MUNICIPAL LIABILITY 2014-2015 UPDATE

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I. THE NOTICE OF CLAIM

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

a. Is A Notice of Claim Even Required?

Margerum v. City of Buffalo, 24 N.Y.3d 721, 28 N.E.3d 515, 5 N.Y.S.3d 336 (2015). A notice of claim need not be filed for a Human Rights Law claim against a municipality because GML § 50–e requires service of a notice of claim only "[i]n any case founded ***upon tort*** where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation" and GML § 50–i precludes commencement of an action against a city "for ***personal injury, wrongful death or damage to real or personal property*** alleged to have been sustained by reason of the negligence or wrongful act of such city". (But note that an employment discrimination claim brought against a ***county*** under the Human Rights Law is subject to County Law § 52(1)'s notice-of-claim requirement, which is broader than the GML, requiring notice of "any claim for damages arising at law or in equity, alleged to have been caused ... because of any misfeasance, ... or wrongful act on the part of the county". *see*, Mills v. County of Monroe, 89 A.D.2d 776, 453 N.Y.S.2d 486 [4th Dept 1982], affd 59 N.Y.2d 307, 309 [1982], cert denied 464 U.S. 1018 [1983]).

Rose v. New York City Health and Hospitals Corporation, 122 A.D.3d 76, 991 N.Y.S.2d 602 (1st Dep't 2014). Notice of Claim required for whistleblower action against municipality seeking reinstatement, back pay, and removal of an unsatisfactory rating, even though it is akin to an employment discrimination claim brought under the Human Rights Law (Executive Law § 296), the latter of which does not fall under the categories of claims requiring that notice be served as set forth in General Municipal Law § 50–i. Good lengthy discussion of when a notice of claim is required and when not.

Villar v. Howard, 126 A.D.3d 1297, 6 N.Y.S.3d 811 (4th Dep't 2015). Plaintiff was sexually assaulted twice by another inmate at the Erie County Correctional Facility. He sued the Sheriff, who operated the facility. The assaults occurred on consecutive days in the same shower stall, while plaintiff was being held in custody on a pending criminal charge. Defendant's motion to dismiss for failure of plaintiff to serve a notice of claim was denied. Service of a notice of claim upon a public corporation is not required for an action against a county officer, appointee, or employee unless the county "has a statutory obligation to indemnify such person under [the General Municipal Law] or any other provision of law" (General Municipal Law § 50–e [1][b]) and, here, Erie County had no statutory obligation to indemnify defendant sheriff. The Court also rejected the defendant's argument that it had no duty to the plaintiff, since pursuant to Correction Law § 500–c a sheriff has a "duty to 'receive and safely keep' prisoners in the jail over which he has custody" and to properly train and supervise his deputy sheriffs. Further, in the context of this CPLR 3211 motion, the issue whether of defendant's alleged acts of negligence "were discretionary and thus immune from liability was a factual question which could not be determined at the pleading stage." Defendant's motion to dismiss the cause of action alleging the Sheriff to be vicariously liable for the negligence of his deputies was dismissed since a sheriff is not vicariously liable for the actions of his deputies.

b. Whom To Name In the Notice of Claim

Pierce v. Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321 (3rd Dep't 2015). Motorist brought personal injury action against county and county employee, seeking to recover damages for injuries she sustained when storm debris being transported by employee fell off of his truck and struck motorist in the head. The notice of claim did not name the individual employee. County argued it should have. Court held that neither County Law § 52 nor the provisions of General Municipal Law §§ 50–e(2) and 50–i(2) require that an

individual municipal employee be named in the notice of claim. Notably, the purpose underlying the notice of claim requirement—to provide a municipality with sufficient information to enable it to promptly investigate the subject claim and ascertain its potential exposure to liability -- may be served without naming the individual agents, officers or employees in the notice of claim.

c. Problems with Insufficient Specificity in the Notice of Claim

Loughlin v. New York City Transit Authority, 125 A.D.3d 496, 4 N.Y.S.3d 19 (1st Dep't 2015). Bus suddenly stopped short, causing plaintiff to be thrown to the ground. Plaintiff's attorney's correspondence to the Authority, which enclosed, inter alia, plaintiff's no-fault application and a narrative report from plaintiff's physician, together satisfied the form and contents requirements of a notice of claim, pursuant to General Municipal Law § 50–e(2) and placed the Authority on notice that plaintiff intended to commence a personal injury action. Unlike in Richardson v. New York City Tr. Auth., 210 A.D.2d 38, 39, 619 N.Y.S.2d 711 [1st Dept.1994]), relied upon by the motion court, plaintiff was represented by counsel at the time of the submission of her no-fault application and her attorney's correspondence made it clear that plaintiff was not limiting her claim to no-fault benefits. The letters clearly informed the Authority that counsel had also been retained to represent plaintiff in a separate and distinct claim for "personal injuries." The attorney's letters and enclosures provided the Authority with sufficient information "of the place, time and nature of her accident in order to investigate, collect evidence and evaluate the merit of [the] claim".

Steins v. Incorporated Village of Garden City, 127 A.D.3d 957, 7 N.Y.S.3d 419 (2nd Dep't 2015). Plaintiff slipped and fell on a patch of ice in defendant's parking lot. In her notice of claim, the plaintiff stated that the nature of the claim was a "slip and fall on ice." The complaint went further, alleging that the defendant created the ice patch upon which the plaintiff fell. The defendant moved for summary judgment arguing that there was no evidence that it created the icy condition. In the alternative, the defendant argued that the notice of claim was defective because it did not state a theory of liability. The Court found that the defendant had failed to demonstrate that its alleged failure to spread a salt and sand mixture on the ground after it plowed the parking lot in the early morning hours preceding the plaintiff's accident did not affirmatively cause the icy condition that resulted in the plaintiff's accident. *Nevertheless, the Court dismissed the complaint because the notice of claim was deficient.* While a claimant need not state "a precise cause of action in haec verba in a notice of claim", the notice of claim must at least adequately apprise the defendant that the claimant would seek to impose liability under a cognizable theory of recovery. Moreover "a party may not add a new theory of liability which was not included in the notice of claim". Here the notice of claim made no allegations that the ice patch on which the plaintiff slipped and fell was created by defendant's snow removal operation, or existed by virtue of its negligence.

Matter of New York City Asbestos Litig., 24 N.Y.3d 275, 22 N.E.3d 1018, 998 N.Y.S.2d 150 (2014). Construction worker brought action against Port Authority of New York and New Jersey, alleging that he was injured by being exposed to asbestos while working on Port Authority building many years earlier. Plaintiff died of his injuries between the service of the notice of claim and the beginning of the lawsuit. The notice of claim was served but before suit was filed and his widow became his administratrix. She did not serve a new notice of claim, but amended the existing complaint to substitute herself for her husband as a plaintiff. The complaint continued the deceased personal injury action, which became a "survivorship" claim for damages incurred in his lifetime, and added a claim for wrongful death. The Port Authority moved to dismiss the complaint, asserting that plaintiffs "failed to satisfy the conditions precedent" to the bringing of the action, "thus denying the Court subject matter jurisdiction." The Port Authority argued that no notice of claim for wrongful death had ever been served, only a notice of claim for personal injuries, and thus the proper conditions precedent to the wrongful death suit had not been followed, and the Court lacked jurisdiction to consider the claim. The motion had not been decided when the case came on for trial and the Port Authority, relying on its view that the court lacked jurisdiction, chose not to participate in the trial. After trial, Supreme Court denied the motion to dismiss and entered a default judgment against the Port

Authority. The Appellate Division reversed, holding that "plaintiffs should have served on the Port Authority a new notice of claim concerning the wrongful death and survivorship actions". The Court of Appeals granted leave to appeal and reversed. Although normally a notice of a claim for personal injuries is not sufficient to substitute for notice of a claim for wrongful death, the Court here makes an exception – at least for this particular case -- for where the person injured dies of his injuries between the service of the notice of claim and the beginning of the lawsuit. The Court here adopted New Jersey case law's "substantial compliance" rule on the facts of this case since the entity sued was both a New York and a New Jersey entity, so it is not clear whether this same rule will apply to purely New York defendants.

d. Municipal Defendant's Waiver of Proper Service of Notice of Claim

Person v New York City Hous. Auth., 129 A.D.3d 595, 13 N.Y.S.3d 19 (1st Dep't 2015). Defendant moved for summary judgment on the ground that plaintiff's notice of claim was not served within the 90–day period set forth in General Municipal Law § 50–e, and plaintiff had not timely moved for an extension of time to serve. Plaintiff contended that she qualified under either or both prongs of the "savings provision" under General Municipal Law § 50–e(3)(c), which provides that "[i]f the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant ... be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received." The record showed that plaintiff served a notice of claim on defendant via regular mail, which did not comply with the requirement that service be completed in person or via registered or certified mail. However, defendant subsequently demanded that plaintiff appear for examinations pursuant to General Municipal Law § 50–h with regard to her claim. Under such circumstances, plaintiff's service of the notice of claim was valid under the first prong of General Municipal Law § 50–e(3)(c).

B. Amending the Notice of Claim

Priant v. New York City Transit Authority, 126 A.D.3d 774, 5 N.Y.S.3d 473 (2nd Dep't 2015). Plaintiff served a timely notice of claim alleging defendant's lack of proper security in which he stated that, while riding the subway, he was assaulted and robbed by three men. He stated that when the subway stopped at a station, he "rushed onto the platform, still being chased by the muggers, and out of the station to the street where in a state of semi-consciousness he walked into the street and was struck by a motor vehicle." Nine months after the incident, plaintiff filed a motion for leave to serve ***a late or amended*** notice of claim. The proposed amendments to the notice of claim alleged that, after the plaintiff ran from the subway station, he boarded a bus owned by the defendant New York City Transit Authority in a bloody, dazed, disoriented, and confused condition, and that after exiting the bus he wandered into the street where he was struck by a car. He claimed that the operator of the bus was negligent in, inter alia, allowing him to exit the bus. The motion to serve an amended notice of claim was denied. A notice of claim may be amended only to correct good faith and non-prejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim, and the proposed amendments to the notice of claim added events that were not described in the original notice of claim and asserted a new claim relating to the operator of the bus. The motion to serve a new, but late, notice of claim was also denied because the defendant did not have actual knowledge of the new facts within 90 days of the incident or a reasonable time thereafter.

Miller v. City of New York, 122 A.D.3d 591, 996 N.Y.S.2d 104 (2nd Dep't 2014). Plaintiff was driving on a road in Staten Island when she struck a raised sewer cap. While the plaintiff's notice of claim, complaint, and bill of particulars alleged that the accident occurred on Narrows Road North at the intersection of Targee Street, an amended bill of particulars alleged that the accident occurred on Narrows Road North between Rhine Avenue and Targee Street. Supreme Court correctly exercised its discretion to allow the

plaintiff to correct the mistake, even after the Statute of Limitations had passed, as defendants failed to show they were prejudiced by the error in the notice of claim.

C. Late Service of the Notice of Claim

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

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

i. What is "a Reasonable Time" After 90-Day Period Expires?

Stark v. West Hempstead Union Free School District, 127 A.D.3d 765, 7 N.Y.S.3d 216 (2nd Dep't 2015). Actual knowledge of essential facts of claim first received with the service of the Notice of claim served ***78 days after*** the expiration of the 90–day statutory period did not provide defendant with actual knowledge of the essential facts constituting the claim within a *reasonable time* after the expiration of the statutory period.

ii. Med Mal Cases: Test is whether med mal was apparent in the med records.

Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.), 120 A.D.3d 1082, 992 N.Y.S.2d 232 (1st Dep't 2014). Infant plaintiff's mother was required to serve a notice of claim on HHC by November 8, 2005 (90 days after the child's discharge from the hospital) but did not serve until January 16, 2007. She commenced the action on August 4, 2008, which was within the statute of limitations, as tolled by CPLR 208. On December 9, 2010, plaintiff sought an order deeming her previously served notice of claim timely nunc pro tunc, or for leave to file a late notice of claim. Plaintiff's experts provided an affirmation that, after reviewing the infant plaintiff's medical records, it was their opinion that departures from good and accepted medical practice by HHC's hospital staff were a proximate cause of the infant plaintiff sustaining hypoxic-ischemic brain injury by placental abruption and chorioamnionitis. Thus, plaintiff showed actual knowledge of the facts of the claim within the 90-day period. In its cross motion to dismiss, HHC argued that plaintiff's expert affidavits should be disregarded because they failed to address whether the infant plaintiff's medical records provided HHC with actual notice of negligent conduct, rather than simply claiming that HHC's records showed that it inflicted injury upon the child. HHC additionally argued that the child's medical records documented that his premature delivery could not have been avoided and that his condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by his extremely premature birth. The majority held that the hospital chart did NOT demonstrate that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter, as required by GML § 50–e(5). But the dissent disagreed, noting that, under existing case law, the medical records need not ***conclusively*** document that malpractice caused the injury but rather merely need to ***suggest*** injury attributable to malpractice, which was the case here.

Rojas v. New York City Health and Hospitals Corp., 127 A.D.3d 870, 6 N.Y.S.3d 294 (2nd Dep't 2015). Plaintiff went to the municipal hospital's emergency room complaining of decreased fetal movement. After tests were performed, hospital personnel observed a "good result" and a fetal heart rate with "positive accelerations." The plaintiff was discharged from the hospital. Eight months later her fetus died. In the late-filed notice of claim, she alleged that she complained of decreased fetal movement and her complaints were ignored by hospital personnel, and the death of her fetus was caused by the hospital's negligence, inter alia, in failing to perform testing in connection with her complaint of decreased fetal movement and failing to diagnose and treat prolonged amniotic fluid infection. Thereafter, she filed a motion pursuant to General Municipal Law § 50–e(5) to deem the notice of claim timely served nunc pro tunc. Examining the factors, the Court found that plaintiff had a reasonable excuse for not serving a timely notice of claim because the hospital failed to provide the autopsy report for her stillborn fetus for eight months despite her multiple,

prompt requests for it. The plaintiff had served the notice of claim just a few days after she received the autopsy report concerning the stillborn fetus, and filed the motion, seeking to deem her notice of claim timely served, approximately five weeks later. Further, the plaintiff made a sufficient showing that HHC had actual knowledge of the essential facts constituting her claims within 90 days of accrual or within a reasonable time thereafter. "In medical malpractice cases, when the medical records themselves contain facts that detail both the procedures used and the claimant's injuries, and suggest that the relevant public corporation may be responsible for those injuries, the public corporation will be held to have had actual knowledge of the essential facts constituting the claim". Motion to late-serve granted.

iii. Actual Knowledge from Accident Reports

Gonzalez v. City of New York, et al., 127 A.D.3d 632, 8 N.Y.S.3d 290 (1st Dep't 2015). Worker who sustained injury in fall from flatbed of railroad car while working in Bronx railway yard sued City of New York, its Department of Transportation, and various components of Metropolitan Transit Authority (MTA). In plaintiff's application to late-serve a notice of claim, he failed to demonstrate that defendants acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter. The workers' compensation form or "C–2" form regarding the accident did not set forth any facts suggesting that the claimed injuries were due to defendants' negligence; it merely stated that plaintiff was injured after he lost his footing while he was close to the edge of the train car while working, making no mention of his present claim that the railroad car had a bent edge and was not equipped with proper safety devices. In light of the foregoing factors, which heavily militated against granting the petition, the court declined to address the final criterion to be considered in assessing a late notice of claim—whether defendants have been substantially prejudiced by the delay—except to note that defendants' assertion that the alleged defective condition remained unchanged since the accident was unsupported.

