y. 2014) The evidence submitted at the summary judgment motion established that the planting of a tree or trees adjacent to the sidewalk where the accident occurred, and the alleged failure to maintain the roots of the tree or trees, would at most constitute nonfeasance, not affirmative negligence.

Wald v. City of New York, 115 A.D.3d 939, 982 N.Y.S.2d 534 (2nd Dep't 2014). Evidence that the City, in response to an oral complaint received, repaired potholes in the subject street more than 10 weeks prior to the happening of the accident, did not raise a triable issue of fact as to whether the City affirmatively created the condition, as there was no evidence that a dangerous condition existed immediately after the repair was completed or that the repair caused subsequent immediate deterioration.

Brown v. City of Yonkers, --- N.Y.S.2d ----, 119 A.D.3d 881, 2014 WL 3732918 (2nd Dep't 2014). City established its prima entitlement to summary judgment by demonstrating that it did not receive prior written notice of the defect and that it did not, merely by placing rock salt on the bridge, create the condition through an affirmative act of negligence. The conclusion of the plaintiff's expert that the condition encountered by the plaintiff was caused over time by the application of rock salt was speculative and did not raise a triable issue of fact as to whether the City affirmatively caused the condition, thereby triggering the affirmative negligence exception.

E. Special Use Exception

Hannibal v. Incorporated Village of Hempstead, 110 A.D.3d 960, 973 N.Y.S.2d 742 (2nd Dep't 2013). Plaintiff tripped and fell on water cap protruding from sidewalk outside county courthouse. The County established its prima facie entitlement to judgment by submitting evidence that it did not have prior written notice of the alleged defective condition as required by the Administrative Code of the County of Nassau 12–4.0(e). However, in opposition, the plaintiff raised a triable issue of fact as to whether the "special use" exception to the statutory rule requiring prior written notice applied.

F. New York City Sidewalk Law

Alexander v. City of New York, 118 A.D.3d 646, 986 N.Y.S.2d 852 (2nd Dep't 2014). Plaintiff tripped and fell while walking over broken and uneven pavement near or part of a tree well and

was also close to a cable box cover in the pavement. For purposes of the Administrative Code in NYC, a tree well is not part of the 'sidewalk'. Consequently, section 7–210 does not impose civil liability on abutting property owners for injuries that occur in city-owned tree wells. Furthermore, Rules of City of New York Department of Transportation (34 RCNY) § 2–07(b) provides that the owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is "flush with the surrounding street surface" (34 RCNY § 2–07[b][3]). The definition of the term "street" includes the "sidewalk". Here, both the City and abutting property defendants failed to demonstrate the absence of any triable issues of fact as to whether the plaintiff fell over a defective sidewalk, in a tree well, or a combination of the two. Additionally, the defendants failed to establish whether the plaintiff fell within or outside of 12 inches of the cable box cover, therefore failing to establish as a matter of law that the accident occurred within the cable box owner's zone of responsibility.

McKenzie v. City of New York, 116 A.D.3d 526, 984 N.Y.S.2d 32 (1st Dep't 2014). Pedestrian slipped and fell as he attempted to climb over a two-foot-high mound of plowed snow covering curb between street and sidewalk to get from his car parked on the street to a City parking lot on the other side of the mound. A City employee had cleared a snow-free path on the sidewalk, causing the snow to pile up along the curb. However, plaintiff acknowledged that unimpeded access to the sidewalk from the street was available at the nearest street corner, where the curb cut-out had been cleared of snow,four or five car-lengths from his car, but he chose instead to climb over the mound. Summary judgment granted to City as a property owner will have discharged its duty if a snow-free path is cleared between the street and the sidewalk within a reasonable walking distance of the property, since it is not reasonably foreseeable that a person would attempt to climb over a significantly obstructive curbside mound of snow rather than walk to a nearby unobstructed path.

Terilli v. Peluso, 114 A.D.3d 523, 980 N.Y.S.2d 443 (1st Dep't 2014). Defendants showed that their property abutting the sidewalk where plaintiff fell was a single-family, owner-occupied residence, exempt from Administrative Code of City of N.Y. § 7–210, and thus, they had no duty to maintain or repair the flagstone on which plaintiff fell. Nor did that portion of the sidewalk on which plaintiff fell constitute a special use to defendants, since defendants did not derive any exclusive benefit of the use of the sidewalk, unrelated to public use. That defendants replaced other flagstones on the sidewalk did not give rise to a duty to repair the entire sidewalk, or the flagstone where plaintiff fell.

Meyer v. City of New York, 114 A.D.3d 734, 980 N.Y.S.2d 482 (2nd Dep't 2014). Pedestrian brought action against city and owners of residential property abutting public sidewalk, seeking to recover damages for personal injuries allegedly sustained in trip-and-fall incident. Although a certificate of occupancy issued no later than 1959 provided that the structure's permissible use

was commercial, and deposition testimony established that the structure had been used commercially prior to 1993, the respondents established that the present use of the property was entirely residential, and thus the property owner could not be held liable pursuant to the NYC Sidewalk Law.

Schron v. Jean's Fine Wine & Spirits, Inc., 114 A.D.3d 659, 979 N.Y.S.2d 684 (2nd Dep't 2014). Plaintiff slipped and fell on a thin layer of ice covering the sidewalk in front of defendants' commercial premises. Pursuant to Administrative Code section 16–123(a), owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk. Here, the owners had until 11:00 a.m. on the day of the accident to comply with the ordinance. Since that period had not yet expired at the time of the injured plaintiff's fall, the owners demonstrated, prima facie, that they could not be liable for any failure to clear the sidewalk at the time of the accident.

Staruch v. 1328 Broadway Owners, LLC, 111 A.D.3d 698, 974 N.Y.S.2d 796 (2nd Dep't 2013). Plaintiff tripped and fell over one of the crowd control barriers which had been installed by the NYPD on the sidewalk abutting the defendant's property in Manhattan. The defendant established, prima facie, that the barrier at issue, which was part of a long chain of barriers erected by the NYPD as part of its crowd control measures during the holiday season, was not part of the "sidewalk" for purposes of liability under Administrative Code § 7–210 and thus the Statute was inapplicable and the defendant, as owner of the abutting property, had no duty to maintain the barriers.

Vigil v. City of New York, 110 A.D.3d 986, 973 N.Y.S.2d 750 (2nd Dep't 2013). Pedestrian brought action against city and abutting property owner when she tripped and fell over two-to-three-inch height differential between metal grating covering tree well and surrounding sidewalk. In its summary judgment motion, property owner failed to eliminate triable issues of fact as to whether the plaintiff was caused to fall due to an alleged defect in the tree well, the sidewalk, or a combination of the two.

Klau v. Belair Bldg., LLC, 110 A.D.3d 769, 973 N.Y.S.2d 654 (2nd Dep't 2013). Plaintiff tripped and fell while walking on the sidewalk in front of property owned by a commerce. The sidewalk was described as "an uneven upraised/depressed 'lump like' area of concrete over what appears to be a metal box." The metal box to which the concrete was affixed was a square gas cap owned by National Grid. The cap provided access to National Grid's gas service valve. The gas cap itself did not protrude above the level of the sidewalk. The concrete affixed to it was the same color as the surrounding sidewalk flag and extended about one inch above the level of the sidewalk and was two to three inches wide. Plaintiff sued under Long Beach's sidewalk law, and defendant in turn commenced a third-party action against, among others, National Grid. The property owner moved for SJ arguing that it did not create the defect. Relying largely on

precedent interpreting New York City's sidewalk law, the motion court held that the gas cap did not fall within the scope of the sidewalk provisions of the Charter of the City of Long Beach (hereinafter the Charter), but the Appellate Division disagreed. The Code of Ordinances of the City of Long Beach defines "sidewalk" as "any portion of a street between the curbline and the adjacent property line, intended for the use of pedestrians, excluding parkways" (Code of Ordinances of the City of Long Beach § 1–2). Here, the gas cap was located entirely within a sidewalk flag and was level with the sidewalk, and therefore apparently was intended to be traversed by pedestrians. Thus the concrete above the gas cap is covered by Long Beach's sidewalk law, at least to the extent that it may have been an "obstruction" on the sidewalk. The Court noted that the Long Beach law is broader than the New York City law in its imposition of liability on abutting landowners.