Bhargava v. City of New York, 130 A.D.3d 819, ---N.Y.S.3d--- (2nd Dep't 2015). The incident report prepared by the City's Department of Parks and Recreation on the day of the accident did not provide the City with actual notice of the essential facts constituting the plaintiff's claim that the City was negligent in allowing the boardwalk upon which she fell to be operated, managed, controlled, and maintained in a dangerous and hazardous condition. Moreover, the late notice of claim served upon the City 45 days after the 90–day statutory period had elapsed was served too late to provide the City with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period. Plaintiff failed to rebut the City's contention that the 3½-month delay in commencing this proceeding, after the expiration of the 90–day statutory period, would substantially prejudice its ability to conduct an investigation of the claim.

iv. Actual Knowledge from EMT report

Williams v. Jamaica Hospital Medical Center, 124 A.D.3d 636, 1 N.Y.S.3d 252 (2nd Dep't 2015). Plaintiff asserted that the City obtained actual knowledge of the essential facts constituting the claim within 90 days of the alleged negligence or within a reasonable time thereafter by virtue of a "FDNY Prehospital Care Report" prepared by EMS workers. However, in order for the Report to have provided actual knowledge of the essential facts, one must have been able to readily infer from the Report that a potentially actionable wrong had been committed by the City and this report did not provide the City with actual notice of the essential facts constituting the plaintiff's claim, inter alia, that the City was negligent in delaying transport of the plaintiff's mother to the hospital or that the plaintiff sustained any injuries as a result of the City's alleged negligence. The infant plaintiff also failed to demonstrate that the four-year delay in serving the notice of claim, and the additional delay of a year and a half between service of the late notice of claim and the plaintiff's motion, would not substantially prejudice the City's ability to conduct an investigation of the claim.

v. Actual Knowledge from School Incident Reports

Matter of Lamprecht v Eastport-South Manor Cent. Sch. Dist., 129 A.D.3d 1084, 13 N.Y.S.3d 154 (2nd Dep't 2015). Student who was injured when he jumped over a fence on a theater stage and landed on a piece of scenery was not entitled to leave to file late notice of claim on school district one year and seven months after accident happened, although student was infant. Lengthy delay in seeking leave to serve a late notice of claim was not the product of student's infancy, principal excuse proffered for delay in commencing proceeding, that student did not want to sue his school or his teachers, was not reasonable excuse for delay and was unrelated to his infancy, medical claim form prepared by school's theater director 10 days after date of accident did not provide district with actual knowledge of essential facts underlying claim that theater stage was dangerous, unsafe, and negligently maintained, or that its use was inadequately supervised, and student failed to rebut district's assertions that one-year-and-seven-month delay was reasonable.

vi. First-hand actual knowledge

Kellman v. Hauppauge Union Free School District, 120 A.D.3d 634, 991 N.Y.S.2d 128 (2nd Dep't 2014). Student injured during baseball practice brought motion to late-serve the school district. Two weeks before the injury at issue, the infant plaintiff had sustained an ankle injury at school. The injury was tended to by the school nurse and documented in the school records. In connection with that first injury, the infant plaintiff wore a visible air cast on his leg, the school made accommodations for his injury, and the infant plaintiff did not participate in gym or sports activities. Moreover, the defendants had in their possession a note from the infant plaintiff's doctor, dated the same day as the first injury, advising that the infant plaintiff should not participate in sports until a reevaluation. For almost two weeks, the baseball coach, an employee of the defendants, refused to allow the infant plaintiff to participate in practice. However, before the scheduled reevaluation had occurred, the baseball coach directed the infant plaintiff to act as goalie in a "handball" game during baseball practice, and the coach was present when the infant plaintiff fell and injured his shoulder during that game. That day, the coach filled out an accident report which was subsequently signed by the school nurse and the principal and retained in the school records. The following day, the school nurse sent out email communications to other staff members, including the baseball coach, about the infant plaintiff's injury and the doctor's note. The coach also admitted to the infant plaintiff's father that he had allowed the infant plaintiff "to play goalie during the game and [he] shouldn't have" and told the infant plaintiff that "he will definitely get fired for what happened." Accordingly, the defendants had actual knowledge of the essential facts underlying the legal theories on which liability is predicated well within the 90–day statutory period.

Sosa v. City of New York, 124 A.D.3d 546, 2 N.Y.S.3d 111 (1st Dep't 2015). Plaintiff timely filed a notice of claim for wrongful death arising from the multi-vehicle accident allegedly caused by the defendant's failure to prevent or remedy the icy accumulation upon a public roadway (see GML § 50–e[1][a]). With respect to the late-filed notice of claim for conscious pain and suffering, the police department's accident investigation squad conducted a comprehensive investigation at the accident scene, including the taking of multiple witness statements and color photographs, and preparing several accident reports, wherein each of the witnesses attributed the cause of the accident to the icy conditions of the roadway. Under these circumstances, defendant acquired knowledge of the facts underlying the claim, and was not substantially prejudiced by the delay in serving a notice of claim.

vii. Actual Knowledge from 50-H Hearing

Torres v. City of New York, 125 A.D.3d 573, 1 N.Y.S.3d 816 (1st Dep't 2015). The notice of claim at issue specified that plaintiff was injured when she tripped and fell "on the median" at the southwest corner of Lincoln Avenue and East 138th Street, due to a defect, hole, crack, or breaks "in the street." At her GML § 50–h hearing, plaintiff testified that she tripped at the place where the sidewalk meets the street, and when

shown photographs of the street corner, circled the intersection of the sidewalk curb and the roadway as the place where she fell. The location description in the notice of claim, when considered in conjunction with plaintiff's 50–h testimony, was sufficient to enable defendant to conduct a prompt investigation, and assess the merits of plaintiff's claim. Defendant failed to exclude the possibility that any notice defects, if they exist, were remedied at the General Municipal Law § 50–h hearing. Defendant also failed to show any prejudice resulting from the notice of claim's description, inasmuch as it made no effort to investigate the circumstances of plaintiff's accident.

viii. Getting Discovery regarding Whether Defendant had Knowledge

Bonaguro v. City of New York, 122 A.D.3d 731, 996 N.Y.S.2d 144 (2nd Dep't 2014). Worker employed by a general contractor moved for leave to serve late notice of claim upon city for injuries three months after the expiration of the 90 day period. He had fallen performing cleaning work at a wastewater treatment plant owned and operated by city. The lower court granted the motion to late-serve outright, but the appellate court found that plaintiff had not proven defendant had enough timely notice of his claim. It remitted to the lower court to decide whether plaintiff should get discovery on the issue of whether defendant had enough timely notice of the actual facts of his claim.

b. Reasonable Excuse for Lateness in Applying to Late-Serve

i. Disability

Dardzinska v. City of New York, 123 A.D.3d 483, 998 N.Y.S.2d 358 (1st Dep't 2014). Plaintiff failed to make an adequate showing, via medical or other evidence, that her claimed injuries prevented her from timely filing a notice of claim, especially since she was able to file a report with her employer within 90 days of her accident. And since defendants did not acquire actual knowledge of the facts and circumstances constituting the claim within the statutory 90–day service period, or a reasonable time thereafter, motion for leave to late-serve denied.

Matter of Rivera v City of New York, 127 A.D.3d 445, 8 N.Y.S.3d 43 (1st Dep't 2015). Pedestrian tripped on debris on city walkway and suffered traumatic brain injury. In her motion to late-serve the notice of claim, she proved that her medical condition required ongoing medical treatment, and that her physicians advised her that she could not leave her home unaccompanied. After she retained counsel, she did not unreasonably delay in making the application for leave to file a late notice of claim. Her counsel explained that his public records search revealed that the City of New York was only one of multiple owners of the property where the construction occurred, and that he had no way of identifying the company that performed the construction work at the site, or of knowing whether the City, or another owner, had contracted with that company for the project. His attempts at obtaining this information before filing the motion at issue were rebuffed by the City's failures to promptly respond to her requests for information under the Freedom of Information Law. He made the motion after his search proved fruitless. Under these circumstances, where the City contributed to the delay, the City could not credibly argue that plaintiff unduly delayed in making the motion, or that the City did not acquire essential knowledge of the facts underlying plaintiff's claim within a reasonable time after the expiration of the 90–day period for filing a timely notice of claim. Motion to late-serve granted.

ii. "Served the Wrong Public Entity"

Kuterman v. City of New York, 121 A.D.3d 646, 993 N.Y.S.2d 361 (2nd Dep't 2014). Even if Court accepted an excusable error in identifying the municipal agency upon which plaintiff was required to serve a notice of claim, plaintiff failed to proffer any excuse for the additional delay of more than seven months

between the time he discovered the error and the filing of his petition for leave to serve a late notice of claim. And defendant did not have actual notice of the essential facts of the claim through the police report, which did not mention any injuries. The overall 10–month delay in commencing the proceeding here deprived the City of the opportunity to find witnesses promptly or otherwise conduct a timely and meaningful investigation in this matter.

Matter of Fox v New York City Dept. of Educ., 124 A.D.3d 887, 2 N.Y.S.3d 210 (2nd Dep't 2015). The infant had served a timely notice of claim, but on the wrong entity, the City of New York, instead of the proper one, the DOE. But the DOE acquired actual knowledge of the essential facts constituting the infant's claim within 90 days after the accident because the same attorney from the office of the New York City Corporation Counsel who represented the DOE was involved in defending the identical claims asserted against the City and thus petition as to the infant granted. Thus, motion to late serve for infant was granted.

iii. Infancy

Lyles v. New York City Health and Hospitals Corp., 121 A.D.3d 648, 993 N.Y.S.2d 344 (2nd Dep't 2014). The statements of the plaintiff's mother that she was unaware of the requirement to serve a notice of claim within 90 days after the claim arose did not constitute a reasonable excuse. Furthermore, the infancy of the plaintiff, without any showing of a nexus between the infancy and the delays, was insufficient to constitute a reasonable excuse. In addition, the plaintiff failed to explain the additional lapse of approximately 10 months between the time he served the late notice of claim without court authorization and the motion for leave, inter alia, to deem the late notice of claim timely served nunc pro tunc. Finally, the evidence submitted by the plaintiff with the initial motion, which did not include the hospital records, failed to establish that the defendant had actual knowledge of the essential facts constituting the claim within the requisite 90–day period or a reasonable time. Motion denied.

iv. "Did not appreciate the severity of injuries"

Bramble v. New York City Department of Education, 125 A.D.3d 856, 4 N.Y.S.3d 238 (2nd Dep't 2015). The fact that the injured plaintiff's did not immediately appreciate the nature and severity of her injuries during the first 90 days after the subject incident was unavailing without supporting medical evidence explaining why the possible permanent effects of the injuries took so long to become apparent and to be diagnosed. Moreover, plaintiff failed to proffer any excuse for the significant delay between the time that she was diagnosed with her injuries and the time that she commenced this proceeding. In addition, there was no proof that defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time. The occurrence report merely indicated that the plaintiff injured her back while attempting to defuse a fight between students and did not indicate that the injury was caused by a malfunctioning door or door-closing device as now claimed. Motion to late-serve denied.

Matter of Kellel B. v New York City Health & Hosps. Corp., 122 A.D.3d 495, 997 N.Y.S.2d 50 (1st Dep't 2014). The mother's assertion that she waited to file a notice of claim because she did not know until several months after the child was born that he was injured is a reasonable excuse for the delay in moving to file a late notice of claim, and defendants' experts did not disputed the assertion made by claimant's experts that periventricular leukomalacia (PVL), the injury alleged here, does not generally manifest itself until the infant fails to meet his developmental milestones, which in this case was approximately six months after the injury was inflicted, and that a layperson, such as the child's mother, would be unable to tell that he was injured. Further, plaintiff demonstrated defendants acquired actual knowledge of the facts surrounding the instant claim within 90 days or a reasonable time thereafter, because her expert affidavits establish that the records, on their face, evinced respondent's failure to provide the mother with proper labor and delivery care. Thus, motion to late-serve granted.

Fernandez v. City of New York, 2015 WL 4744425 (2nd Dep't 2015). In plaintiff's motion to late-serve the notice of claim, the evidence showed that the City had actual knowledge of the accident through an ambulance report and hospital records but did not have actual knowledge of the essential facts constituting the petitioner's claims that it had violated Labor Law §§ 200, 240(1), and 241(6). Further, the plaintiff's excuse that he was unaware of the severity of his injury "is unavailing without supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed". Motion to late-serve denied.

b. Motion To Late Serve Must Include The Proposed Notice of Claim

Alas v. Brentwood Health Center, 121 A.D.3d 822, 993 N.Y.S.2d 518 (2nd Dep't 2014). The plaintiff's failure to include a proposed notice of claim with the papers in support of her cross motion was a sufficient basis for denying her cross motion for leave to serve a late notice of claim (see General Municipal Law § 50–e[7]). Moreover, the plaintiff failed to demonstrate grounds for granting leave to serve a late notice of claim.

c. Motion to Late Serve Brought Too Late (after the SOL expires)

Cassidy v. Riverhead Central School District, 128 A.D.3d 996, 11 N.Y.S.3d 102 (2nd Dep't 2015). Plaintiff sustained personal injuries in a three-car collision which involved a school bus owned by the defendant School District. The plaintiff's claim accrued on September 20, 2012, the day of the accident. Accordingly, the plaintiff was required to serve the notice of claim within 90 days thereof, i.e., by December 19, 2012. It was undisputed that the plaintiff served the notice of claim no earlier than February 4, 2013, approximately seven weeks after the deadline (see General Municipal Law § 50–e[3][b]). Thus, the plaintiff's notice of claim was a nullity, since it was served late, without leave of the Supreme Court. Subject to certain tolling provisions not applicable here, the plaintiff was required to move for leave to serve a late notice of claim within 1 year and 90 days of the accrual date of the claim. Since the plaintiff moved for such relief after the 1–year–and–90–day period has expired, the Supreme Court was without authority to grant such relief. Case dismissed.

d. Recommencing under CPLR 205-a After Failing to Comply With Conditions Precedent in First Suit

Benedetti v. Erie County Medical Center Corporation, 129 A.D.3d 1462, 11 N.Y.S.3d 375 (4th Dep't 2015). According to plaintiff, decedent died because the medical condition was not appropriately treated by defendant prior to decedent's discharge. There was no dispute that plaintiff timely commenced an action, but because defendant was a public benefit corporation (see General Construction Law § 66 [1], [4]), plaintiff was required to serve a notice of claim (see Public Authorities Law § 3641[1][a]), which she had not done prior to commencement of the action. The court granted plaintiff's motion to late-serve a notice of claim, which notice of claim was then served. But defendant then moved to dismiss the claim because plaintiff had failed to comply with the condition precedent of serving a notice of claim *prior* to commencement of suit. (Note: The plaintiff apparently did not move to have the notice of claim deemed served *nunc pro tunc*, which would have corrected the problem). The Court then granted defendant's motion to dismiss the action "without prejudice and subject to the terms of CPLR [ ] 205(a)" because of the failure to serve a notice of claim prior to commencement of suit. Defendant moved to dismiss pursuant to CPLR 3211 on the ground that plaintiff failed to comply with Public Authorities Law § 3641(1)(c), contending that the one-year and 90–day requirement in that section was a "condition precedent to suit" not subject to the six-month extension of time provided for in CPLR 205(a). The court denied the motion and concluded that the one-year and 90–day period for commencement of an action against defendant pursuant to Public Authorities Law § 3641(1)(c) was not a condition precedent to suit but, rather, a statute of limitations. Therefore, the court concluded that CPLR 205(a) applied to the dismissal of the prior action and that the commencement of the instant action was timely. (Note, however, that the one-year statutory period

for commencement of suit against the Port Authority Trans–Hudson Corporation set forth in McKinney's Unconsolidated Laws of N.Y. § 7107 has been held to be a condition precedent to suit not entitled to the tolling benefit of CPLR 205(a). *See Yonkers Contr. Co.*, 93 N.Y.2d at 378–379, 690 N.Y.S.2d 512, 712 N.E.2d 678). As emphasized by the Court of Appeals in *Yonkers*, "Unconsolidated Laws § 7107 unambiguously allows an action against the Port Authority only 'upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year' " (id., 93 N.Y.2d at 379, 690 N.Y.S.2d 512, 712 N.E.2d 678). Here, Public Authorities Law § 3641(1)(c) contained no similar express conditional language).