Perez v. City of New York, 116 A.D.3d 1019, 984 N.Y.S.2d 412 (2nd Dep't 2014). Pedestrian fell upon stepping onto a sunken portion of a roadway brought personal injury action against city. Defendant demonstrated it did not have prior written notice of the alleged defective condition, as required by section 7–201(c) of the Administrative Code of the City of New York and that it did not affirmatively create the alleged defective condition. Plaintiff's engineer's affidavit did not raise a triable issue of fact as to whether the defendant created the alleged defective condition, because the conclusions set forth by his expert were not supported by empirical data or any relevant construction practices or industry standards. Moreover, the expert's affidavit failed to explain how he reached the conclusion that the alleged defective condition was created by work performed by the defendant.

Lipari v. Town of Oyster Bay, 116 A.D.3d 927, 983 N.Y.S.2d 852 (2nd Dep't 2014). Plaintiff tripped and fell on a sidewalk slab raised by tree roots and claimed the Town affirmatively created the dangerous condition by planting of a tree or trees adjacent to the sidewalk and the failure to maintain the roots of the tree or trees. But since this would at most constitute nonfeasance, not affirmative negligence, and the hazard would not immediately be present, summary judgment granted to defendant.

Methal v. City of New York, 116 A.D.3d 743, 984 N.Y.S.2d 71 (2nd Dep't 2014). While crossing Avenue M near the intersection of East 15th Street in Brooklyn, plaintiff tripped and fell on a raised piece of asphalt located at a bus stop. The plaintiff failed to allege the special use exception in either her notice of claim or her complaint and therefore, that new theory of liability was improperly raised in opposition to the City's motion for summary judgment. In any event, the operation of bus stops on City roadways does not bestow a special benefit upon the City unrelated to the public use and does not constitute a special use of the roadway.

Moncrieffe v. City of White Plains, 115 A.D.3d 915, 982 N.Y.S.2d 579 (2nd Dep't 2014). Plaintiff tripped and fell on ice in roadway and claimed the City affirmatively created a

dangerous condition by the manner in which it piled up snow and ice at the location of the accident. The City established its prima facie entitlement to judgment by demonstrating that it did not receive prior written notice of a snow mound or icy condition in the area in which the plaintiff fell, and that it did not, merely by plowing the roadway, create a dangerous condition through an affirmative act of negligence. In opposition, the plaintiff failed to raise a triable issue of fact.

Wald v. City of New York, 115 A.D.3d 939, 982 N.Y.S.2d 534 (2nd Dep't 2014). Plaintiff tripped in hole in street and claimed affirmative act of negligence. Evidence that the City, in response to an oral complaint, repaired potholes in the subject street, more than 10 weeks prior to the happening of the accident, did not raise a triable issue of fact as to whether the City affirmatively created the condition, as there was no evidence that a dangerous condition existed immediately after the repair was completed or that the repair caused subsequent immediate deterioration.

Donnellan v. City of New York, 112 A.D.3d 780, 977 N.Y.S.2d 326 (2nd Dep't 2013). Plaintiff tripped on loose and raised boards on a boardwalk in Brooklyn. In the notice of claim served upon the defendants, the plaintiff identified the location of the accident as "the Coney Island boardwalk thirty-two (32) feet directly north of the light pole and ninety-two (92) feet from the exit ramp on the boardwalk leading to West 32nd Street." The defendants moved for summary judgment dismissing the complaint, arguing that they did not receive prior written notice of the defective condition alleged by the injured plaintiff as required by the Administrative Code of the City of New York § 7–201(c). The defendants established their prima facie entitlement to judgment by presenting evidence that they did not receive prior written notice of the condition on the Coney Island Boardwalk that allegedly caused the injured plaintiff's injuries. In opposition, the plaintiff submitted a "Site Inspection Report" regarding the Coney Island boardwalk, which was prepared by the defendant New York City Department of Parks and Recreation approximately five weeks before the injured plaintiff's accident. The report contained 21 photographs of various locations on the boardwalk, including one which was captioned "trip hazard due to uplifted boardwalk slat east of W32nd St." The report also indicated that the overall condition of the boardwalk in this area was "U" for unsatisfactory. Furthermore, while the injured plaintiff's testimony at the hearing held pursuant to General Municipal Law § 50–h did not describe the accident location as being east or west of the West 32nd Street ramp, her deposition testimony suggested that she was slightly east of the subject ramp when the accident took place. To the extent that there are factual disputes regarding the precise location of the defect that allegedly caused the plaintiff's fall, and whether the alleged defect is designated on the [site inspection report], the question should be resolved by a jury. There also remained a triable issue of fact regarding the injured plaintiff's claim that the subject defect was affirmatively and immediately created by the defendants' method of constructing the boardwalk. Thus, sj motion denied.

Sobel v. City of New York, --- N.Y.S.2d ----, 2014 WL 3843807 (2nd Dep't 2014). Plaintiff tripped while attempting to get into a car parked at a curb adjacent to a corner parcel of real property owned by the commercial defendant. The plaintiff testified at a 50–h hearing that she was injured because her left foot became caught on a broken part of the sidewalk as well as on a piece of broken metal that was part of a metal sewer/catch basin that was embedded into the curb. The commercial defendant alleged that the plaintiff fell on the curb and that it was not responsible for maintaining it. Defendant failed to meet its prima facie burden on its summary judgment motion since the precise location of the plaintiff's fall could not be determined from the record, and there are triable issues of fact as to whether the commercial defendant was responsible, under its lease, for the maintenance and repair of the curb and sidewalk adjacent to the property.

Buonviaggio v. Parkside Associates, L.P., --- N.Y.S.2d ----, 2014 WL 3844007 (2nd Dep't 2014). Abutting landowners failed to make a prima facie showing of entitlement to summary judgment against the trip-and-fall plaintiff as they offered no evidence to demonstrate that the defective or dangerous condition which caused the plaintiff to fall was located exclusively on the curb, rather than on the sidewalk abutting their property.

VI. MUNICIPAL EMERGENCY AND HIGHWAY MAINTENANCE VEHICLES AND THE "RECKLESS DISREGARD" STANDARD.

A. Vehicle & Traffic law Section 1104 (Emergency Vehicles)

Williams v. Fassinger, 119 A.D.3d 1368, 989 N.Y.S.2d 561 (4th Dep't 2014). Court held that the applicable standard of liability is reckless disregard for the safety of others as set forth in Vehicle and Traffic Law § 1104(e)) where, at the time of the collision, defendant officer was responding to a police call and was therefore operating an authorized emergency vehicle while involved in an emergency operation. By failing to yield the right of way while attempting to execute a left turn at a green light, defendant officer was "engage[d] in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)" (Kabir v. County of Monroe, 16 NY3d 217, 220), i.e., he was "exercis[ing one of] the privileges set forth in" the statute at the time of the accident. Defendant officer's conduct did not rise to the level of reckless disregard where the officer testified in deposition that he was approaching the intersection in a southbound direction, the only traffic he observed was a line of northbound vehicles waiting to turn left. When he reached the intersection, he stopped for a "few seconds" to ensure that the intersection was clear. Defendant officer testified that he could see a distance of approximately three car lengths in the right northbound lane and that he did not see any traffic in that lane when he started his turn. He then "cre[pt] into the intersection, making sure ... nobody was passing on the right of the vehicles stopped to make a left." Plaintiff testified that there was a line of cars in the northbound lane preparing to turn left, that she "veered to the right" around the line of cars in order to proceed straight through the intersection, and that the accident occurred in the intersection.