II. 50-H ISSUES

Hymowitz v. City of New York, 122 A.D.3d 681, 996 N.Y.S.2d 337 (2nd Dep't 2014). Pedestrian was struck by a bicyclist on a bicycle trail near Cunningham Park in Queens County and later died. The decedent served a notice of claim upon the defendants three days prior to her death. Approximately one month thereafter, the defendants served the attorney who would have represented the decedent before her death with a demand for an oral examination of the decedent pursuant to GML § 50–h. In response to the demand, counsel requested an adjournment of the hearing, which was granted, and thereafter requested three additional adjournments, explaining that the decedent had died and that the estate was in the process of obtaining an administrator. Counsel's final letter informed the defendants that the proposed administrator was ready, willing, and able to testify at a hearing. Thereafter, the defendants did not serve any further demands for a hearing. Plaintiff then sued defendants for CPS and wrongful death. Defendants moved to dismiss the complaint for failure to comply with GML § 50–h. Court held that the failure of plaintiff (administrator of decedent's estate) to appear for an examination pursuant to GML § 50–h should have been excused in light of the decedent's death before service of the demand for her examination, the administrator's willingness to appear at a hearing, and the defendants' failure to demand the examination of any other person.

Legal Servs. for the Elderly, Disabled, or Disadvantaged of W. N.Y., Inc. v County of Erie, 125 A.D.3d 1321, 3 N.Y.S.3d 497 (4th Dep't 2015). It was undisputed that plaintiff was unable to appear at the 50-H hearing because he sustained a severe brain injury and was permanently incapacitated. Further, his power of attorney was unable to appear at the hearing or reschedule the hearing for a later date because he was hospitalized with various ailments. Under these circumstances, plaintiffs' failure to appear for the 50-h hearing did not warrant dismissal of the complaint.

III. GOVERNMENTAL IMMUNITY

A. Governmental v. Proprietary functions

Granata v. City of White Plains, 120 A.D.3d 1187, 993 N.Y.S.2d 47 (2nd Dep't 2014). Plaintiff's decedent was attacked and killed in a City parking garage. Court found that the security deficiencies alleged by the plaintiffs did not involve governmental functions or arise out of a pure "exercise of discretion ... with respect to overall security measures and the deployment of limited police resources" such as in Matter of World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 455, 933 N.Y.S.2d 164, 957 N.E.2d 733 (failure to take precautions against terrorist attacks) or the participation by a teacher in supervising a playground as part of a school district's overall security system strategy (see Bonner v. City of New York, 73 N.Y.2d 930, 539 N.Y.S.2d 728, 536 N.E.2d 1147), or a policy decision with respect to how the issue of homelessness should be addressed (see Doe v. City of New York, 67 A.D.3d 854, 856, 890 N.Y.S.2d 548). Those kinds of security breaches are more at the "governmental" end of the continuum, whereas the security breaches here were closer to the "proprietary" end. The gravamen of the complaint was not that the City failed to properly allocate government resources and services to the public at large (governmental discretion) but that it failed in its capacity as a commercial owner of a public parking garage to meet the basic ***proprietary*** obligation of providing minimal security for its garage property via lighting, alarms, cameras, and warning signs. These

measures are within the normal range of security measures necessary to satisfy the duty of care owed by any landlord or commercial property owner to its tenants or invitees. In the "continuum of responsibility to individuals and society deriving from its governmental and proprietary functions," the lapses complained of encompass a failure to maintain the reasonable security measures expected of any landlord. Thus, no governmental immunity. And issues of fact existed as to the foreseeability of an attack upon the decedent, thus precluding the award of summary judgment to the City.

McCrae v. New York City Transit Authority, 123 A.D.3d 598, 999 N.Y.S.2d 395 (1st Dep't 2014). A fifty-pound sandbag struck and killed plaintiff's decedent, who was standing on the public sidewalk below the Rockaway Avenue train station of the Number 3 subway line. Plaintiff alleged that the Transit Authority, acting in a proprietary capacity as owner and operator of the station, failed properly to secure the sandbag box, and thereby failed to maintain the subject premises in a reasonably safe condition. Defendant alleged that the failure to secure the sand bag was governmental function that provided it immunity. Court held that, even if the failure to secure the sandbag can be characterized as a "security deficiency," as this deficiency did not serve as part of defendant's general security plan to protect the public pursuant to its police powers, it did not implicate the allocation of police resources, and does not require the expenditure of substantial sums on capital improvements, and thus the alleged negligent act was so overwhelmingly proprietary in nature as to place the source of defendant's asserted liability well toward the proprietary function terminus of the continuum.

Clark v. City of New York, 130 A.D.3d 964, ---N.Y.S.3d--- (2nd Dep't 2015). Homeless man in City shelter was set on fire by others who had entered the shelter with flammable liquids. The plaintiff's theory of liability was premised upon the alleged failure of the municipal defendants to provide an adequate and proper security force to prevent attacks by third parties at the homeless shelter where the subject incident occurred. Such a claim, however, was here held to implicate a governmental function, and thus City liability was barred absent a breach of a special duty owed to the injured party. But there was no "special duty" or "special relationship" established. Therefore, SJ was granted to the municipal defendant. However, the same claim against a private for-profit contractor of security services survived the SJ motion. The private defendant had no governmental immunity, and plaintiff was deemed a third-party beneficiary of the contract between the security company and the City, which contract unequivocally expressed an intent to confer a direct benefit on homeless clients such as plaintiff in the residence at the City shelter. Pursuant to that contract, the private security company was required to provide security to the shelter and its residents, which included performing a security check at the entrance to the shelter before admitting any resident to prevent prohibited items, such as the flammable liquid that was used to set the plaintiff on fire, from being brought into the shelter.

B. Discretionary v. Ministerial Acts

Shipley v. City of New York, et al., 2015 WL 3590553 (Ct. of Appeals 2015). Court of Appeals here addresses a "right of sepulcher" case in the context of governmental immunity. A high school student died in a car accident, and his father consented to a city medical examiner autopsy. The body was returned, but – unbeknownst to the family – the brain was withheld by the City medical examiner in a jar with the boy's name on it. By some weird fluke, a science class from the boy's high school was later taking a tour of the medical examiner's office and some of the kids noticed the jar containing a brain with the deceased classmate's name on it. Someone told his sister, who told the parents, who eventually sued the city for negligent infliction of emotional distress, alleging violation of common-law right of sepulcher by failing to notify next of kin, before decedent's burial, that decedent's brain had been retained for further examination and testing as part of autopsy. The Appellate Division held that the medical examiner had "the mandated obligation, pursuant to Public Health Law § 4215(1) and the next of kin's common-law right of sepulcher, to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains [had] been fulfilled". The court deemed this obligation to be not only "***ministerial*** in nature" but also one that was "clearly for the benefit of, and ... owed directly to, the

next of kin," and this obligation could have been met with "the simple act of notifying the next of kin that, while the body [was] available for burial, one or more organs [had] been removed for further examination". In the Appellate Division's view, such notification would have given the parents an opportunity "to make an informed decision regarding whether to bury the body promptly without the missing organs and then either accept the organs at a later date or authorize the medical examiner to dispose of them, or alternatively, to wait until such time as the organs and body can be returned to them together ... for burial or other appropriate disposition by the next of kin". The Court of Appeals disagreed. It found that providing the "body" to the family was enough to fulfill the common law right of sepulture, and the fact that the City medical examiner had retained an organ – the brain – was of no matter. Nor did the defendant have a duty to notify the family that it was retaining the organ. To be sure, a cause of action for violation of the right of sepulcher will lie where there has been an "unauthorized autopsy". However, the autopsy in this instance was plainly authorized. "Indeed, there is nothing in our common law jurisprudence that mandated that the medical examiner do anything more than produce the decedent's ***body*** for a proper disposition". At most, a medical examiner's determination to return only the body without notice that organs and tissue samples are being retained is ***discretionary***, and, therefore, no tort liability can be imposed for either the violation of the common-law right of sepulcher or Public Health Law § 4215(1). There was one dissenter.

Alvarez v. Beltran, 121 A.D.3d 488, 994 N.Y.S.2d 331 (1st Dep't 2014). The police officer had motioned to the plaintiff pedestrian to approach his police car, and then advised him to "go ahead", i.e., to go across the street. Plaintiff proceeded to cross the street when he was struck by a vehicle. Court held that the City was immune from liability for plaintiff's injuries, even if they were sustained as a result of the officer's negligence, because the officer was engaged in the ***discretionary*** governmental functions of police investigation and traffic control.

McCants, Jr., etc. v. Hempstead Union Free School District, et al., 127 A.D.3d 941, 8 N.Y.S.3d 337 (2nd Dep't 2015). Plaintiff sixth-grade student was struck by a motor vehicle he was leaving his Middle School. No crossing guard was assigned to the intersection, however, crossing guards were assigned to nearby intersections. The Village established its entitlement to judgment by demonstrating that its actions were ***discretionary***. Although the Village had assigned crossing guards to certain intersections near the school, its decision not to post a crossing guard at the subject intersection did not give rise to liability on the part of the Village.

Dixon v. City of New York, 120 A.D.3d 751, 991 N.Y.S.2d 463 (2nd Dep't 2014). Mother and infant son sued city and city fire department for newborn's brain injuries allegedly caused by negligence of ambulance dispatcher in sending wrong type of ambulance when mother experienced heavy vaginal bleeding and negligence of EMT personnel in delaying transport of mother to hospital. They sent a "Basic Life Support" but, after seeing her heavy blood loss and shortness of breath, the EMT workers requested an "Advanced Life Support" ambulance staffed with paramedics and had the mother wait for it to arrive. The ALS ambulance arrived a few minutes later and the mother got to the hospital about 30 minutes after the 911 call. At hospital, a cesarean was performed. It was determined that the mother had suffered a placental abruption, which caused a depletion in oxygen from the mother to the fetus, resulting in the infant plaintiff sustaining permanent brain damage. Court held the 911 dispatcher's and the EMT's actions were ***discretionary***, and thus governmental immunity applied. Specifically, the dispatcher exercised discretion in deciding which type of ambulance to send and The EMTs exercised their discretion in calling for an ALS ambulance based upon the amount of blood loss and the difficulty breathing and in requiring the mother to wait for the ALS paramedics in her apartment. SJ to defendant granted.

Coleson v. City of New York, 125 A.D.3d 436, 2 N.Y.S.3d 468 (1st Dep't 2015). Wife who was stabbed by her husband brought action on behalf of herself and her son against city and city police department, alleging that defendants were negligent in failing to protect plaintiffs from attacks by husband, and asserting claim for negligent infliction of emotional distress. On a prior appeal, the First Department affirmed Supreme Court's order granting the City's motion for summary judgment dismissing the entire complaint. It had

dismissed the inadequate protection claim on the ground that statements allegedly made to plaintiff by police officers were too vague to constitute promises that would give rise to a special relationship. The Court of Appeals reversed that portion of the order, finding that plaintiff raised a triable issue of fact as to whether there was a special relationship and remitted the case to the Appellate Division "for consideration of issues raised but not determined", i.e., whether the actions of the city police were discretionary or ministerial. Here the Appellate Division held that defendant failed to make a prima facie showing of the availability of the governmental immunity defense because its motion was supported by nothing more than a bare assertion that the actions of its police officers were discretionary. "In order to prevail on a governmental function immunity defense, a municipality must do much more than merely allege that its employee was engaged in activities involving the exercise of discretion".

Delanoy, Jr., et al. v. City of White Plains, et al., 122 A.D.3d 663, 995 N.Y.S.2d 725 (2nd Dep't 2014). Plumber brought negligence action against city and city plumbing inspector who directed the plaintiff to perform a clearly unsafe air pressure test. The jury determined that the City and its inspector took "positive control of a known and dangerous safety condition", which is one of the ways the government can create a "special duty" to a plaintiff. In addition, the jury's determination that the inspector was performing ***ministerial*** acts, rather than discretionary acts was not contrary to the weight of the evidence. Jury verdict against City upheld.

Hephzibah v. City of New York, 124 A.D.3d 442, 997 N.Y.S.2d 900 (1st Dep't 2015). Plaintiff was knocked over on a crowded sidewalk during a police chase. Court noted that the police conduct at issue clearly involved the exercise of ***discretion*** in making an arrest, but that even if the action did not constitute an exercise of discretion, plaintiff had established no special duty. Plaintiff advanced only conclusory allegations that the officer's conduct violated police department rules and regulations, and thus was not a reasonable exercise of judgment or discretion shielded by governmental immunity.

Klepanchuk v. County of Monroe, 129 A.D.3d 1609, 12 N.Y.S.3d 701 (4th Dep't 2015). Estate of motorist killed in a multivehicle accident and passengers injured in the accident brought negligence claims against county, and county airport, claiming that the defendants were negligent in making alterations and modifications to airport property, specifically to tunnels and retaining walls, which caused snow to blow across the road and created "white-out" conditions that caused the accident. Defendants established on SJ that construction of the tunnels and retaining wall was undertaken in a **governmental** capacity inasmuch as the construction was the result of defendants' ***discretionary*** decision-making after defendants consulted with experts to determine how to make improvements to the Airport property in compliance with, inter alia, safety regulations of the Federal Aviation Administration. Further, even if it was not discretionary, plaintiffs failed to raise a triable issue of fact whether defendants owed a **special duty** to plaintiffs or were acting in a proprietary capacity.

C. Special Duty

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

(Note: Elements are: (1) Direct contact, (2) voluntarily assume duty, (3) knew or should know failure to carry out duty would put plaintiff in danger, (4) justifiable reliance by plaintiff).