Torres v. Saint Vincent's Catholic Medical Centers of New York, 117 A.D.3d 717, 985 N.Y.S.2d 606 (2nd Dep't 2014). Plaintiff was driving his car through an intersection with a green light in his favor, when his car was struck by an ambulance, which had its emergency lights turned on and its siren sounding. Vehicle and Traffic Law § 114–b defines emergency operation as: "[t]he operation ... of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency." In this case, the plaintiff presented evidence that the radio call to which the ambulance driver was responding was for the police to assist, and that the driver sought to offer assistance in the form of "crowd control ... until the police got there." Under these circumstances plaintiff established a triable issue of fact as to whether the ambulance driver was operating the ambulance as part of an emergency operation as contemplated by the statute. There were also issues of fact as to whether the ambulance driver's conduct constituted reckless disregard since plaintiff submitted an affidavit from a nonparty witness that raised triable issues of fact as to whether the ambulance slowed down prior to entering the intersection. Although the driver claimed that she was traveling five miles per hour through the subject intersection, the witness averred that she was driving at a high rate of speed, without ever slowing down, on the wrong side of the road through a steady red signal.

Dodds v. Town of Hamburg, 117 A.D.3d 1428, 984 N.Y.S.2d 752 (4th Dep't 2014), Police officer in unmarked police vehicle saw a vehicle traveling in opposite direction with snow covering its windshield and the driver operating the vehicle with his head stuck out of the side window. Officer made U-turn in an intersection to go after him, but he did not activate the vehicle's emergency lights or siren. As he began the U-turn from the right lane, plaintiff's vehicle crashed into the side of his police vehicle. Court granted defendant's motion for summary judgment, finding that the police vehicle was an authorized emergency vehicle engaged in an emergency operation by virtue of the fact that he was attempting a U-turn in order to "pursue an actual or suspected violator of the law" (§ 114–b). As the Court of Appeals recognized in *Kabir v. County of Monroe*, 16 N.Y.3d 217, 220, 920 N.Y.S.2d 268, 945 N.E.2d 461, the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence. Here, by attempting to execute a U-turn, the officer's conduct was exempted from the rules of the road by section 1104(b)(4). As a result, his conduct is governed by the reckless disregard standard of care in section 1104(e). Further, as a matter of law the officer did not demonstrate "reckless disregard. A 'momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach and here the officer acted under the mistaken belief that the vehicles behind him were sufficiently

behind him and that it was, at that moment, safe to execute a U-turn. This constituted a momentary lapse in judgment not rising to the level of 'reckless disregard for the safety of other.

Quintero v. City of New York, 113 A.D.3d 414, 978 N.Y.S.2d 155 (1st Dep't 2014). Plaintiff police officer was a passenger in an unmarked police car brought GML 205–e claim against police officer driving the car predicated on violations of the Vehicle and Traffic Law. Vehicle and Traffic Law § 1104 did not bar the claims because there was no "emergency operation". The officer driving the vehicle had double-parked the police vehicle in order to observe two suspects. As they were sitting at the accident location, they were struck from behind by codefendants' minivan. Double-parking to investigate a suspect is not an "emergency operation" as defined by Vehicle and Traffic Law § 1104(a).

Mouring v. City of New York, 112 A.D.3d 588, 976 N.Y.S.2d 185 (2nd Dep't 2013). In the course of responding to a police call, a police officer drove an unmarked police vehicle through an intersection against a red light, causing it to collide with another car in the intersection, which was in turn propelled by the impact to hit the plaintiff, a pedestrian. Defendant made out a *prima facie* case for summary judgment because the officer was engaged in an emergency operation at the time of the collision and that the officers' conduct did not rise to the level of reckless disregard for the safety of others. Plaintiff's evidence, however, raised issues of fact as to whether the officer was engaged in an "emergency operation" and, even if he was, whether the officer demonstrated "reckless disregard". There was evidence that the officer did not properly use the sirens, and did not stop the police vehicle before entering the intersection or slow it sufficiently, particularly in light of the large number of pedestrians in the area and certain conditions which allegedly obstructed the officers' ability to observe traffic on the road that had the right of way.

Ruiz v. Cope, 119 A.D.3d 1333, 989 N.Y.S.2d 211 (4th Dep't 2014). Plaintiff's vehicle collided with a Syracuse Police Department (SPD) vehicle being driven by a police officer who was in the process of "field training" under the supervision of a sergeant. Shortly before the collision at a blind intersection, defendant had received a "priority one," "shots-fired" radio call, and the sergeant activated the vehicle's siren and lights. As defendant's vehicle approached the intersection, his direction of travel had a red light, and the cross street on which plaintiff was driving had a green light. Defendant failed to come to a complete stop prior to entering the intersection, in violation of SPD rules and regulations. Witness testimony and the physical evidence, including a 45–foot skid mark, presented conflicting accounts whether defendant slowed down or came to a near stop prior to entering the intersection and whether he failed to look left, i.e., in plaintiff's direction. Although defendants met their initial burden on the motion, plaintiff raised a triable issue of fact whether defendant acted with "reckless disregard for the safety of others" in his operation of the police vehicle (§ 1104[e]). Specifically, plaintiff submitted evidence that defendant was traveling at an excessive rate of speed; that defendant did

not slow down or look left as he approached the intersection; that defendant's direction of travel was controlled by a red light; that a building obstructed defendant's and plaintiff's views of each other; that there was other vehicular traffic in the vicinity; that the roads were wet; and that defendant had violated the rules and regulations of the SPD. The jury verdict for plaintiff was thus upheld.

Quock v. City of New York, 110 A.D.3d 488, 973 N.Y.S.2d 72 (1st Dep't 2013). Plaintiff police officer, a passenger, was injured in a collision at an intersection between a radio motor patrol vehicle in which he was a passenger and a taxi when his fellow officer entered the intersection against a red light. Defendant was granted summary judgment. Defendant was engaged in an emergency operation, had activated her lights and sirens immediately upon entering the vehicle, thereby alerting those around her to her presence and emergent right of way and also reduced her speed as she approached the intersection, and although she thereafter accelerated, she looked in the direction of oncoming traffic, but saw no cars approaching. The fact that she did not see the taxi until just before the accident does not render her conduct reckless, nor does the fact that she was traveling 5 miles above the speed limit.

Ryan v. Town of Riverhead, 117 A.D.3d 707, 985 N.Y.S.2d 584 (2nd Dep't 2014 Dept.). An ambulance owned by the Town of Riverhead was being driven in the westbound lane and carrying a patient along with EMT's when it swerved to avoid a dump truck in the westbound lane, which had turned across that lane without signaling. The ambulance collided with a tree on the side of the road killing the patient and injuring the EMT's. Plaintiffs all sued the ambulance driver and Town, who moved for summary judgment on the grounds that the claims were barred by the exclusivity provision of the Volunteer Ambulance Workers' Benefit Law § 19, that the ambulance driver was engaged in an emergency operation pursuant to Vehicle and Traffic Law § 1104. Summary judgment was granted to defendants as to the causes of action of the EMT's as they were barred by the exclusivity provision of the Volunteer Ambulance Workers' Benefit Law § 19. The Town fell into the category of a "political subdivision regularly served" by their decedents' ambulance company under the Statute. As for the patient's estate, the Town defendants established their prima facie entitlement to judgment based on Vehicle and Traffic Law § 1104 by demonstrating that the driver of the ambulance was involved in an emergency operation and engaged in conduct specifically exempted from the rules of the road by the statute, and that he did not act with reckless disregard for the safety of others. However, in opposition, the plaintiffs raised a triable issue of fact with respect to whether "audible signals [were] sounded from [the ambulance] as [was] reasonably necessary" as required for the exemptions set forth in Vehicle and Traffic Law § 1104(b) to apply (Vehicle and Traffic Law § 1104[c]). Plaintiff also raised a triable issue of fact as to whether the driver acted with reckless disregard for the safety of others during the emergency operation of the ambulance. There was evidence that the driver had sufficient time to appreciate and respond to the risk of the collision and failed to use reasonable care to avoid and also whether he was driving at an excessive rate of speed.

Benn v. New York Presbyterian Hosp., --- N.Y.S.2d ----, 2014 WL 3844026 (2nd Dep't 2014). 13 year old plaintiff exited a city bus and had to cross a busy City street to get to school. She began to cross a busy street with the "walk" light in her favor, but half way across, the light turned in favor of traffic coming from her left and right. A school crossing guard, employed by the defendant New York City Police Department, was assigned to the intersection. As she was in the process of crossing, and just after the light had turned in favor of the traffic approaching from her left and right, an ambulance went through the green light and into the cross walk and struck her. There was no question that the child had the right of way, since she had begun her crossing with a green "walk" light in her favor. The ambulance moved for summary judgment based on V&T 1104, claiming that plaintiff could not show "reckless disregard". Plaintiff countered that, because defendant was not engaged in one of the four protected driving activities of 1104, e.g., going through a stop sign or red light, speeding), the ordinary negligence standard applied, and there was an issue of fact as to negligence. Court agreed with plaintiff. Failing to yield the right of way to a pedestrian in a cross walk is not one of the protected driving activities listed in V&T 1104.

B. Vehicle & Traffic law Section 1103(b) (Municipal Highway Maintenance Vehicles)

Deleon v. New York City Sanitation Dept., 116 A.D.3d 404, 983 N.Y.S.2d 17 (1st Dep't 2014). Court agreed with plaintiff that Vehicle and Traffic Law § 1103(b), which exempts "hazard vehicles" from the rules of the road and limits the liability of their owners and operators to reckless disregard for the safety of others, does not apply to a New York City street-sweeping vehicle. At the time of the accident, in 2010, Vehicle and Traffic Law § 1103(b) was superseded by Rules of City of New York Department of Transportation (34 RCNY) § 4–02, which excepted street sweepers, among others, from compliance with traffic rules to the limited extent of making such turns and proceeding in such directions as were necessary to perform their operations (34 RCNY 4–02[d][1][iii][A]). While subparagraph (iv) contained a broader exception, expressly invoking Vehicle and Traffic Law § 1103, subparagraph (iv) did not include street sweepers because that would have rendered subparagraph (iii) redundant and meaningless. Indeed, when 34 RCNY 4–02 was amended, in 2013, the City Council explained in its "Statement of Basis and Purpose" that the effect of the adopted rule would be "that operators of DOT and New York City Department of Sanitation snow plows, sand/salt spreaders and sweepers will now be subject to the general exemption set forth in subparagraph (iv) of that same subsection" — a strong indication that they were not so subject before then. But even holding defendants to an ordinary negligence standard, plaintiff did not established prima facie that it was their negligence that proximately caused the accident. The operator of the street sweeper testified that while he was sweeping on the right side of the street, plaintiff was parked in the center of the street, and that

when he started to pass plaintiff, plaintiff suddenly swerved in front of him. The lone dissenter disagreed and would have found that Vehicle and Traffic Law § 1103(b) applied.

Gawron v. Town of Cheektowaga, 117 A.D.3d 1410, 984 N.Y.S.2d 715 (4th Dep't 2014). Plaintiff's car was struck by a municipal truck whose plow was down and was in the process of using that plow to remove accumulated water and debris from the road. Plaintiff alleged that the water was propelled onto the windshield of the truck blocking his vision and causing him to cross over into an oncoming lane where it struck plaintiff's vehicle. The plow was actually being operated on a service road, and so plaintiff raised an issue as to whether this constituted a "highway" within the meaning of V&T Law 1103. The Court noted that a "highway" is defined as "[t]he entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel" (V&T § 118). Although the road on which the accident occurred was a service road, it was publicly maintained and open to the use of the public for the purpose of vehicular travel. Plaintiff also argued that the statute applied only when the vehicles are "performing their assigned work" and that the truck driver here was not assigned to plow water and debris from the service road on the day of the accident. The Court ruled that plaintiff's interpretation of the Statute improperly added language to the statute by qualifying the word "work", and thus ruled that the protections of V&T 1103(b) applied. The Court thus held that the truck was "actually engaged in work on a highway" at the time of the accident and thus that it was exempt from the rules of the road except to the extent that its operation constituted a 'reckless disregard for the safety of others" (Vehicle and Traffic Law § 1103[b]). There were, nevertheless, triable issues of fact whether the truck driver acted with such reckless disregard at the time of the accident. A two-member dissent would have held that Vehicle and Traffic Law § 1103(b) did not apply as a matter of law. While they agreed with the majority that the access road where the accident occurred constituted a "highway", they concluded that the truck driver was not "actually engaged in work on a highway" as contemplated by the statute (§ 1103[b]). The driver's duties included plowing snow, but on the day of the accident he was assigned to perform maintenance and janitorial work at the Town's senior center. The snow plow was on the pickup truck only because the Town had not yet had the time or opportunity to remove it. Further, there was no proof that plows were ever used to remove debris from a road, the driver was not instructed to remove the water and debris from this access road, and did so on his own initiative and there was no evidence suggesting that the water or debris posed an immediate hazard on this access road. The legislature could not possibly have intended to apply such a broad interpretation to the phrase "actually engaged in work on a highway" in Vehicle and Traffic Law § 1103(b) as that applied by the majority here.

VII. SCHOOL LIABILITY

A. Negligent Supervision

Arrin C. v. New York City Dept. of Educ., 118 A.D.3d 485, 987 N.Y.S.2d 140 (1st Dep't 2014). Plaintiff, then 11 years old, sustained injuries to his mouth while in school. One of his teeth was knocked out, and another was knocked into his upper jaw, requiring extraction. Plaintiff, who is autistic, did not testify at trial. Defendants presented no evidence at trial. The evidence presented by plaintiff, inter alia, showed that the individual defendants, a teacher and a paraprofessional, did not know how plaintiff, who required intensive supervision, injured himself. The Court held that the evidence was sufficient to support the jury's finding that defendants were liable for negligent supervision, and the finding accords with the weight of the evidence.