Coleson v. City of New York, 24 N.Y.3d 476 (2014). Plaintiff had ordered her abusive husband to leave the apartment where she resided with their 7 year old son, and changed the locks. He later tried to force himself into the building and threatened to kill plaintiff and stab her with a screwdriver he was carrying. Plaintiff called the New York City Police Department but when they arrived on the scene, husband had already fled. He was apprehended later that day. Plaintiff got an order of protection for herself and her son. At her deposition, plaintiff testified that the officers told her they had arrested her husband and he was going to be

in prison for a while and she should not worry as she was going to be given protection. She was escorted by the police to Safe Horizon, a nonprofit organization that provides services to domestic violence victims, to meet with a counselor and receive other assistance. That evening, plaintiff received a follow-up phone call from one of the officers, who told her that her husband "was in front of the judge" and that he was going to be "sentenced." Two days later, plaintiff went to pick up her son from his school when her husband confronted her and knifed her while her son sought shelter in a nearby car wash where an employee locked him in a broom closet for protection. About 5 to 10 minutes later the child came out of the closet and saw his mother on the ground in a pool of blood. The City's main arguments on summary judgment were that the officers' statements to the plaintiff were not definite enough to create a "justifiable reliance" (one of the 4 elements necessary to for a "special duty") by plaintiff. The Appellate Division agreed, holding that plaintiffs failed to establish the requirements for a special relationship because they failed "to demonstrate that the verbal assurance of protection at the precinct was followed by any visible police protection" and "failed to show any post arraignment promise of protection". Here Court of Appeals reverses, finding a question of fact regarding "justifiable reliance" in that, given "the assurances that . . . the husband was in jail and that he would be there for a while, a jury could find that it was reasonable for plaintiff to believe that the husband would be jailed for the foreseeable future, and that the police would contact her if that turned out not to be the case".

Kirchberger v. Senisi, 122 A.D.3d 804, 996 N.Y.S.2d 656 (2nd Dep't 2014). Shortly after a fire began in plaintiffs' home, plaintiffs' neighbors called 911. Their calls, as well as one of plaintiff's own calls, were routed to the Suffolk County Fire Rescue Emergency Services (FRES), which informed plaintiff that firefighters would respond to the premises and notified the defendant Brentwood Fire Department of the incident. The firefighters arrived approximately 25 minutes after the first 911 call was made. The plaintiffs sued to recover damages for injury to property, alleging that the defendant was "delinquent" in responding to the emergency. Governmental immunity defense prevailed since there was no question of fact as to whether there was "***direct contact***" between the defendant and the plaintiffs. According to plaintiff's testimony, he spoke to a 911 operator and to an individual employed by FRES. Plaintiff did not speak directly with any employee of the defendant, and there was no evidence of an agency relationship between FRES and the defendant. Moreover, plaintiffs did not justifiably rely upon any affirmative undertaking by the defendant.

Thomas v. New York City Department of Education, 124 A.D.3d 762, 2 N.Y.S.3d 178 (2nd Dep't 2015). Teacher was assaulted by a student at school. She contended that the defendants breached a duty of care in failing to remove the student from classes at the school and in failing to protect her from the student. Defendants established their entitlement to judgment by demonstrating that they ***did not voluntarily assume a duty*** toward the plaintiff that generated her justifiable reliance. In opposition, the plaintiff failed to raise a triable issue of fact as to whether a special relationship was formed. Furthermore, the plaintiff does not allege that a special relationship was formed because the defendants violated a statutory duty, or assumed positive direction and control in the face of a known, blatant, and dangerous safety violation.

Philip v. Moran, etc., 127 A.D.3d 717, 7 N.Y.S.3d 294 (2nd Dep't 2015). Plaintiff was assaulted in his driveway by a teenager defendant. The plaintiff's wife called the 911 emergency telephone number, and two New York City police officers responded to the scene. The plaintiff told the officers that he had seen the assailant enter a nearby house, and he walked the officers over to the house. One officer went to the door of the house, while the plaintiff stood near the other officer. The plaintiff testified that the officers did not say anything to him while they were walking or while they waited outside of the house. The assailant then emerged, ran toward the plaintiff, and punched him (again). The officers then arrested him. Plaintiff sued the City and officers for negligence in allowing him to be punched the second time. The Court held that the officers' conduct during the incident constituted a governmental function and thus the City could not be held liable unless there existed a special relationship between it and the plaintiff. Here, the City demonstrated that no special relationship existed which would give rise to a duty of care to the plaintiff individually. The

police were fulfilling their general duty to the public at large by responding to a call regarding a completed crime, and in the course of the investigation, ***made no promises to the plaintiff***, in word or action, that gave rise to an affirmative duty of care running to the plaintiff personally. The Court stated that it need not reach the issue of whether the police were exercising discretion (as opposed to ministerial actions) because in any event there was ***no special duty established***.

Clark v. City of New York, 130 A.D.3d 964, ---N.Y.S.3d--- (2nd Dep't 2015). Homeless man in City shelter was set on fire by others who had entered the shelter with flammable liquids. The plaintiff's theory of recovery was premised upon the alleged failure of the municipal defendants to provide an adequate and proper security force to prevent attacks by third parties at the homeless shelter where the subject incident occurred. Such a claim, however, implicated a governmental function, and thus City liability was barred absent a breach of a special duty owed to the injured party. There was ***no "special duty" or "special relationship"*** established. Therefore, SJ was granted to the municipal defendants. However, the same claim against a private for-profit contractor of security services survived the SJ motion. The private defendant had no governmental immunity, and plaintiff was deemed a third-party beneficiary of the contract between the security company and the City, which contract unequivocally expressed an intent to confer a direct benefit on homeless clients such as plaintiff in the residence at the City shelter. Pursuant to that contract, the private security company was required to provide security to the shelter and its residents, which included performing a security check at the entrance to the shelter before admitting any resident to prevent prohibited items, such as the flammable liquid that was used to set the plaintiff on fire, from being brought into the shelter.

Earle v. Village of Lindenhurst, 130 A.D.3d 973, ---N.Y.S.3d--- (2nd Dep't 2015). Plaintiff's decedent suffered from chronic obstructive pulmonary disease and emphysema. She collapsed, after losing consciousness, in the bedroom of her home. The decedent's adult son called 911. A few minutes later, a municipal ambulance and EMT arrived at the decedent's house and were directed to the decedent's bedroom. The EMTs asked the son to leave the room, and he complied. According to the plaintiffs, the EMTs were thereafter negligent in removing the decedent from her bedroom, thereby injuring her. The plaintiffs commenced this action against the Village of Lindenhurst to recover damages for personal injuries and wrongful death. The defendant moved for summary judgment dismissing the complaint. The Court first noted that, under recent Court of Appeals case law, "***when a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a governmental function and cannot be held liable unless it owed a 'special duty' to the injured party"*** (Applewhite v. Accuhealth, Inc., 21 NY3d 420, 423–424). Such a special duty can arise, as relevant here, where "the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally," or, in other words, where the municipality "voluntarily assumed a 'special relationship' with the plaintiffs". Here the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint by establishing that ***no special relationship existed*** between it and the decedent. Even assuming that the EMTs' contact with plaintiff's decedent equated to ***direct contact*** with the decedent, the defendant demonstrated, prima facie, that the EMTs did not make any promises or take any actions that could constitute ***the assumption of an affirmative duty*** to act on behalf of the decedent. In that respect, the only allegations of negligence concern the EMTs' conduct in removing the decedent from her bedroom so as to transport her to the hospital. In performing that task, the EMTs simply requested that decedent's son step out of the room. Contrary to the plaintiffs' contention, the request that the son step out of the room while the EMTs performed their work did not constitute the assumption of an affirmative duty to act, beyond what was owed to the public generally.

2. Special Duty Formed by Statute

Bouet v. City of New York, et al., 125 A.D.3d 539, 5 N.Y.S.3d 18 (1st Dep't 2015). Defendant was entitled to summary judgment because the investigation of the motor vehicle accident was a governmental function, and therefore, the City of New York was not liable for failing to properly investigate the incident unless

there existed a special duty to plaintiff, in contrast to a general duty owed to the public. Contrary to plaintiff's contention, she could not establish a special relationship through defendants' violation of a ***statutory duty***, because ***none of the sections of the Vehicle and Traffic Law cited by plaintiff authorize a private right of action*** nor were they otherwise enacted for the benefit of a particular class of persons as opposed to the public at large.

Cunningham v. City of New York, 48 Misc.3d 135 (1st Dep't 2015). Plaintiffs commenced this negligence action against the municipal defendants seeking damages resulting from the nonfeasance of certain police officers. Plaintiffs alleged that after they were struck by a vehicle driven by an unidentified woman, the police officers that responded to the scene failed to prepare and file a report memorializing the accident, or provide plaintiffs with the identity of the driver. As a result, plaintiffs claim that they were precluded from obtaining no-fault benefits arising from the accident. Although this same Court had previously held that plaintiffs sufficiently alleged that a "special relationship" was formed by Statute (Vehicle and Traffic Law §§ 600, 603 require police to make police reports) (see Cunningham v. City of New York, 28 Misc.3d 84 [2010]), the First Department's later decision in *Bouet v. City of New York*, 125 AD3d 539 (2015) was dispositive of plaintiffs' claims and required their dismissal. In *Bouet*, the Court held that no special relationship arises where police "failed to record the identity of the owner and/or operator of the vehicle that struck" an individual—reasoning that the provisions of law requiring police to request the license and insurance identification card of drivers involved in an accident, and to prepare an accident report (see Vehicle and Traffic Law §§ 600, 603) ***neither "authorize a private right of action nor were they otherwise enacted for the benefit of a particular class of persons as opposed to the public at large***." In any event, even were the Court to assume that the municipal defendants breached a special duty owed to plaintiffs, defendants established, prima facie, that plaintiffs did not sustain any actual or ascertainable damages as a result of the breach. Plaintiff's contention that the absence of a police report precluded them from obtaining no-fault benefits in connection with the underlying accident was flatly contradicted by the unrebutted documentary evidence, viz., a no-fault arbitration award, which conclusively established that plaintiffs' medical expenses were paid by the no-fault insurer.

3. Special Duty formed by municipal officer assuming "positive control of a known and dangerous safety condition"

Delanoy, Jr., et al. v. City of White Plains, et al., 122 A.D.3d 663, 995 N.Y.S.2d 725 (2nd Dep't 2014). Plumber brought negligence action against city and city plumbing inspector who directed the plaintiff to perform a clearly unsafe air pressure test. ***The jury determined that the City and its inspector took "positive control of a known and dangerous safety condition***", which is one of the ways the government can create a "special duty" to a plaintiff. In addition, the jury's determination that the inspector was performing *ministerial* acts, rather than discretionary acts was not contrary to the weight of the evidence. Jury verdict against City upheld.

4. Third Party Claims For Contribution Can Proceed Even Where No Special Duty is Shown

Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs., 120 A.D.3d 1323, 993 N.Y.S.2d 98 (2nd Dep't 2014). Student in GED course at county facility leased by not-for-profit organization sued County and the not-for-profit after she was sexually assaulted by maintenance worker whom County had referred to the not-for-profit for hire at facility, despite worker's designation as level three sex offender. Prior to this, the County had agreed to not refer anyone to work at the not-for-profit who had a criminal record. On SJ, Court held that plaintiff's direct case against the County had to be dismissed because governmental immunity applied. The County did not voluntarily assume a special duty to the plaintiff, i.e., there was no special relationship. Nevertheless, the third party action by the not-for-profit against the County survived summary judgment. A contribution claim can be made even when the contributor has no duty to the injured plaintiff. Here, the County agreed not to refer anyone to the not-for-profit who had a criminal background.

Nonetheless, the County referred a level three offender to the not-for-profit. There was a triable issue of fact as to whether the County breached a duty of care to the not-for-profit.

D. Qualified Immunity for Highway Design and Other Designs

Jones, et al. v. State of New York, 124 A.D.3d 599, 1 N.Y.S.3d 293 (2nd Dep't 2015). Claimant was traveling on the Robert Moses Causeway when her vehicle drifted to the right and her two right tires dropped from the roadway surface onto the shoulder. She lost control of her vehicle when she remounted the roadway, and, as a result, the vehicle went off the road and struck a tree. The claimant contended that the State had improperly maintained the shoulder of the roadway such that there was a six-inch vertical drop from the level of the pavement to the level of the shoulder. Court upheld the Court of Claims trial verdict that claimants had failed to establish the existence of a dangerous condition. The claimants presented no evidence as to the actual height differential between the roadway and the shoulder in the area where the accident occurred, and the court was not required to credit the estimate of six inches put forward by their witnesses.

Lindquist, et al. v. County of Schoharie, 126 A.D.3d 1096, 4 N.Y.S.3d 708 (3rd Dep't 2015). Plaintiff's vehicle left the road on a curve, traveled down an embankment, and struck a tree. The complaint contained a single negligence cause of action that, in addition to allegations pertaining to negligent maintenance and repair, claimed that defendant "caused, created and maintained" a defective and unsafe condition on the road. Plaintiff had no memory of the accident and did not know why her car left the road, other than her speculative testimony that she might have been "reaching around to check on my kids, you know", when it was happening. Plaintiffs neither made an evidentiary showing that defendant breached a duty to supply a guide rail or wider clear zone, nor showed that such failures proximately caused the accident or plaintiff's injuries. With regard to the speed limit, there was no showing of a breach of duty by defendant. As for proximate cause, Plaintiff's amnesia as to the cause of the accident did not excuse her from submitting prima facie proof of proximate cause. SJ to defendant.

Turturro v. City of New York, 127 A.D.3d 732, 5 N.Y.S.3d 306 (2nd Dep't 2015). Infant was struck by an automobile while riding his bicycle on Gerritsen Avenue in Brooklyn. According to a police report, the vehicle was traveling at a minimum speed of 54 miles per hour in a posted 30 mile-per-hour zone at the time of impact. As against the City, plaintiff alleged, among other things, that the City was negligent in that it received numerous complaints that vehicles were speeding and racing along the entire length of Gerritsen Avenue, but completely failed to conduct a proper and adequate study of this speeding problem, and failed to implement a reasonable plan to control or resolve the dangerous condition presented on the roadway. Since a municipality's duty to keep its roads and highways in a reasonably safe condition is proprietary in nature, the City's defense that that it could not be held liable under the plaintiffs' theory absent the existence of a "special duty" to the infant plaintiff was rejected. The Court explained that, in the field of traffic design engineering, a municipality is accorded only *qualified immunity* from liability arising out of its highway planning decisions, which only shields the defendant where the municipality has conducted a study which "entertained and passed on the very same question of risk" as was alleged by the plaintiff. Indeed, a municipality may be held liable if, "after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures may be necessary to alleviate the condition". Moreover, after a municipality implements a traffic plan, "it is 'under a continuing duty to review its plan in the light of its actual operation". Here, the testimony and documentary evidence indicated that, over a period of several years prior to the subject accident, the City had received numerous complaints from neighborhood residents and elected officials that certain intersections along Gerritsen Avenue that were not controlled by traffic signals posed a danger to school children crossing the street, and that vehicles were speeding and racing along the entire length of Gerritsen Avenue, thus creating a dangerous speeding condition. The City tendered evidence showing that, in response to these complaints, the Intersection Control Unit (hereinafter the ICU) of the New York City Department of Transportation (hereinafter the DOT) conducted several traffic studies related to Gerritsen Avenue. While it was undisputed that these

studies considered and addressed the issue of whether traffic signals were warranted at the specified intersections, there was conflicting testimony as to whether these studies also considered and addressed the question of what reasonable measures might be necessary to respond to the risks presented by vehicles speeding and racing along the overall length of Gerritsen Avenue. Thus, contrary to the City's post-trial contention, there was a valid line of reasoning supporting the jury's apportionment of some fault to the City.