B. School Bus Accidents

Williams v. Weatherstone, --- N.Y.3d ----, 2014 WL 1883945 (2014). Hyperactive, special needs 12 year old was struck by vehicle while waiting for school bus. She had been waiting for the bus by her home on a busy state highway. The student was not subject to IEPs that required the District to provide her with extra assistance during the commute to and from school. A new bus driver forgot to pick her up as he traveled past her house. The bus monitor saw the child, though, and alerted the driver as to the missed stop. The bus driver turned the bus around in a parking lot and traveled behind a car. His intention was to go past the child again, and then turn around in another parking lot so as to pick the student up on her side of the road. Meanwhile, a car with an undefrosted window had struck the child who had moved out into the road. The injured child testified that she saw the bus go by and turn around, and that she looked both ways before crossing the road to catch the bus on the other side. The School moved for summary judgment on the grounds that it owed no duty to a student not within its physical care or custody and that, in any event, its purported negligence was not a proximate cause of the student's injuries. In a split decision, the Appellate Division, Fourth Department, rejected plaintiff's claim that the District owed the student a duty of care by virtue of her being a special education student with an IEP. The court observed that the IEP "required only that [the District] provide transportation to school [and] did not place the student within [the District's] orbit of authority while she waited for the school bus, [or] give rise to a duty ... to ensure that the child was safe while waiting for the bus outside her home". Nonetheless, the Appellate Division concluded that, "under the facts presented," the student was "within the orbit of [the District's] authority such that [it] owed a duty to [her] based upon the actions of [the District]; i.e ., the bus arrived at the bus stop, passed it, and the driver turned around to pick up the child. Thus, 'the injury occurred during the act of busing itself, broadly construed' ... Where, as here, it was reasonably foreseeable that the child would be placed 'into a foreseeably hazardous setting [the District] had a hand in creating,' [the District] owed a duty to the child". The court agreed with Supreme Court that an issue of fact existed as to whether the District's alleged negligence proximately caused the accident. The Court of Appeals, in reviewing the matter, noted that the liability school bussing cases stemmed either from the fact that the injury occurred during the act of busing itself, broadly construed, or from the violation of a specific statutory duty to see children safely across the street at which the

bus is stopped, when their route took them across that street. Those facts were not present here. Further, the Court analyzed the four situations generally in which a school district can be held liable for a child being hit by a vehicle.

The act of busing, broadly construed: The Court noted that the language, "the act of busing itself, broadly construed", which the Court had used in its *Pratt* decision, imposes a duty to transport students in a careful and prudent manner to cover a child injured *just after alighting from a school bus*, which was not the case here. Here the student walked onto the highway while the bus was still moving in traffic. She was therefore never within the District's physical custody, or any time- and space-limited area of implied custody and control that may arise once a bus stops and passengers begin to board. Thus, her injuries did not "occur[ ] during the act of busing itself, broadly construed".

Creating a hazardous setting: Here the Court held that, even if the bus driver was negligent in missing the stop and turning around, negligence does not create duty. The case was distinguishable from the Court's *Ernest* case in that the *Ernest* child was in the school's physical custody when he was released "without further supervision" into an arguably hazardous setting. In other words, the school was in a position to determine the timing, place and conditions for sending the child home, and the school was under a duty to release the child from its physical custody "in a safe and anticipated manner" Ernest marks an exception to the general rule that a school's duty of care does not extend beyond school premises, and is limited to "injury that occurred ... shortly [after school hours] upon the student's departure from school". Here, by contrast, the student was not injured while going home from school; indeed, she was never in the District's physical custody. Instead, she was in her mother's custody while she waited at the foot of her driveway for the school bus.

Signaling: Plaintiff also sought to impose a duty on the District on the basis of Appellate Division case law broadly holding that a motorist who signals a pedestrian to cross a street risks liability if the pedestrian is hit by another vehicle. But all the past cases in this regard entailed some intentional hand motion or gesture directed by the motorist at the pedestrian, which did not occur here.

Special duty: Plaintiff claimed that the student was owed a "special duty" by the District as a result of a special relationship created by the IEP; specifically, the "special busing services" afforded the student in the IEP. But the IEP only directed the District to transport the student to and from school even though she lived within walking distance. Notably, the IEP did not call for an aide or escort to wait with the student at her designated bus stop. Thus, there was no special duty.

Dissent: Justice Smith, Lippman and Pigot dissented and would have found a duty.

C. Student Must Generally Be in School's Physical Custody for Liability to Attach

Begley, v. City of New York, 111 A.D.3d 5, 972 N.Y.S.2d 48 (2nd Dep't 2013). Developmentally disabled student died after suffering anaphylactic reaction to blueberries at private school. His placement in this private school for special needs children came as the result of an Individualized Education Program prepared by his local Staten Island school district, which directed that, in light of his history of severe asthma and allergies, he be provided with such exceptional services as a registered nurse to accompany him while he traveled to and from school and monitor him throughout the school day. The New York City Department of Education paid for the nurses' services. Plaintiffs sued the Department of Education and others claiming negligent supervision, negligent care, etc.. The DOE moved for summary judgment on the theory that the child was not in its physical custody at the time of his injury, and that it could not be held vicariously liable for the nurse's alleged negligence because she was an independent service provider. The DOE prevailed, despite reliance on a Fourth Department case that seemed to support plaintiff's position: *Troy v. North Collins Cent. School Dist.*, 267 A.D.2d 1023, 701 N.Y.S.2d 199. In that case, the Lackawanna School District formulated an IEP for the plaintiff's son which was implemented by BOCES at a school in a separate school district. The IEP, which was "monitored and enforced by Lackawanna," provided for the plaintiff's son to enroll in a technology class. The plaintiff's son was injured in technology class while operating a miter saw. Lackawanna moved for summary judgment dismissing the complaint since it has referred the child out for services at the other school district and was not directly involved thereafter in caring for the child. The Fourth Department kept Lackwanna in the case, reasoning that "[e]ven assuming that Lackawanna met its initial burden . . . plaintiff raised a triable issue of fact whether plaintiff's son was within Lackawanna's 'orbit of authority' by virtue of Lackawanna's statutory duty to formulate and enforce the IEP and thus whether Lackawanna owed plaintiff's son a duty of care in supervising and controlling him". The Fourth Department further concluded that there was an issue of fact as to whether Lackawanna was negligent in placing the plaintiff's son in a situation posing a foreseeable risk of harm by failing to indicate on his IEP that he suffered from cerebral palsy and a seizure disorder. Here, the Court disagreed with the Fourth Department, stating, "to the extent that *Troy* can be read as holding that a school district's responsibility to formulate and implement an IEP brings a child who is not in its physical custody within its "orbit of authority," this Court implicitly rejected that . . " The Court also distinguished the two cases on their facts. Here, unlike in *Troy*, the DOE demonstrated that it fulfilled its obligations under the IDEA and the Education Law by formulating an appropriate IEP for the infant plaintiff which called for him to attend the private educational facility for special needs children selected by his parents, and to receive nursing services while traveling to and from school and during the school day. In contrast to the IEP at issue in *Troy*, which was allegedly deficient because it failed to reveal that the child suffered from cerebral palsy and a seizure disorder, here the infant's IEP for the subject school year alerted private school to the child's known allergens and required nursing services for both his allergies and his asthma. The Court went on to say that, "more fundamentally, the IDEA and the Education Law provisions implementing it recognize that there will be instances where a school district will be required to

contract out the provision of educational services because it cannot provide a child with the specialized educational setting necessary to appropriately meet the child's needs." The DOE was entitled to reasonably rely on the private school to act responsibly in providing for the infant's medical needs, and protecting his safety. The DOE did not exercise control over the day-to-day supervision of the infant while he was in the custody of the private school, and its statutory obligation to provide him with an appropriate education does not extend so far as to impose a duty on the DOE to supervise a child while he was under the care and custody of such a third-party provider. Nor could the DOE be held vicariously liable for the nurse's alleged acts of negligence because she was not a DOE employee.

D. Student on Student Assaults

Harrington v. Bellmore–Merrick Cent. High School Dist., 113 A.D.3d 727, 978 N.Y.S.2d 868 (2nd Dep't 2014). Seventh-grade student was assaulted by a fellow student. Defendant established, prima facie, that the alleged assault was an unforeseeable act and that it had no actual or constructive notice of prior conduct similar to the subject incident. In opposition, the plaintiffs failed to raise a triable issue of fact.

E. After Hours Liability of School

Weisbecker v. West Islip Union Free School Dist., 109 A.D.3d 657, 970 N.Y.S.2d 824 (2nd Dep't 2013). High school student was attacked by another student on an athletic field owned by the defendant. It happened at 9:30 p.m., after a group of youths had congregated on the field without permission and had been drinking alcoholic beverages. Plaintiff alleged there was not enough security at the school. The "provision of security against physical attacks by third parties ... is a governmental function ... and ... no liability arises from the performance of such a function absent a special duty of protection" This special duty arises "when a municipality assumes an affirmative duty to act on behalf of a specific party, and that party justifiably relies on the direct assurances of the municipality's agents." Defendant demonstrated on summary judgment motion that it owed no special duty to the infant plaintiff. The District established that it did not make direct assurances regarding security to the infant plaintiff and that he did not rely on the provision of security in deciding to congregate with others on the field. Defendant's alleged failure to lock a gate to the field was in its capacity as a property owner, and thus there would be no governmental immunity, but plaintiff failed to show an issue of fact as to whether this was a proximate cause of the infant plaintiff's injuries. The failure to lock the gates accessing the field was not a proximate cause of the infant plaintiff's injuries, since the assault here was not a foreseeable act.

F. Sports Accidents at School

Palmer v. City of New York, 109 A.D.3d 526, 970 N.Y.S.2d 583 (2nd Dep't 2013). An 11th grader was walking and running around a track in physical education class when he collapsed and later died. Defendants failed to establish their entitlement to judgment regarding the allegations that the School's staff negligently supervised the decedent prior to her collapse. The submissions revealed the existence of a triable issue of fact, inter alia, as to whether the decedent's physical education teacher denied the decedent's request to stop and rest after she completed the first lap. But defendant's motion to dismiss the Education Law § 917 (schools are required to maintain an AED) claim prevailed because the school personnel's failure to use an AED was not a proximate cause of the decedent's injuries. The defendants submitted evidence that the decedent was breathing and had a pulse until seconds before emergency medical services personnel arrived at the School, and that an AED should not be used on an individual who is breathing and has a pulse. Therefore, the Court did not rule on whether there was a private right of action under Education Law § 917 in the first instance. But the Court dismissed the claim that the School negligently failed to perform CPR immediately following the student's collapse based on the factual submissions of the parties.

Perez v. City of New York, 118 A.D.3d 686, 986 N.Y.S.2d (2nd Dep't 2014). Plaintiff, a then–17–year–old member of her high school varsity softball team, was injured during a game when she slid into home plate and her left foot "got stuck" in mud. The plaintiff testified, both at a hearing pursuant to General Municipal Law § 50–h and when deposed, that it had rained heavily the day before the game and that she had seen the "mud area" prior to the accident. Case dismissed on grounds of primary assumption of risk.

Godoy v. Central Islip Union Free School Dist., 117 A.D.3d 901, 985 N.Y.S.2d 732 (2nd Dep't 2014). High school student sued for injuries sustained in a game of floor hockey during physical education class in which teacher was also playing and his hockey stick made contact with student's right hand as teacher attempted shot on goal and student attempted to block shot. Defendants moved for summary judgment. But the evidence submitted by the defendants in support of their motion failed to satisfy their prima facie burden of establishing their entitlement to judgment as a matter of law. Plaintiff testified at both his 50–h hearing and his deposition that he was injured when the teacher took a "slap shot" while the plaintiff's stick was right next to the ball. The plaintiff also testified at his 50–h hearing that the teacher and he were being competitive during the game, while the other players were not actively participating, and that after the teacher took the slap shot, his follow through with the stick was "really high." This raised questions of fact as to whether this constituted proper supervision, as well as whether the alleged negligent supervision was a proximate cause of the plaintiff's injuries.

Anastasiya M. v. New York City Bd. of Educ., 112 A.D.3d 585, 976 N.Y.S.2d 202 (2nd Dep't 2013). The plaintiffs commenced this action after the infant plaintiff allegedly was injured during a school gym class when she fell while walking backwards in an accelerated manner. At

her deposition and in her affidavit, the infant plaintiff stated that on the day of the accident, she was experiencing "pain and instability" in her ankle, and that she made complaints concerning this condition to the teacher who was supervising the gym class. The infant plaintiff further averred that despite her complaints, the teacher nevertheless insisted that she continue to participate in the gym exercises and that, as a result, she thereafter fell and sustained injuries. This created an issue of fact regarding negligent supervision.

Shakura T. v. City of New York, 116 A.D.3d 596, 983 N.Y.S.2d 791 (1st Dep't 2014). Where students are engaged in wholly voluntary extracurricular athletic endeavors, the school sponsoring such activity is under a duty of ordinary reasonable care, a duty to protect student athletes from unassumed, concealed or unreasonably increased risks. Here, plaintiff assumed the risk that she might lose her balance and fall while roller skating.

Rispoli v. Long Beach Union Free School Dist., 111 A.D.3d 690, 975 N.Y.S.2d 107 (2nd Dep't 2013). Injured wrestler brought negligence action against school district, wrestling association, and referee, alleging that referee's failure to stop wrestling match when wrestlers entered a potentially dangerous position caused wrestler's injuries. Defendants demonstrated in summary judgment motions that the injured plaintiff assumed the risk of injury by voluntarily participating in the sport of wrestling, thereby consenting to the commonly appreciated risks which are inherent in and arise out of the sport generally and flow from such participation. Furthermore, they submitted evidence establishing that the wrestling position at issue was only considered potentially dangerous for the injured plaintiff's opponent, not for the injured plaintiff, and, therefore, the referee's failure to stop the match did not unreasonably increase the injured plaintiff's risk of injury. In opposition, the plaintiffs failed to raise a triable issue of fact.

Cruz v. Longwood Cent. School Dist., 110 A.D.3d 757, 973 N.Y.S.2d 260 (2nd Dep't 2013). Middle school student was struck in the mouth by a softball thrown by a fellow student while she was participating in pre-game warmups with the school softball team. Defendant established that the infant plaintiff voluntarily engaged in the activity of softball and that, as an experienced player, she knew the risks inherent in the activity, including being hit by a ball. Defendant also established that the after-school supervisor's temporary absence from the athletic field or his alleged lack of training was not a proximate cause of the infant plaintiff's injury. The infant plaintiff was struck by her teammate's ball so quickly that no amount of supervision could have averted the accident.

Shivers v. Elwood Union Free School Dist., 109 A.D.3d 977, 971 N.Y.S.2d 568 (2nd Dep't 2013). The 17-year old student was participating in a "Competition Night" activity at the high school gymnasium. The specific activity in which the plaintiff was engaged was a relay race known as "human railroad." In this race, student teams line up at a starting point, the first member of each team lays down on the gym floor and stretches his or her hands over his or her

head, and the second team member then straddles the first one, and lays down in front of the prone participant, who then grabs and holds onto the feet of the second team member. This linking is then continuously repeated by all of the members of the team until they eventually return to the starting point. The winner is the team which first returns all of its members back to the starting point. The plaintiff alleges that the student who was behind her "dove down too early" at one point in the race, and made contact with the plaintiff's head, which then hit the floor. As a result, the plaintiff sustained a deviated septum. Defendant demonstrated its prima facie entitlement to judgment by presenting evidence that the injured plaintiff understood and voluntarily assumed the risks inherent in the activity at issue. The plaintiff had previously participated in the same "human railroad" relay race at the high school during her sophomore year. Moreover, given the mechanics of this particular activity, it is clear that a reasonable person who had observed or previously participated in such activity would have realized that it was fraught with risk for injury.

Agosto v. City of New Rochelle, 114 A.D.3d 625, 979 N.Y.S.2d 689 (2nd Dep't 2014). Contrary to the City's contention, the City failed to submit evidence sufficient to establish, prima facie, its entitlement to summary judgment on the issue of whether the infant plaintiff assumed the risk inherent in playing touch football during camp. Under the circumstances of this case, the City failed to eliminate triable issues of fact as to whether the infant plaintiff voluntarily participated in the game of touch football and whether the risk of injury inherent in the game of touch football was unreasonably increased by the active participation of the adult counselors, particularly where the game was being played on an asphalt surface where there was also sand present. There was also an issue of fact as to whether the City properly maintained the asphalt parking lot on which the infant plaintiff was injured during the touch football game.