Gugel v. County of Suffolk, 120 A.D.3d 1189, 992 N.Y.S.2d 543 (2nd Dep't 2014). A municipality is immune from liability "arising out of claims that it negligently *designed* [a] sewerage system, however, a municipality "is not entitled to governmental immunity arising out of claims that it negligently *maintained* the sewerage system as these claims challenge conduct which is ministerial in nature". In order for a municipality to demonstrate its prima facie entitlement to judgment in sewer backup cases, the municipality must show that it had no "notice of a dangerous condition" and that "it regularly inspected and maintained the subject sewer line". Here the County's proof regarding its regular inspection and maintenance of the sewer system was deficient. The County failed to demonstrate its entitlement to judgment.

Moskovitz, etc., et al., v. City of New York, 130 A.D.3d 991 (2nd Dep't 2015). The infant plaintiff was injured when she fell on playground equipment located at McCarren Park in Brooklyn. The City moved for summary judgment dismissing the complaint based, inter alia, on qualified governmental immunity grounds. The motion to dismiss based on qualified immunity was dismissed because, while a municipality will generally be accorded qualified immunity from liability arising out of its planning decisions, a governmental body may be liable for a planning decision when its study is "plainly inadequate or there is no reasonable basis for its plan" and here 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.

Frechette v. State of New York, 129 A.D.3d 1409, 13 N.Y.S.3d 266 (3rd Dep't 2015). Estate of motorist who was killed when the vehicle she was operating spun out on a patch of windblown snow on a state highway, and crossed into another lane of traffic where it was struck by a truck, brought action alleging that the state was negligent in, among other things, failing to warn motorists of the danger of windblown snow or to take reasonable measures to prevent it from accumulating on the roadway. Defendant won summary judgment below on the novel argument that the storm in progress doctrine applied to windblown snow that has accumulated on a public highway during periods of high winds. The Appellate Court reversed and denied SJ. No Court had previously addressed the issue of whether the storm in progress doctrine could be applied to hazards created solely by wind, nor whether it might be invoked by defendant to modify its "nondelegable duty to maintain its roadways in a reasonably safe condition" (the doctrine has been used exclusively in slip and fall cases). The Appellate Court rejected the expansion of the use of the doctrine. The defendant lost on the qualified immunity defense as well. Plaintiff claimed defendant had received notice of the dangerous recurrent hazard of windblown snow on the roadway well before that date, but nonetheless failed to take reasonable measures to remedy the hazard or warn motorists of the danger. "Once a defendant is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger". The evidence showed that in the 10 years preceding the accident, defendant's agents were contacted on several occasions regarding concerns about the safety of the road in the vicinity of the accident. There was a long history of snow and ice-related accidents in the vicinity of the crash site. There was also testimony from DOT supervisors and the snow plow operator assigned to the subject roadway who testified that the area was prone to windblown snow prior to decedent's accident. Most notably, the snow plow operator stated that the problem of windblown snow on the roadway occurred "every time the wind blows, it's in the same spot every year." Plaintiff's expert testified that the conditions at this site called for the installation of a snow fence that "could have mitigated—if not prevented—the accident." Although defendant contended that its decision not to utilize a snow fence or other measures intended to mitigate the hazard of windblown snow resulted from a "reasoned plan or study," the record was inadequate to demonstrate, as a matter of law, that such a study was undertaken.

Evans v. State of New York, 30 A.D.3d 1146, 817 N.Y.S.2d 228 (3rd Dep't 2015). In this case the issue was whether the alleged roadway defect was a "design" issue (in which case qualified immunity would apply) or merely a roadway "maintenance" issue (in which cause no qualified immunity would apply). The facts were that an on-duty Deputy Sheriff was driving on a washed out roadway where a sinkhole caused his car to bottom out, launch into the air and land with such force that he injured his back. The gravamen of the claim was that the 9–foot–high, 15–foot–wide oval culvert that carried a creek underneath the highway was too small and should have been replaced. The culvert that caused the flooding was installed many years before in accordance with the design standard that required culverts to be built to withstand a "50 year storm," meaning the worst storm on record in the past 50 years. Defendant's engineers inspected the culvert periodically, beginning in accordance with an established culvert inspection program. After these inspections, the culvert was assigned satisfactory ratings until 2008, when defendant's engineers determined to assign it the lowest possible rating that a functioning culvert could receive. The culvert was slated to be replaced, but there were many other culverts that also needed replacing, and this particular culvert did not get replaced until sometime after the accident. The Court found that the replacement of the culvert presented a design and not a maintenance issue and that defendant was entitled to qualified immunity. Further, the case was dismissed on qualified immunity grounds because the evidence supported the Court of Claims' assessment that the timing of the replacement was due to legitimate funding priorities and, thus, the delay in ultimately replacing the culvert was not unreasonable.

E. Malfunctioning Traffic Light Cases

Watt v. County of Nassau, et al, 130 A.D.3d 613, 13 N.Y.S.3d 192 (2nd Dep't 2015). Motorist sued for injuries sustained in motor vehicle accident caused by the traffic signal governing the intersection, which was not working properly at the time of the accident. Pursuant to a written service contract between the defendant County and the private defendant, private defendant was required to respond to a malfunctioning traffic light within two hours of its receipt of the notification. On the day of the accident, about 1 hour and 15 minutes prior to the accident, private defendant received notification from the Police Department that the traffic signal at the subject intersection was malfunctioning. Private defendant responded to the scene and repaired the condition after the accident but within 2 hours after it had received notice of the defect. Private defendant established that it did not owe the plaintiff a duty of care, since its limited maintenance contract with the County did not displace the County's duty to maintain the traffic signal at the subject intersection in a reasonably safe condition and it did not launch an instrument of harm. Further, the County, established, prima facie, that it maintained the traffic light at the subject intersection in a reasonably safe condition and that it did not have sufficient time to remedy the alleged malfunction. In opposition, the plaintiff failed to raise a triable issue of fact. (Note: Qualified immunity defense does not apply to malfunctioning traffic light cases because they do not entail allegations of negligent ***design or planning***, but only ***negligent maintenance.***)

F. Absolute Immunity for Judicial Decisions

Polanco v. State of New York, 130 A.D.3d 1494 (4th Dep't 2015). Prisoner brought action for damages against State when he was denied parole, alleging the negligence of State Parole Board employees in performing their official duties. The case was dismissed for lack of subject matter jurisdiction and based on absolute immunity. As for subject matter jurisdiction, "regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims". Although claimant characterized his claim as one for money damages, the adjudication of his claim required a review of the underlying administrative determination, over which the Court of Claims lacked subject matter jurisdiction. In any event, the claim was also denied based on ***absolute governmental immunity***. Determinations pertaining to parole and its revocation are deemed strictly sovereign in nature and, accordingly, the State, in making such determinations, is absolutely immune from tort liability.

G. **Other Immunity Arguments: Executive Law § 25(5)**

Pierce v. Hickey, 129 A.D.3d 1287, 11 N.Y.S.3d 321 (3rd Dep't 2015). Motorist brought personal injury action against county and county employee, seeking to recover damages for injuries she sustained when storm debris being transported by employee fell off his truck and struck motorist in the head. Citing the looming public health crisis allegedly brought about by the large volume of debris generated in the wake of Hurricane Irene and Tropical Storm Lee, defendants contended that they could not be held liable for the manner in which they elected to transport debris from the DPW garage on the date of plaintiff's accident. Specifically, defendants' relied on Executive Law § 25(5), which governs a municipality's allocation and use of governmental resources, e.g., equipment, supplies and/or personnel, upon the threat or occurrence of a local disaster. To that end, the statute provides that "[a] political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee carrying out the provisions of this section" (Executive Law § 25 [5]). In the Court's view, however, the scope of the immunity conferred by Executive Law § 25 was clear: When faced with a disaster, a political subdivision's chief executive may, for example, decide where to set up a makeshift hospital or aid station, prioritize and determine which streets to clear or allocate supplies and personnel as he or she sees fit, and such discretionary determinations, in turn, will not serve as a basis upon which to expose the political subdivision to liability. In other words, a disgruntled homeowner who is confronted with a flooded basement and is living on an impassable residential street cannot seek to hold a locality liable for damages simply because its chief executive deemed it more important to first clear a path to the local hospital or to pump out the holding cells in the local police station. That said, the immunity conferred by Executive Law § 25(5) does not grant a political subdivision carte blanche to perform a discretionary function in any manner that it sees fit—particularly in a manner that poses a danger to the traveling public. Here, a valid—and discretionary—determination may well have been made that the removal of storm debris from, among other locations, the DPW garage was a priority and, further, that transporting such debris in open containers was the most efficient and expeditious way to do so. The discretionary nature of these broad, resource-based decisions, however, did not obviate the need for defendants to comply with the provisions of Vehicle and Traffic Law § 380–a(1) in terms of the actual transport of such debris. As the immunity conferred by Executive Law § 25(5) does not extend to the particular facts of this case, Supreme Court properly denied defendants' cross motion for summary judgment dismissing plaintiff's complaint.

IV. **PRIOR WRITTEN NOTICE AND OTHER SIDEWALK/STREET LIABILITY ISSUES**

A. **Prior Written Notice Required or Not?**

DeSalvio, et al. v. Suffolk County Water Authority, et al., 127 A.D.3d 804, 7 N.Y.S.3d 331 (2nd Dep't 2015). Plaintiff brought action against town and county water authority when she tripped and fell over a water vault cover. The defendant **Town** met its burden of proof for summary judgment with an affidavit from its Town Clerk demonstrating that it did not receive prior written notice of the condition alleged, and that it did not create the alleged condition through an affirmative act of negligence. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the Town created the alleged condition through an affirmative act of negligence. The defendant **Water Authority**, however, did not get out on summary judgment. No "prior written notice" rule applies to a Water Authority. Its submissions failed to demonstrate that it did not have constructive notice of the alleged condition. Since the Water Authority failed to meet its prima facie entitlement to judgment as a matter of law in the first instance, the burden never shifted to the plaintiffs to raise a triable issue of fact with respect to the Water Authority.

Craig v. Town of Richmond, 122 A.D.3d 1429, 997 N.Y.S.2d 566 (4th Dep't 2014). Plaintiff was thrown from his motorcycle on a road owned and maintained by defendant. It was undisputed that there was no prior written notice. Although plaintiff was correct that the prior written notice laws do not apply to a

municipality's failure to erect proper speed limit or other traffic control signs or to similar claims alleging negligence in the design or construction of a roadway, that principle did not apply here where plaintiff claimed that defendant failed to erect signs warning motorists of the *condition of the pavement*. Allegations of poor conditions of the pavement required prior written notice, and thus alleging the defendant should have warned of such conditions also required prior written notice.

Poveromo v. Town of Cortlandt, 127 A.D.3d 835, 6 N.Y.S.3d 617 (2nd Dep't 2015). Plaintiff motorcyclist was injured – he claimed – because an abutting property owner allowed a large evergreen tree to remain on his property, which obscured the vision of motorists navigating the subject intersection. With respect to the Town, the plaintiff alleged that the Town was negligent in that it allowed the dangerous limited sight condition created by the evergreen tree to remain. The plaintiffs also alleged that the Town was negligent in creating a dangerous condition by painting certain street lines and by failing to install appropriate traffic control devices at the subject intersection. The Town moved pursuant to CPLR 3211(a) to dismiss the complaint, which motion was granted in part because the allegation that vegetation obstructed a driver's view of the intersection and of traffic on the intersecting roadways was subject to the Town's prior written notice statute. The plaintiff did not even allege that the Town had prior written notice of any obstructed sight lines. But the portion of the complaint that alleged the Town negligently created a dangerous condition by painting certain street lines and by failing to install appropriate traffic control devices at the subject intersection survived. The prior written notice provision of a Town Code does not apply to a claim that a municipality created a defect or hazard through an affirmative act of negligence such as the Town's allegedly negligent act of painting certain street lines, or to a claim that the municipality failed to provide appropriate traffic control devices at an intersection. The qualified immunity doctrine (*Weiss v. Fote*) would apply to that defense, but the claim could not be dismissed under CPLR 3211.

Frenchman v Lynch, 97 A.D.3d 632, 948 N.Y.S.2d 396 (2nd Dep't 2012). Plaintiff was injured in a motor vehicle accident caused in part by a malfunctioning traffic light. Plaintiffs sued the County of Nassau and Welsbach Electric Corporation of Long Island, the company that maintained the traffic light pursuant to a contract with the County. Defendant submitted an affidavit from a County employee who stated there was no written records of prior notice of the alleged defect. But Nassau County's prior written notice statute -- Administrative Code § 12-4.0(e) -- was not applicable to defective traffic lights. The plaintiffs raised a triable issue of fact regarding whether the County had prior ***oral*** notice of a dangerous condition at the subject intersection, thus showing an issue of fact as to negligence.

B. Only required for sidewalks, streets, etc.

Cieszynski v. Town of Clifton Park, 124 A.D.3d 1039, 2 N.Y.S.3d 243 (3rd Dep't 2015). Pedestrian tripped on piece of metal rebar that was protruding from the ground while traversing grassy area near highway to enter shopping center parking lot. She sued town and shopping center parking lot owner. Town moved for summary judgment on grounds that plaintiff failed to provide prior written notice of the alleged defect. The issue was whether the grassy area in question constituted either a highway, a sidewalk or a site that serves the same "functional purpose" as a highway or sidewalk so as to require prior written notice. The Court noted that a highway "encompasses the associated shoulders, guardrails, embankments, retaining walls and culverts" and "whether the land adjacent to a highway is paved or otherwise improved does not determine its status as a shoulder; rather, the inquiry is whether the area in question creates a general right of passage for the traveling public". The Town failed to establish that the grassy area where plaintiff fell was designed or intended to provide a general right of passage nor did the grassy area fall within the definition of "sidewalk". The grassy area did not lie between a sidewalk and a roadway and the mere fact that plaintiff was traversing the grassy area to access the nearby parking lot did not render it the functional equivalent of a sidewalk. Motion dismissed.

C. Highway Law § 139: Constructive Notice Is Enough

Rauschenbach v. County of Nassau, 128 A.D.3d 661, 9 N.Y.S.3d 110 (2nd Dep't 2015). Bicyclist fell when he hit a pothole on a road maintained by the County of Nassau. The Court noted that, notwithstanding the existence of a prior written notice statute, a County may be liable for an accident caused by a defective highway condition where the County has constructive notice of the condition (see Highway Law § 139[2]) The County submitted the deposition testimony of a County employee who inspected the roadway where the fall occurred every Monday through Friday until the week before the accident, and did not observe any potholes. This was sufficient to establish, prima facie, that the County lacked constructive notice of the alleged defect. However, in opposition to the County's motion, the plaintiff submitted the affidavit of an expert who inspected the subject roadway and opined that the defect was in existence for at least four months prior to the accident. This affidavit was sufficient to raise a triable issue of fact as to whether the County had constructive notice of the alleged defect by virtue of the fact that it existed for so long a period that it should have been discovered and remedied in the exercise of reasonable care and diligence.

D. Highway Law § 12(5) Liability

Buto v. Town of Smithtown, 121 A.D.3d 829, 994 N.Y.S.2d 366 (2nd Dep't 2014). Pedestrian tripped and fell on a defect in a curb near a sewer. The curb was part of a roadway owned by the State of New York. The Town moved for summary judgment because it did not own the roadway. Plaintiff contended that Highway Law § 12(5) imposes a duty upon a town to maintain curbs on state-owned highways that have been widened by the town, and as such, the Town's motion was premature inasmuch as the Town failed to provide disclosure as to whether it widened the subject roadway. Court agrees, and dismisses the motion as premature.