G. Premises Liability Claims against Schools

Farren v. Board of Educ. of City of New York, 119 A.D.3d 518, 988 N.Y.S.2d 684 (2nd Dep't 2014). Infant plaintiff slipped and fell on a wet floor in the third-floor girls' bathroom at Public School 32 in Staten Island. The Board of Education established its prima facie entitlement to judgment by submitting, inter alia, the deposition testimony of the custodian engineer assigned to clean the school. He testified that he inspects the school, including the bathrooms, every morning to make sure that it is safe and clean. He further testified that he had last inspected the subject bathroom approximately two to two and one-half hours before the infant plaintiff allegedly was injured, and that there was no liquid on the floor at that time. The Board of Education also submitted the affidavit of a school administrator who averred that the school had not received any complaints regarding water on the floor of the subject bathroom between the time of the inspection and the time of the alleged accident. Additionally, the Board of Education submitted the deposition testimony of the infant plaintiff's mother, who admitted that, prior to the accident, the infant plaintiff never complained to her about water accumulation on the bathroom floors.

The plaintiffs' contention that the Board of Education created a dangerous condition by allegedly removing paper towels from the school's bathrooms, causing children to shake water off their hands onto the floor, was based on conjecture and surmise as well as hearsay testimony from the plaintiff's mother, which was insufficient to raise a triable issue of fact.

VIII. CLAIMS BROUGHT BY ON-DUTY COPS AND FIREFIGHTERS

Dryer v. Musacchio, 117 A.D.3d 1115, 985 N.Y.S.2d 302 (3rd Dep't 2014). Firefighter plaintiff responded to a structure fire at bowling alley. He found an incipient fire. Ceiling fell on him and was surrounded by fire. Dowd exited the building and devised a rescue plan, which included sending firefighters into the bowling alley, showing them approximately where Dryer was believed to be located and instructing them "to knock [down] as much fire ... in that area" as they could. Approximately 20 to 26 minutes later, firefighters—digging mostly by hand—were able to extract Dryer from the rubble. As a result of the collapse and ensuing entrapment, Dryer sustained serious injuries—including severe burns and the loss of his right arm. Owner moved for SJ against the GML 205-a claim, which motion was denied because there was an issue of fact as to whether the owner had violated a section of the Uniform Fire Prevention and Building Code (19 NYCRR 1219.1 [which regulates use of power strips and extension cords]. Despite defendants' experts' affidavit testimony that the fire was incendiary in nature, plaintiff's expert disagreed, offering a sufficiently supported opinion the cause was the violation of the building code.

LaPiedra v. City of New York, 118 A.D.3d 852, 988 N.Y.S.2d 251 (2nd Dep't 2014). The plaintiff, a New York City firefighter, responded to the scene of a fire at a building in Staten Island which housed a marijuana grow room. The plaintiff testified that this room contained numerous planters containing marijuana plants and that the planters "were all connected with wires, plugged in at some point." In the process of searching the premises, the plaintiff stepped onto a marijuana planter and fell forward, striking a window jamb. Approximately 15 minutes later, the plaintiff's feet became tangled in the wiring and he fell a second time. The plaintiff commenced this lawsuit against the City of New York and the New York City Fire Department, among others, alleging, inter alia, a right to recover under General Municipal Law § 205–e based on the municipal defendants' violation of Labor Law § 27–a(3)(a)(1). Court held that, even assuming that the grow room presented hazards constituting a violation of Labor Law § 27–a(3)(a)(1), the municipal defendants established their prima facie entitlement to judgment by demonstrating that the plaintiff's injuries did not result from their "neglect, omission, willful or culpable negligence" in failing to comply with the statute.

Cassidy v.Korik, 119 A.D.3d 831, 989 N.Y.S.2d 393 (2nd Dep't 2014) The injured plaintiff, a New York City firefighter, responded to an incident at a house owned by the defendant when the chimney fell on him. Defendant's sj motion to dismiss the § 205-a cause of action was granted because the alleged violations were not the result of neglect, omission, or willful or culpable negligence on the owner's part.

Quintero v. City of New York, 113 A.D.3d 414, 978 N.Y.S.2d 155 (1st Dep't 2014). Police officer was injured in a motor vehicle accident while she was a passenger in an unmarked police car. The municipal defendants failed to make a prima facie showing that the complaint's GML § 205–e claims, predicated on violations of the Vehicle and Traffic Law, and co-defendants' cross-claim for negligence were barred by Vehicle and Traffic Law § 1104. *Williams v. City of New York*, 240 A.D.2d 734, 659 N.Y.S.2d 302 (2d Dept.1997), relied on by defendants, was distinguishable in that in *Williams* there was evidence that the police vehicle had used its portable light and siren to get a suspected stolen car to pull over whereas here the officer driving the vehicle had double-parked the police vehicle in order to observe two suspects and that they were sitting at the accident location approximately 15 to 20 minutes before they were struck from behind by codefendants' minivan. Further, the officer had double-parked the police vehicle in order to investigate a suspect, which was not an "emergency operation" as defined by Vehicle and Traffic Law § 1104(a).

Quock v. City of New York, 110 A.D.3d 488, 973 N.Y.S.2d 72 (1st Dep't 2013). Plaintiff police officer was injured in a collision at an intersection between a radio motor patrol vehicle in which he was a passenger, and a taxicab. The accident occurred when plaintiff's partner, driving east in response to a radio call of a crime in progress, proceeded through a red traffic light and was hit by the cab. Case against the City was dismissed because there are no triable issues as to whether the driving officer acted recklessly in crossing the intersection, as required to impose liability under Vehicle and Traffic Law § 1104, the statutory predicate for plaintiff's claim under General Municipal Law § 205–e. The record showed that the officer driving had activated her lights and sirens immediately upon entering the vehicle, thereby alerting those around her to her presence and emergent right of way, and that she had also reduced her speed as she approached the intersection and looked in the direction of oncoming traffic, but saw no cars approaching. The fact that she did not see the taxi until just before the accident did not render her conduct reckless.

Mulham v. City of New York, 110 A.D.3d 856, 973 N.Y.S.2d 314 (2nd Dep't 2013). Police officer was injured when he pursued a suspect into a wooded, vacant lot owned by the City, when his foot went through the plywood foundation of a structure made of debris. The City moved for summary judgment dismissing the GML 205-a cause of action on the grounds that New York City Health Code § 153.19, a mere "sanitation provision", could not form a predicate for such a cause of action because it was not a "safety provision". The regulation at issue required owners and others to keep premises "free from obstructions and nuisances and for keeping ... the ... lot clean and free from garbage, refuse, rubbish, litter, other offensive matter or accumulation of water." The Court held that this provision constituted "a well-developed body of law", as required to form a GML 205-a predicate. Indeed, the failure to comply with section 153.19 can result in criminal sanctions, including incarceration for up to one year and "where criminal liability may be imposed, [the Court] would be hard put to find a more well-developed body of law and regulation that imposes clear duties". Although sanitation prohibitions, such as against littering, may be primarily directed toward aesthetic and health considerations, they also serve

the purpose of keeping sidewalks and lots free of refuse that may present tripping hazards. In any event, General Municipal Law § 205–e includes no exceptions; indeed, its language is broad, referring to any of the statutes, ordinances, rules, orders and requirements of virtually any governmental division, which are limited only to the extent that those provisions are well-developed and impose clear duties. The Legislature has frowned upon judicially crafted exceptions and defenses to General Municipal Law § 205–e, expressing its clear intent through subsequent amendments designed "to eradicate apparent confusion in the courts regarding the scope of [the statute] to ensure [that it is] applied in accordance with the original legislative intent to provide an umbrella of protection for police officers ... who, in the course of their many and varied duties, are injured ... by any tortfeasor who violates any relevant statute, ordinance, code, rule, regulation or requirement". Thus, it was error for the Supreme Court to conclude that New York City Health Code § 153.19 could not form the basis for a General Municipal Law § 205–e claim because it was a "sanitation provision." The defendant also failed to satisfy its prima facie burden on the issue of notice. Recovery under General Municipal Law § 205–e "does not require proof of such notice as would be necessary to a claim in common-law negligence". Rather, the plaintiff must only establish that the circumstances surrounding the violation indicate that it was a result of neglect, omission, or willful or culpable negligence on the defendant's part and the City, as owner of the lot, failed to demonstrate that the plaintiff's injury was not the result of its alleged neglect of its property.