E. Prior Written Notice Established by "Big Apple Map"

Bartels v. City of New York, 125 A.D.3d 583, 6 N.Y.S.3d 60 (2nd Dep't 2015). Pedestrian tripped and fell in a tree well. Argued that the tree well should have been protected by a fence or barrier. Issue was sufficiency of Big Apple map notice. Court held that the map provided the City with notice that the subject tree well was unprotected and potentially hazardous. The map showed and named the defect as a lack of barrier or fence. Defendant also argued that the notice of claim was deficient because it did not specifically mention lack of barrier or fence. It alleged only a "defective condition". But City's investigation of the claim was not prejudiced by this. Nor could the City articulate how investigating a defective sidewalk would differ from investigating an unsecured tree well at the same location. Motion to dismiss denied.

Fleisher v. City of New York, 120 A.D.3d 1390, 993 N.Y.S.2d 112 (2nd Dep't 2014). Trial Court erred in denying the plaintiffs' application to admit the Big Apple map into evidence. The map was relevant to the issue of whether the City had prior written notice of the defect in the sidewalk that allegedly caused the injured plaintiff to fall. Moreover, the plaintiffs did not seek to admit the map for its truth, that is, whether the map accurately depicted the claimed sidewalk defect. Rather, they properly sought to admit it for the non-hearsay purpose of establishing that the City had notice of the alleged defect at least 15 days prior to the injured plaintiff's accident, as required by Administrative Code of the City of New York § 7–201(c)(2). Contrary to the City's contention, since the map as offered did not constitute hearsay, the plaintiffs were not required to establish that the map satisfied the requirements of CPLR 4518, the business records exception to the hearsay rule. Moreover, the testimony of a City employee who worked with Big Apple maps on behalf of the DOT for many years was sufficient to lay a proper foundation for the admission of the map.

F. Inter-Office Writings within Municipal Office Do Not Constitute "Written Notice"

Wolin v. Town of North Hempstead, 129 A.D.3d 833, 11 N.Y.S.3d 627 (2nd Dep't 2015). Pedestrian tripped and fell on sidewalk raised by tree roots. The Town established its prima facie entitlement to SJ by submitting the affidavits of the statutory designees, the Superintendent of Highways and the Town Clerk, both of whom averred that a search of the appropriate records had been done and there was no prior written

notice of the alleged defective condition that caused the plaintiff's accident and that the Town did not undertake any construction, repair, or alteration of the subject sidewalk. Contrary to the plaintiff's contention, the various writings that were prepared by Town employees in response to a verbal complaint did not satisfy the prior written notice requirement. In addition, a system-generated email concerning the removal of a tree located adjacent to the subject sidewalk, which was sent to, among others, a local council member, did not satisfy the statutory requirement that written notice be "manually transcribed by the complainant," and be given to the Town Superintendent of Highways or the Town Clerk. The fact that the Town may have inspected the area where the plaintiff fell prior to her accident in connection with the removal of the tree does not obviate the need for prior written notice.

Wilson v. Incorporated Village of Hempstead, et al., 120 A.D.3d 665, 991 N.Y.S.2d 651 (2nd Dep't 2014). Motorcyclist sued Village for pothole in public street that caused him to be thrown from his bike. Village submitted the affidavit of the Village Clerk, who stated no prior written notice of the subject defect. In opposition, plaintiff submitted the sworn statements of two witnesses who lived on the street where the accident occurred. The first witness stated that the pothole condition was so severe that in January 2010, he telephoned the Village and left a voicemail with information with respect to the condition. He further claimed that "the Village did come and repair the pothole, yet it was repaired incorrectly because the patches quickly fell apart." The second witness also claimed that he reported the pothole condition to the Village by telephone and the Village repaired the pothole about two weeks later, but the pothole reappeared only one week later, after a rainstorm, and "was in the same condition." Court noted that a verbal or telephonic communication which was reduced to writing by the Village would not satisfy the prior written notice requirement. Case dismissed.

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

1. Must Prove Defendant Created the Hazard

Rodriguez v. City of New York, 130 A.D.3d 998, 13 N.Y.S.3d 574 (2nd Dep't 2015). Plaintiff tripped and fell over a raised portion of asphalt near a bus stop on Kings Highway in Brooklyn. The plaintiff's contention that the City failed to install a concrete bus pad, resulting in the formation of a physical defect in the roadway which caused her to fall, does not amount to an "affirmative act of negligence." Thus, the plaintiff's claim requires prior written notice pursuant to Administrative Code of the City of New York § 7–201(c), which in fact there was not.

Monaco v. Hodosky, 127 A.D.3d 705, 7 N.Y.S.3d 197 (2nd Dep't 2015). The conflicting testimony submitted by the Village presented triable issues of fact as to whether the Village's alleged repair work affirmatively created the alleged hazardous condition that proximately caused the plaintiff to fall. Since the Village did not satisfy its initial burden as the movant, the burden never shifted to the plaintiffs to submit evidence sufficient to raise a triable issue of fact.

Agard v. City of White Plains, 127 A.D.3d 894, 8 N.Y.S.3d 344 (2nd Dep't 2015). Pedestrian sued city and others for fall on icy roadway. The City established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the alleged icy condition, as required by section 277 of the Charter of the City of White Plains. Plaintiffs failed to raise a triable issue of fact as to whether the City's record-keeping, as it concerned its prior written notice logbook, was reliable, or whether the City created the icy condition through an affirmative act of negligence.

Fisher v. Village of New Square, 127 A.D.3d 807, 9 N.Y.S.3d 63 (2nd Dep't 2015). Pedestrian tripped and fell over a hole while crossing a public street at an intersection. At the time of the accident, there was a contract in place between the Village and the third-party defendant Town of Ramapo, pursuant to which the Town was responsible for street maintenance and repair in the Village. The Village established its prima facie entitlement to judgment as a matter of law by submitting evidence that it lacked prior written notice of the hole over which the injured plaintiff tripped, as required by its prior written notice statute. In opposition,

the plaintiff failed to raise a triable issue of fact as to whether the Village received prior written notice as required by its prior written notice statute or that either the Village or the Town, on the Village's behalf, created the hole through an affirmative act of negligence. Further, the plaintiffs did not allege that the special use exception applied.

Joyce v. Village of Saltaire, 126 A.D.3d 760, 5 N.Y.S.3d 490 (2nd Dep't 2015). Plaintiff slipped and fell while taking a shower at an open-air outdoor shower on the Broadway Beach boardwalk (considered part of the "sidewalk" or "boardwalk", and thus protected by the prior written notice rule) near the ocean in the Village of Saltaire on Fire Island. It was undisputed that the Village owned and maintained the outdoor shower area of the boardwalk on the date of the accident and for several years prior thereto, and that it had replaced the wood planking in the shower area of the boardwalk approximately one month prior to the accident. Plaintiff asserted the municipality created the defective condition by an affirmative act of negligence and the defendant failed to establish, prima facie, that it was entitled to judgment with respect to the claim. Defendant's motion for sj denied.

Santelises v. Town of Huntington, 124 A.D.3d 863, 2 N.Y.S.3d 574 (2nd Dep't 2015). Bicyclist struck object in the road and was thrown from his bicycle. Triable issue of fact exists as to whether a contractor hired by the Town created the subject defect during the course of the installation of storm drains and as to whether the Town was responsible for the creation of the defect through the contractor's actions.

2. Affirmatively Creating Hazard by Snow Removal Efforts

Lopez-Calderone v Lang-Viscogliosi, 127 A.D.3d 1143, 7 N.Y.S.3d 506 (2nd Dep't 2015). Infant plaintiff slipped and fell on snow and ice on a sidewalk fronting property belonging to a private defendant in the Village of Hempstead. Plaintiff created an issue of fact as to whether the Village had affirmatively created the hazard by its snow removal efforts. Further, contrary to the Village's contention, the fact that the ice and snow condition in the area of the accident was open and obvious did not preclude a finding of liability as against the defendant, but, rather, presented a triable issue of fact regarding the comparative fault of the infant plaintiff, the private defendant, and the Village. Furthermore, although the infant plaintiff testified at his deposition that he had problems with his balance, and usually wore inner soles in his shoes to help him maintain his balance, the Village failed to establish, prima facie, that the infant plaintiff's failure to wear inner soles in his shoes was the sole proximate cause of the accident.

3. Negligent Repairs: Defect Must Be Immediately Visible.

Monaco v. Hodosky, 127 A.D.3d 705, 7 N.Y.S.3d 197 (2nd Dep't 2015). Plaintiff tripped and fell over a defect in a sidewalk abutting premises owned by the defendants in the defendant Village of Bellport. The complaint alleged that the Village had created the subject defect by negligently patching a prior defect in that part of the sidewalk. In its SJ motion, Village submitted testimony that Village made repairs to the subject area of the sidewalk approximately one year before the alleged accident, and that after the repairs were made, that area of the sidewalk was in good condition. He also testified at his deposition that at the time of the accident, the accident site was in the same condition as when the repair was first made. But the Court denied the motion because of testimony from plaintiff and his witnesses that there was a height difference of four to six inches between the two concrete slabs. Issue of fact as to whether Village affirmatively created a defect.

Gonzalez, et al. v. Town of Hempstead, et al., 124 A.D.3d 719, 2 N.Y.S.3d 527 (2nd Dep't 2015). Pedestrian he tripped and fell on bolts protruding from a public sidewalk. The bolts were left in the ground after a bench that had been anchored to the sidewalk was damaged during an automobile accident. The Town established its prima facie entitlement to judgment by submitting the affidavit of the Highway General Crew Chief of the Town's Department of Highways, who averred that his search of the Town's records revealed

no prior written notice of any hazardous condition on the sidewalk where the accident occurred. The plaintiffs failed to raise a triable issue of fact in opposition.

DeVita v. Town of Brookhaven, 128 A.D.3d 759, 9 N.Y.S.3d 115 (2nd Dep't 2015). Plaintiff stepped on a curb in front of his residence, the curb crumbled under his foot. The curb was adjacent to a roadway maintained by the defendant Town of Brookhaven. About one year prior to the accident, a contractor on behalf the Town removed the asphalt from the road in preparation for a repaving of the road. The Town submitted transcripts of the deposition testimony showing that it did not have any record of prior written notice of the defect and that the contractor did not create a defect that was visible when the job was finished. Plaintiff failed to counter this evidence, and thus lost.

4. Abutting Landowner Liability

Palka v. Village of Ossining, 120 A.D.3d 641, 992 N.Y.S.2d 273 (2nd Dep't 2014). Plaintiff slipped and fell on an icy condition located on the sidewalk, but Village showed it lacked prior written notice of the allegedly dangerous icy condition, as required by Village Law § 6–628. As for the case against the abutting owner, although section 229–6 of the Code of the Village of Ossining required a landowner to remove snow and ice from abutting public sidewalks, it did not specifically impose tort liability for a breach of that duty, and hence there can be no liability for the same. Further, the plaintiffs did not allege that the private owners created the icy condition.

Maya v. Town of Hempstead, et al., 127 A.D.3d 1146, 8 N.Y.S.3d 372 (2nd Dep't 2015). Plaintiff tripped and fell due to a raised sidewalk flag adjacent to property located in the defendant Town. The abutting owner defendants owned the property abutting the sidewalk flag where the accident occurred. In support of their motion, the abutting owners demonstrated, prima facie, that they did not make special use of the sidewalk adjacent to their home. They also demonstrated, prima facie, that they did not negligently create the condition of the raised sidewalk flag through negligent sidewalk repair. Further, while the Code of the Town of Hempstead imposes a duty on, among others, landowners to keep contiguous sidewalks in good and safe repair, it does not impose tort liability upon such parties for injuries caused by a violation of that duty. In opposition, the plaintiffs failed to raise a triable issue of fact. Thus, abutting property owners were granted summary judgment. As for the Town, it established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the condition alleged, as required by section 6–3 of the Code of the Town of Hempstead. It further established that it did not create the condition through an affirmative act of negligence, or make special use of the sidewalk. In opposition, the plaintiffs failed to raise a triable issue of fact. Accordingly, Town's motion was granted as well.

H. **New York City Sidewalk Law**

1. Tree Wells

Newkirk v. City of New York, 129 A.D.3d 685, 10 N.Y.S.3d 545 (2nd Dep't 2015). The plaintiff was injured when she tripped and fell as a result of a difference in elevation between two cement slabs surrounding a tree within a tree well in front of premises owned by the private commercial defendant. Defendant argued it could not be held liable under § 7–210 of the Administrative Code of the City of New York, which imposes tort liability on abutting property owners for the failure to maintain city-owned sidewalks in a reasonably safe condition, because the plaintiff fell in a tree well, which is not considered to be part of a sidewalk for purposes of Administrative Code § 7–210. Court agreed: tree well was owned by the City of New York and defendant had no duty to maintain it.

Avezbakiyev v. Champion Commons, LLC, 122 A.D.3d 781, 997 N.Y.S.2d 156 (2nd Dep't 2014). Plaintiff tripped over a tree stump in a tree well in an area of a sidewalk on 64th Road in Queens. A tree well is not

part of the 'sidewalk' for purposes of that section of Administrative Code of the City of New York" and thus the defendants were not responsible for maintenance of the tree well.

Donadio v. City of New York, 126 A.D.3d 851, 6 N.Y.S.3d 85 (2nd Dep't 2015). Plaintiff fell on curbside tree well adjacent to a privately owned property in Queens. A tree well does not fall within the applicable Administrative Code definition of "sidewalk" and, thus, "section 7–210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells. There was no evidence that any condition concerning the sidewalk was a possible factor in the happening of the accident, and thus the property owner was let out on SJ. And since there was no prior written notice and the City did not create the defect, the City was let out, too.

2. Residential owner-occupied Exception

Shneider v. City of New York, 127 A.D.3d 956, 8 N.Y.S.3d 349 (2nd Dep't 2015). Pedestrian tripped and fell on an uneven sidewalk abutting defendants' property. The defendants demonstrated that they were exempt from liability pursuant to Administrative Code of the City of New York § 7–210(b) for their alleged failure to maintain the sidewalk abutting their property by establishing that the subject property was a single-family residence, that it was owner occupied, and that it was used solely for residential purposes. Further, they established, prima facie, that they could not be held liable for the plaintiff's alleged injuries under common-law principles. "Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use". Here, the defendants established, prima facie, that they did not create the alleged defective condition, and there is no contention in the pleadings that the alleged defect was caused by a special use. In opposition, the plaintiff failed to raise a triable issue of fact.

Starkou v. City of New York, 128 A.D.3d 802, 9 N.Y.S.3d 338 (2nd Dep't 2015). Plaintiff sued two sets of property owners adjacent to the area in the sidewalk where he slipped on ice. Once set of abutting property owners established their prima facie entitlement to judgment as a matter of law by submitting evidence that they were owner occupants of their two-family residence, which exempted them, pursuant to Administrative Code of the City of New York § 7–210(b), from liability for injuries caused by the failure to maintain the sidewalk in front of their property in a reasonably safe condition. The plaintiff's contention that the presence of a driveway on the property constituted a "special use" which removed the exemption provided by Administrative Code of the City of New York § 7–210(b) was not supported by plaintiff's own deposition testimony, which established that the plaintiff's fall occurred "in the middle, between the two buildings," and thus was not in the area of the sidewalk which contained the driveway. The other set of abutting property owners also established their prima facie entitlement to judgment as a matter of law. Those defendants demonstrated that, as owner occupants of their two-family residence, they had no statutory duty to clear snow or ice from the public sidewalk abutting their property and further demonstrated that they did not exacerbate any dangerous condition on the sidewalk by showing that they had taken no steps to clear ice on the morning that the plaintiff fell. In opposition to both motions, the plaintiff failed to raise a triable issue of fact.

Bisono v. Quinn, 125 A.D.3d 704, 4 N.Y.S.3d 226 (2nd Dep't 2015). The plaintiff allegedly was injured when she tripped and fell on a defect in a sidewalk abutting a detached garage of a two-family residential property owned by the defendants. Defendants failed to establish, prima facie, that their two-family residential property was owner occupied and that they were exempt from liability pursuant to Administrative Code of the City of New York § 7–210(b). The defendants also failed to establish, prima facie, that the defect did not arise as a result of their special use of the sidewalk as a driveway. Since the defendants failed to meet their initial burden as the movant, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact.

Medina v. City of New York, 120 A.D.3d 1398, 993 N.Y.S.2d 141 (2nd Dep't 2014). The defendant property owner failed to make a prima facie showing that he was entitled to judgment on the theory that he is exempt from liability pursuant to Administrative Code of City of N.Y. § 7–210(b). Although there was evidence that the subject property was a three-family residence, the owner's own deposition testimony raises issues of fact as to whether the premises were "owner occupied" within the meaning of Administrative Code § 7–210(b).

3. Which of Two Abutting Property Owners Liable?

Sangaray v. West River Associates, LLC, 121 A.D.3d 602, 996 N.Y.S.2d 13 (1st Dep't 2014). Plaintiff tripped and fell due to a height differential between two adjacent flags of pavement on a public sidewalk. The tripping hazard had developed because the lower of the two adjacent sidewalk flags had been allowed to cave in and sink without repair. The issue was: Which of two abutting property owners was responsible. Or were they both responsible? Plaintiff's surveyor located approximately 92–94% of the defect on abutting property owner A's property and 6–8% on abutting property owner B's property. The point at which the two flags met, forming the height differential on which plaintiff tripped, was unquestionably on defendant A's property. But, as the defendant A pointed out, he could not have corrected the defect on his own without the participation of defendant B. Had he attempted to raise the height of the portion of the sunken flag located at his property, such efforts would only have served to move the location of the tripping hazard to the property line, and in doing so, he could still have been liable for affirmatively creating the new tripping hazard. Yet defendant B sought and obtained summary judgment dismissing the complaint as against it, on the ground that the undisputed evidence established that the spot at which plaintiff tripped was on the sidewalk abutting the defendant A's property, and not defendant B's property. Based on the Court' reading of Administrative Code § 7–210, it was constrained to grant defendant B summary judgment. Because this 2003 legislative enactment was "in derogation of common law," and "creat[ed] liability where none previously existed," it must construe be strictly construed. Consequently, the provision's imposition of liability on ***owners of the property abutting the defect*** that caused plaintiff's injury could not be broadly construed to apply to the owner of the property next to that abutting property. When strictly construing the Code provision, it is irrelevant that the hazard here could only have been corrected by the two neighboring property owners together.

4. Liability for Negligent Snow Removal

Herskovic v. 515 Avenue Tenants Corp., 124 A.D.3d 582, 997 N.Y.S.2d 907 (2nd Dep't 2015). Defendant property owner established, prima facie, that the area in which the plaintiff slipped and fell was part of a pedestrian ramp, for which it was not responsible under Administrative Code of City of N.Y. § 7–210. However, a property owner that elects to engage in snow removal activities must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by a storm, and defendant failed to eliminate all triable issues of fact as to whether the black ice condition upon which the plaintiff allegedly slipped and fell was created by its snow removal efforts.

Mullaney v. City of New York, 125 A.D.3d 948, 5 N.Y.S.3d 146 (2nd Dep't 2015). The plaintiff slipped and fell on a sidewalk abutting a three-family house owned by the defendant. Since the subject premises were partially owner-occupied and used exclusively for residential purposes, defendant was exempt from liability imposed pursuant to Administrative Code of the City of New York § 7–210(b) for negligent failure to remove snow and ice from the sidewalk. Thus, the owner may be held liable for a hazardous snow and ice condition on the sidewalk only if she undertook snow and ice removal efforts that made the naturally occurring condition more hazardous or caused the defect to occur because of a special use. Unless one of these factors is present, the abutting owner of a three-family residence could not be held liable for the removal of snow and ice in an incomplete manner. Defendant established that her snow removal efforts did not create a hazardous condition or exacerbate a natural hazard created by the storm, and plaintiff did not establish an issue of fact in this regard.

5. City or Abutting Owner Responsible?

Weinstein v. WB/Stellar IP Owner, LLC., 125 A.D.3d 526, 4 N.Y.S.3d 182 (1st Dep't 2015). Plaintiff fell on a public sidewalk abutting a building owned by defendant. Before any discovery, defendant moved for summary judgment, arguing that it was not responsible for maintaining the portion of the sidewalk where the accident occurred, because the City had assumed responsibility for it. Defendant's property manager explained that the sidewalk was extended beyond its original width in 2000 as part of the Greenwich Street Improvement Project undertaken by the New York City Economic Development Corporation (EDC). Defendant relied on an unsworn letter sent to its predecessor in 2000 by an EDC project manager, who stated that, after the project was completed, maintenance requirements would remain the same as they had been, meaning that the owner of the abutting building would remain responsible only to the limits of the existing sidewalk. Plaintiff argued that defendant had a nondelegable duty to maintain the sidewalk under Administrative Code of City of N.Y. § 7–210. The Court held that defendant's motion should have been denied as premature, since plaintiff had no opportunity to depose defendant, codefendant friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion.

6. Landlord or Tenant Liable?

Oduro v. Bronxdale Outer, Inc., 130 A.D.3d 432, 13 N.Y.S.3d 46 (1st Dep't 2015). Plaintiff tripped and fell on a defect on the ground immediately outside the entranceway of a gym located on property leased to a fitness center. Neither defendant landowner nor the tenant was entitled to summary judgment dismissing the complaint. The landowner failed to make a prima facie showing that it lacked actual notice of the alleged defect. In addition, neither defendant was entitled to summary judgment in view of the triable issue arising from the record as to whether the defect was on the demised premises, for which H & S Fitness was responsible as tenant-in-possession and under the express terms of its lease, or on the adjoining public sidewalk, for which the landowner was responsible under New York City Administrative Code § 7–210.

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

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

1. What is an "Emergency Operation"?

Jones v. Albany County Sheriff's Department, 123 A.D.3d 1331, 999 N.Y.S.2d 260 (3rd Dep't 2014). Plaintiff contended that the police officer in an unmarked police car was negligent in making a U–turn without using a siren, emergency lights or a left turn signal, and was not engaged in an "emergency operation" (required to trigger the statute) of a police vehicle in that he was merely providing assistance to a police officer who did not need backup, and thus defendant was not protected by V&T 1104(a). But the officer was stopping to assist a fellow officer who appeared to be having trouble with a detained suspect on the sidewalk, and thus was undertaking an "emergency operation" when he struck plaintiff. Specifically, the officer observed his fellow officer holding the suspect's hands on top of his head and struggling as he frisked him, which he considered to be an emergency requiring his assistance. As such, the officer-driver was "pursuing an actual or suspected violator of the law," and/or "assisting at the scene of an accident, ... police call ... or other emergency". And because the officer was operating a police vehicle, he was exempt from the requirements applicable to other emergency vehicles to utilize audible signals, sirens, lights, horns and the like when reasonably necessary. Further, defendants established that the officer did not act with conscious indifference to the consequences of his actions, i.e., recklessly, and that plaintiff failed to demonstrate a triable, material issue of face on this dispositive issue.

2. What Constitutes "Reckless Disregard"?

Frezzell v. City of New York, 24 N.Y.3d 213, 21 N.E.3d 1028, 997 N.Y.S.2d 367 (2014). Appeal to Ct of Appeals from a 3-2 split Appellate Division. City police officer collided with another police car driving the wrong way on a one-way street during an emergency operation. He sued under GML § 205–e, predicated upon violations of Vehicle and Traffic Law § 1104. The defendant officer's driving the wrong way on a one way street was privileged and had to be reviewed under the heightened "reckless disregard" standard of Vehicle and Traffic Law § 1104(e). Whether the standard was met here was a fact-specific inquiry. The Court found that the defendant met its burden of establishing that the defendant officer's conduct did not amount to reckless disregard of a highly probable risk of harm "with conscious indifference to the outcome" as a matter of law. The evidence revealed that the defendant officer slowed down as he turned onto the one-way street and was driving below the speed limit on a clear and dry evening. Plaintiff's testimony that the defendant officer was traveling at a "high rate of speed" was insufficient to create a material question of fact in light of his admission that he could not the speed. In addition, the defendant officer testified as to the preventative measures he took to avoid the collision, namely braking hard and veering to the side of the street. Further, there were no issues of fact as to whether the officer was using his emergency lights and siren at the time of the accident. Moreover, section 1104 statutorily exempts police vehicles from the requirement that audible signals be emitted while an emergency vehicle is in motion. In the absence of any material questions of fact regarding whether the officer was speeding in poor road or traffic conditions, was inattentive, or otherwise proceeded in an unreasonably dangerous manner without caution or care for the safety of bystanders and motorists, it cannot be said that he acted with conscious indifference to the outcome.

Michaels v. Drake and City of Rochester, 120 A.D.3d 1593, 992 N.Y.S.2d 662 (4th Dep't 2014). It was undisputed that at the time of the accident the officer was operating his vehicle in response to a dispatch call concerning a domestic dispute. He was thus engaged in the emergency operation of a vehicle as defined in Vehicle and Traffic Law § 114–b as a matter of law and the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence. Although the officer admitted that he exceeded the speed limit in responding to the dispatch, speeding is expressly privileged under Vehicle and Traffic Law § 1104(b)(3) provided that the driver "does not endanger life or property" and his conduct did not constitute the type of recklessness necessary for liability to attach. The Court reviewed the trial record and upheld the jury's finding that the defendant did not act with reckless disregard.

Flynn v. Sambuca Taxi, LLC and The City of New York, et al., 123 A.D.3d 501, 999 N.Y.S.2d 27 (1st Dep't 2014). Unmarked police car collided with a taxi, in which plaintiff was a passenger. The officer driving the police vehicle testified that he observed a vehicle commit a traffic infraction. He put on his lights and siren and followed the vehicle to the intersection where the offending vehicle ran through the red light. The officer stopped before entering the intersection, and looked left, the direction from which traffic would have been coming, but saw nothing. He then proceeded through the intersection, where he collided with the taxi. Court granted SJ to defendant because there was no "reckless disregard". The officer's uncontroverted testimony was that he came to a complete stop prior to entering the intersection, that he looked in the direction of, but did not see, the approaching taxi. That issues of fact exist as to whether the police lights were on or whether the siren was activated, was not material, as a police vehicle performing an emergency operation is not required to activate either of these devices, in order to be entitled to the statutory privilege of passing through a red light (Vehicle and Traffic Law § 1104 [c]).

Harris v City of Schenectady Police Dept., 124 A.D.3d 1124, 1 N.Y.S.3d 567 (3rd Dep't 2015). Police officer turned his police cruiser left as he exited police department parking lot and collided with plaintiff's automobile. There was no question that the cop was engaged in an emergency operation (pursuing a suspect) while driving an emergency vehicle and, as such, the only question presented was whether his conduct rose to the level of recklessness. The officer testified that prior to turning onto the street in order to follow the suspect, he looked in both directions to ensure that no traffic was coming. His view of the southbound lane was obscured, however, by several illegally parked vehicles. The officer then turned left

onto the street and collided with plaintiff. The officer did not activate his emergency lights or siren prior to turning, and plaintiff testified that it did not appear that the officer had his headlights on. Court held that, inasmuch as the pursuit had just commenced and he checked for oncoming traffic before turning, his failure to have lights and sirens on constituted nothing more than "a momentary lapse in judgment not rising to the level of 'reckless disregard for the safety of others' ". As a matter of law, no reckless disregard.

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

1. What is "Actually Engaged" in protected work?

Matsch v. Chemung County Dept. of Public Works, 128 A.D.3d 1259, 9 N.Y.S.3d 724 (3rd Dep't 2015). The primary issue on appeal was whether the street sweeper was "actually engaged" (as required by VT 1003[b]) in protected work while operating the street sweeper westbound on I–86. The reckless disregard standard is applicable "only when such work is in fact being performed at the time of the accident" and does not apply when the person and vehicle is traveling from one work location to another. The Court noted that, while the sweeper was not actually "sweeping" at the time of the collision, the sweeper was also not merely traveling from one work site to another. Rather, she was assigned to clear the gravel on I–86 eastbound and, in order to accomplish this task, it was necessary for her to pass over the affected area a number of times without actually sweeping. Given the location and circumstances of the spill, she was required to follow the circuitous route to complete the assigned work. The Court rejected plaintiff's argument that because the broom was not engaged at the time of the accident, the street sweeper was not "actually engaged" in protected work. The street sweeper did not necessarily need to be in the debris area in order to be "actually engaged" in protected work. Further, in light of the trooper's testimony that he saw the sweeper check her mirror and look to the left and right before moving to the passing lane, defendants met their prima facie burden of demonstrating that the street sweeper's failure to observe plaintiff before moving to the passing lane was not conduct that amounted to reckless disregard for the safety of others (see Vehicle and Traffic Law § 1103[b]).

2. Large City Codes May Trump VTL § 1103

Deleon v New York City Sanitation Dept., 25 N.Y.3d 1102, ---N.E.3d--- (2015). Motorist brought action against city to recover damages for injuries sustained when city sanitation street sweeper operator rear-ended motorist's vehicle. The main issue on summary judgment was whether the "reckless disregard" standard applied. The Appellate Division concluded that, under the Rules of the City of New York in effect at the time of the accident (discussed below), the negligence standard, and not the reckless disregard standard applied. The Court of Appeals here reverses and holds the reckless disregard standard of care applied. The analysis involves first VTL § 1642, which authorizes cities of more than one million inhabitants, such as the City of New York, to establish additional rules of the road, including rules that supersede those of and V&T law. At the time of the accident, the City's 34 RCNY § 4–02(d)(1)(iv) provided that VTL § 1103 (reckless disregard standard for municipal vehicles involved in road work or maintenance) applied "to any person or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway". Although this section would seem to make the reckless disregard standard apply here, plaintiff contended it did not apply to "sweepers" and the correct standard for sweepers was found in another provision in effect at the time of the accident, namely 34 RCNY § 4–02(d)(1)(iii)(A), titled "Snow plows, sand spreaders, ***sweepers*** and refuse trucks". That subparagraph provided, in relevant part, "The operator of a New York City Department of Sanitation ... ***sweeper*** ..., while in the performance of his/her duty and acting under the orders of his/her superior may make such turns as are necessary and proceed in the direction required to complete his/her cleaning ... operations subject to § 1102 of the VTL (which requires compliance with police and other official traffic instructions). Plaintiff argued that, by its silence, this provision applied a negligence standard to ***sweeper*** operators. The Court disagreed. After deciding that the reckless disregard standard applied, the Court nevertheless denied SJ to defendant.

Material issues of fact remained as to whether defendant operated his street sweeper in a reckless manner and the extent of plaintiff's own negligence.