Blake v. City of New York, 109 A.D.3d 503, 971 N.Y.S.2d 4 (2nd Dep't 2013). Police officer was injured in an altercation with a female suspect. The plaintiff attempted to subdue the suspect by spraying her with Mace, but the canister failed to work, thereby allowing the suspect to attack and injure the plaintiff. The canister of Mace had been issued to the plaintiff by the NYPD. The plaintiff sued the City a claim pursuant to General Municipal Law § 205–e predicated upon, inter alia, a violation of Labor Law § 27–a(3)(a)(1). Court here grants defendant's CPLR 3211(a)(7) motion to dismiss the cause of action pursuant to General Municipal Law § 205–e insofar as it was predicated upon a violation of Labor Law § 27–a(3)(a)(1), which requires every employer to furnish its employees with a type of employment and a place of employment that are "free from recognized hazards" that cause or are likely to cause death or serious physical harm to those employees. Although Labor Law § 27–a(3) may serve as a proper predicate for a cause of action alleging a violation of General Municipal Law § 205–e, the plaintiff failed to allege that her injuries resulted from a "recognized hazard[ ]" within the meaning of the Labor Law.

IX. COURT OF CLAIMS

Bermudez v. State of New York, 2014 WL 2882969 (Ct of Claims, 2014). The State of New York moved to dismiss this claim for unjust conviction on the ground that it was not "verified" by the claimant as required by subdivision 4 of § 8–b of the Court of Claims Act, even though the claimant did have his signature on the notice of intention "notarized". It was a close call.

The court noted that suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed. The claimant did not personally verify his claim, but he did sign it before a notary, but was this enough?. A verification is a statement under oath that the pleading is "true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to matters he believes it to be true." In sum, verification requires that the claimant has read the submitted claim, knows its contents and that it is true to the extent of his or her knowledge. The underlying matter here was a criminal prosecution. Mr. Bermudez was presumably in court every day of his trial and was sufficiently familiar with subsequent legal motions. On these facts, this Court found that there was no discernible distinction between him "verifying" his claim and "swearing to it before a notary".

Mosley v. State, 117 A.D.3d 1417, 985 N.Y.S.2d 359 (4th Dep't 2014). Claimant slipped and fell on ice and snow on the walkway while approaching the entrance to the Orleans Correctional Facility. Claimant served a document entitled "Notice of Claim" (document) on the Attorney General. The document "had all the hallmarks of a notice of claim against a municipality," rather than a notice of intent against the State, including the title of the document, the stated venue as "Supreme Court," the references to the General Municipal Law, and the naming of the County of Orleans as a "respondent". The Court of Claims granted defendant's motion to dismiss the claim on the grounds that the document could not be considered a notice of intention to file a claim and that it failed to provide sufficient specificity as to where the accident occurred. Appellate Division reversed, finding that the document sufficiently complied with the requirements of Court of Claims Act § 10(3) so as to constitute a "notice of intent" to bring a claim. The document did name the State as a "respondent" and alleged that the premises where claimant fell were owned by the State, and claimant served the document on the Attorney General. In addition, the mistake in naming the place where the claim arose as the "Orleans *County* Correctional Facility" did not require dismissal of the claim. Claimant provided the proper address where the claim arose, which showed that her fall occurred at the Orleans Correctional Facility, and not at the Orleans County Jail, which is located on a different street.

Brown v. State, 114 A.D.3d 632, 979 N.Y.S.2d 676 (2nd Dep't 2014). After the Court of Claims granted the claimant's motion for leave to serve a late claim against the defendant, the claimant served a claim on the Attorney General by regular mail. The defendant's answer raised, as a first affirmative defense, the court's lack of jurisdiction based on the claimant's failure to serve the claim personally or by certified mail, return receipt requested. In opposition to the claimant's motion, inter alia, to dismiss the first affirmative defense, the defendant cross-moved, among other things, to dismiss the claim based on improper service. In opposition to the defendant's cross motion, the claimant requested that, pursuant to CPLR 2001, the court disregard the error in service. The court granted that branch of the defendant's cross motion which was to dismiss the claim for lack of jurisdiction based on improper service of the claim, and denied the claimant's motion.

Zoeckler v State, 109 A.D.3d 1133, 971 N.Y.S.2d 760 (4th Dep't 2013). After obtaining permission from the Court of Claims to file a late claim against defendant, claimants served their claim on the Attorney General by regular mail instead of by certified mail, return receipt requested, as required by Court of Claims Act § 11. Defendant's answer raised the defense that the court lacked, inter alia, subject matter jurisdiction based on claimants' improper service, and defendant later moved to dismiss the claim on that ground. Claimants opposed the motion and cross-moved for an order deeming the service corrected or disregarded pursuant to CPLR 2001. Service by regular mail deprived the Court of subject matter jurisdiction and thus the claim was dismissed. Contrary to claimants' contention, defendant's motion to dismiss on the ground of improper service, made approximately 20 months after service of its answer, was not precluded by the 60–day waiver provision of CPLR 3211(e). The failure to comply with the service requirements in the Court of Claims Act "result[s] not in a failure of personal jurisdiction, but in a failure of subject matter jurisdiction[,] which may not be waived".

Gristwood v. State, 119 A.D.3d 1414, --- N.Y.S.2d --- (4th Dep't 2014). Wrongful conviction case. Court rejected the State's contention that, because wrongfully convicted claimant made an inculpatory statement, the record did not support the determination that claimant established by clear and convincing evidence that he did not "by his own conduct cause or bring about his conviction" (Court of Claims Act § 8–b [5][d]). Claimant consistently maintained his innocence and contended that his inculpatory statement was coerced. "[A] coerced false confession does not bar recovery under section 8–b because it is not the claimant's 'own conduct' within the meaning of the statute" (*Warney v. State of New York,* 16 NY3d 428, 436). The record fully supported the court's determination that claimant's inculpatory statement was the product of police misconduct. Claimant was awake for 34 hours before making his only inculpatory statement, which was the second statement he made. He had been interrogated for 15 hours in a six—by eight-foot windowless room. He ate nothing and drank only one can of soda and, although he was a heavy smoker, he had no cigarettes in the prior four or five hours. He remained under the severe emotional trauma of having seen his wife in a horrible bloodied and battered condition. Claimant was advised that, if he took a polygraph exam and passed, he would be permitted to go home. The polygraph operator expressed significant concern to fellow officers about the reliability of the polygraph exam because claimant was "somewhat physiologically unresponsive to the polygraph." The operator acknowledged that claimant was trying not to fall asleep during the exam. Claimant experienced severe chest pains during the exam. Nevertheless, after the polygraph exam, the interrogation took on an increasingly aggressive and hostile tone, and claimant was told by the police that he was "lying." Claimant's inculpatory statement was made after he was threatened that he would never see his family again if he did not cooperate. Thus, claimant's statement was not voluntarily made and that claimant therefore did "not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8–b [5][d]).