VI. SCHOOL LIABILITY

A. Negligent Hiring or Retention

Timothy Mc. v Beacon City Sch. Dist., 127 A.D.3d 826, 7 N.Y.S.3d 348 (2nd Dep't 2015). This action arose out of a series of interactions between an infant who suffers from severe mental disabilities, and a school bus monitor. Plaintiff alleged she physically and mentally abused him and sued the school for negligent hiring and training as well as negligent supervision. The school defendants failed to establish, prima facie, that the school district had no specific knowledge or notice of bus monitor's propensity to engage in the misconduct alleged. In fact, the evidence submitted in support of the school defendants' motion suggested that the school district had received prior complaints of her misbehavior toward students on the bus. The burden thus never shifted to plaintiff.

B. After School Hours or Off School Premises (Generally no liability)

Giresi v. City of New York, et al., 125 A.D.3d 601, 3 N.Y.S.3d 88 (2nd Dep't 2015). Parent of three-year-old child who had run into the street from between two parked buses and who had been struck by a car in front of the public school where he attended pre-kindergarten filed suit against city and school district alleging negligent supervision and negligent traffic control. The infant had been released from school to his mother inside the school, near his classroom and then the plaintiff and his family members went outside and, while the plaintiff was speaking to another parent on the sidewalk around the corner from where they had left the school, the infant ran into the street from between two parked buses and was struck by a car driven by the vehicle. The municipal defendants moved for summary judgment, which was granted because the accident happened off school grounds while infant was in custody of a parent, and thus the school had no duty toward child at that point.

Mamadou S. v. Feliciano, 123 A.D.3d 610, 999 N.Y.S.2d 65 (1st Dep't 2014). 8th grader was hit by a car while playing tag in front of his school. He had darted or was pushed into the street. Although the driver of the car was not negligent in causing the accident, the record presented issues of fact as to whether defendant BOE owed a duty of care to protect the infant plaintiff from traffic hazards after he was discharged by the school bus in front of the school, five minutes before the school day would begin and whether that duty was breached by the school's failure to provide adequate safety measures, such as traffic barricades, proximately causing the injury.

MS, etc v. Arlington Central School District, et al, 128 A.D.3d 918, 9 N.Y.S.3d 632 (2nd Dep't 2015). Because the inappropriate conduct by the school's marching band instructor toward plaintiff occurred after school hours and off school grounds by means of their personal computers and cellular phones, the causes of action alleging negligent retention and supervision could not provide a basis for liability against the School. Although plaintiff first met the instructor through the marching band, plaintiff's injuries were not proximately caused by any negligent retention or supervision by the appellants. As for the causes of action for negligent supervision, defendant school was granted summary judgment since the wrongful acts occurred outside of the school grounds.

Tanaysha T., etc., et al. v. City of New York, et al., 130 A.D.3d 916, 12 N.Y.S.3d 908 (2nd Dep't 2015). In the summer of 2006, the infant plaintiff, who was then 14 years old, was sexually assaulted by her former eighth-grade math teacher. At the time of the incident, the teacher was tutoring the infant plaintiff at his home. IN support of its summary judgment motion, defendant established all alleged improper acts allegedly committed took place off school premises and outside of school hours, when the defendant did not have custody or control of the infant plaintiff and had no duty to monitor or supervise the teacher's conduct

Moreover, defendant demonstrated that the conduct of the teacher was personally motivated, and constituted a complete departure from his duties as defendant's employee, thereby negating any potential vicarious liability on the part of the defendant for the teacher's tortious acts

C. **Student on Student Assaults**

Mathis v. Board of Education of City of New York, 126 A.D.3d 951, 7 N.Y.S.3d 182 (2nd Dep't 2015). A fellow student allegedly placed plaintiff-student in front of a fourth floor window, opened the window, and held him partially out of the window. The infant plaintiff and his mother sued school alleging among other things, negligent supervision. In support of their motion for summary judgment, the defendants failed to establish they lacked sufficiently specific knowledge or notice of the dangerous conduct that caused the injury. In fact, the record indicated they may had knowledge of the offending student's dangerous propensities arising from his involvement in other altercations with classmates in the recent past. Thus, SJ denied.

Cruz v. Brentwood Union Free School District, 125 A.D.3d 924, 5 N.Y.S.3d 184 (2nd Dep't 2015). Plaintiff seventh-grader was assaulted by two fellow students. The District failed to establish, prima facie, that the alleged assault was an unforeseeable act or that it had no actual or constructive notice of prior conduct similar to the subject incident. Since the District failed to meet its prima facie burden, we need not consider the sufficiency of the plaintiff's opposition papers.

Thomas v. City of New York, 124 A.D.3d 872, 2 N.Y.S.3d 578 (2nd Dep't 2015). Child was thrown down from behind by another student during a game of half-court basketball in his eighth-grade gym class. The evidence demonstrated, prima facie, that the spontaneous act of the other student in grabbing the infant plaintiff's left arm from behind and throwing or dragging him to the ground as the infant plaintiff attempted to shoot a basketball during a basketball game in gym class occurred in such a short span of time that it could not have been prevented even by the most intense supervision. Thus, SJ granted to defendant.

D. **Sports and Gym Accidents at School**

Cohen v. Half Hollow Hills Central School District, 123 A.D.3d 1081, 1 N.Y.S.3d 196 (2nd Dep't 2014). Plaintiff infant fell from a balance beam during his school physical education class. The balance beam was about 12 to 14 inches high. There were mats below the balance beam, and the plaintiff fell onto the mats. Defendant demonstrated on SJ motion that the plaintiff was adequately supervised while he was engaged in an age-appropriate activity and, in any event, that the accident occurred in such a manner that it could not reasonably have been prevented by closer monitoring, thereby negating any alleged lack of supervision as the proximate cause of the plaintiff's injuries.

Jurgensen v. Webster Central School District, 126 A.D.3d 1423, 5 N.Y.S.3d 663 (4th Dep't 2015). Cheerleader was working with her teammates on a choreographed stunt that involved two cheerleaders, referred to as "bases," throwing plaintiff, the "flyer," into the air and then catching her as she came down in a horizontal position. During the second attempt, however, the daughter felt intense pain in her knee when the bases threw her into the air. The daughter curled herself into a ball while airborne, whereupon the two bases caught her and placed her on the mat. It turned out to be a torn anterior cruciate ligament in her knee. According to plaintiff, the injury occurred because one of the bases, i.e., another teammate, was practicing that day with a sprained ankle, which somehow caused the teammate to hold on to the daughter's foot for too long before throwing the daughter into the air. Plaintiff alleged defendant was negligent in allowing the teammate to participate in practice. The plaintiff admittedly was aware that the teammate had injured her ankle and that she had not been cleared to practice by the trainer. Moreover, the plaintiff had practiced the stunt with the teammate on the day in question before she tore her ACL and noticed that the base-anchored partially by the teammate-felt "a little more shaky" than usual. Thus, her case was barred by the doctrine of assumption of risk.

Jorge C. v. City of New York, 128 A.D.3d 410, 8 N.Y.S.3d 307 (1st Dep't 2015). Student ran into a pole while running from another student on a playground during gym class. Even assuming that plaintiff could demonstrate that the supervision during the gym class was inadequate, the defendant established a prima facie case for summary judgment by demonstrating that the accident was the result of a series of sudden and spontaneous acts and that any lack of supervision was not the proximate cause of the infant plaintiff's injury. Although the infant plaintiff did not testify as to exactly how much time elapsed, his testimony as to how the accident occurred, as a whole, demonstrated the injury was caused by the impulsive and unanticipated acts of one of the students finding a balloon, filling it with water and attempting to throw the water balloon at the infant plaintiff, and the infant plaintiff's running away and looking backwards, rather than ahead, which no additional supervision could have prevented. Plaintiff did not meet his burden in opposition.

Staten v. City of New York, 127 A.D.3d 1066, 5 N.Y.S.3d 530 (2nd Dep't 2015). Plaintiff high school student was attending a football camp operated by his public high school on camp grounds. He was standing outside the cabin to which he had been assigned, looking through the cabin window, when another student, who was inside the cabin, punched the window, causing the glass to break and injure his eye. On summary judgment, Court found that defendant met its burden of showing lack of supervision was not a proximate cause of the accident. In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs pointed to the fact that the student who broke the window was involved in an altercation some time before, for which he received an in-school suspension. However, that disciplinary history was insufficient to place the defendants on notice of dangerous conduct which requires a greater level of supervision. The infant plaintiff's injury was the result of a spontaneous, unanticipated act which could not have been averted through the exercise of greater supervision.

Braile v. Patchogue Medford School District of Town of Brookhaven, 123 A.D.3d 960, 999 N.Y.S.2d 873 (2nd Dep't 2014). 12–year–old student, a member of the girls' soccer team, was injured in soccer practice held indoors because it was raining outside. Among other activities, the coach of the soccer team paired up students to run a sprint against each other in a school hallway, which measured approximately 150 feet in length. The coach determined that the finish line would be a space past an open set of double doors; the area between the double doors was narrower than the hallway. Approximately 9–to–10 feet beyond the double doors, directly ahead of the racing path, was a hard wall. Plaintiff sprinted down the hall and tried to slow down at the unmarked finish line between the double doors, put her arms up to brace herself, but was unable to stop, causing her face to strike the wall. Defendant failed to establish that by voluntarily participating as a member of her school soccer team, the infant consented to the risks of racing in the school hallway. The defendant did not establish that the commonly appreciated risks which are inherent in and arise out of the nature of soccer generally and flow from such participation on the soccer team included the risks of running into a wall while racing in the school hallway.

Pierre v. Ramapo Central School District, 124 A.D.3d 614, 2 N.Y.S.3d 510 (2nd Dep't 2015). The infant plaintiff allegedly was injured while competing in her high school's "self-defense tournament," a voluntary competition open to female students who were enrolled in a self-defense class. The self-defense class was one of several electives that female students could take to satisfy the district's physical education requirement. The plaintiffs alleged that the defendant breached its duty of care to the infant plaintiff by allowing the class to be instructed by a person with little martial arts training, and allowing that person to referee the tournament. In its motion for SJ, defendant failed to establish, prima facie, that infant plaintiff consented to the risks associated with the move that ultimately caused her injuries. Rather, the defendant's submissions demonstrated that the risks of the move that ultimately caused the infant plaintiff's injuries were concealed and unreasonably increased. The deposition testimony indicated that, while the self-defense class incorporated moves from various martial arts forms, the instructor had no certifications in any of these martial arts and had had very little martial arts training. The move that caused the infant plaintiff's injury had not been taught by the instructor, but the students had been using this move, which was popularized in

Ultimate Fighting competitions, in class and during the tournament, and the instructor was aware of this fact. The infant's opponent used the move several times during the match, and even though the instructor admitted it might be dangerous, he did not stop the bout at that point nor warned the student not to use the move. SJ denied.

E. Premises Liability Claims against Schools

Wolfe v. North Merrick Union Free School District, 122 A.D.3d 620, 996 N.Y.S.2d 125 (2nd Dep't 2014). Plaintiff was injured while playing "manhunt" (a night-time hide-and-seek game) on school grounds at night. Plaintiff tripped over an elevated concrete platform and fell down an exterior stairway leading to the school's basement. Plaintiff alleged the area where the accident occurred was pitch dark and that he saw neither the elevated platform nor the staircase before he tripped and fell. On SJ motion, defendant failed to establish right to summary judgment on the ground that the action was barred by the doctrine of primary assumption of risk. The doctrine of primary assumption of risk is not applicable to the midnight game of manhunt or to "horseplay" generally as it is not the type of "socially valuable voluntary activity" that the doctrine seeks to encourage (Trupia v. Lake George Cent. School Dist., 14 N.Y.3d at 396, 901 N.Y.S.2d 127, 927 N.E.2d 547). The defendant did, however, establish its prima facie entitlement to judgment as a matter of law by submitting the plaintiff's deposition testimony describing the midnight game of manhunt and the affidavit of its expert, who opined that the amount of lighting was sufficient to illuminate the subject staircase on the night of the accident such that the staircase should have been open and obvious. In opposition, however, the plaintiff raised a triable issue of fact as to whether the defendant was comparatively negligent. The plaintiff submitted the affidavits of two of his friends who were also playing manhunt on the night of the accident, who stated that the area of the staircase was completely dark, and the affidavit of an expert who opined that the lighting at the staircase on the night of the accident was insufficient and below the minimum requirements set by good and accepted engineering practice.

Oldham-Powers v. Longwood Central School District, 123 A.D.3d 681, 997 N.Y.S.2d 687 (2nd Dep't 2014). Plaintiff stepped into a pole vault box while walking across a field in the sports facilities area of a High School. Prior to stepping into the pole vault box, she believed she was traversing a walkway, but she later learned she was walking along the pole vault runway. While she was walking, she was speaking to her daughter trying to determine which field to go to in order to watch her niece in a softball game, and she did not look down. Defendant met its burden for SJ on the ground that the pole vault box was not inherently dangerous and was readily observable to individuals employing the reasonable use of their senses. But plaintiffs raised a triable issue of fact as to whether the condition, while open and obvious, constituted a trap for the unwary. In this regard, the plaintiff submitted photographs of the pole vault area and the affidavit of the injured plaintiff, wherein she stated that she had never been to this area of the athletic fields of the high school before, believed she was walking on a walkway, and was speaking to her daughter trying to determine which field to go to. The plaintiffs also submitted the affidavit of an expert who opined that the pole vault runway and box constituted a pedestrian risk, which required the defendant to either cover the box, or place warning signs to alert pedestrians to the danger. SJ denied.

VII. CLAIMS BROUGHT BY ON-DUTY COPS AND FIREFIGHTERS

A. GOL 205-a and 205-e claims

1. Need to Predicate on a Statute or Rule

Salichs v. City of New York, 127 A.D.3d 406, 8 N.Y.S.3d 268 (1st Dep't 2015). Off-duty police officer's estate brought wrongful death action against city, uniformed police officer, fast food restaurant, and restaurant's security company in connection with uniformed officer's shooting of off-duty officer in restaurant parking lot. Five men had assaulted decedent inside the restaurant, and decedent then proceeded outside into the restaurant's parking lot where he confronted an individual he mistakenly believed had participated in the assault and held his handgun to that person. The defendant officer, responding to a 911

call, arrived and ordered decedent to put down the gun. When decedent failed to comply, the officer shot decedent three times. The court dismissed plaintiffs' GML 205–e claim. Even assuming that decedent was killed in the line of duty as required under GML 205–e, plaintiffs nonetheless failed to produce compelling evidence demonstrating a material question of fact as to whether the conduct of the officer who shot him was criminal, which would have served as a GML 205-3 predicate. Nevertheless, as the court found, the City was not entitled to dismissal of plaintiffs' claims sounding in intentional tort and negligence.

Warshefskie v. New York City Housing Authority, 120 A.D.3d 1344, 993 N.Y.S.2d 324 (2nd Dep't 2014). Police officer's GML § 205–e cause of action was defeated on sj motion because he allege any applicable "statute, ordinance [or] rule" to predicate it upon. Plaintiff's cross-motion for leave to amend the complaint to add allegations that section 26–286 of the 1938 New York City Building Code and section 27–2005 of the New York City Housing and Maintenance Code failed because he failed to set forth any excuse for his delay in seeking leave to amend the complaint subsequent to the note of issue being filed and subsequent to a prior motion to amend the complaint.

2. Predicate Needs to Be "Well-Developed Body of Law"

Paolicelli v. Fieldbridge Associates, LLC., 120 A.D.3d 643, 992 N.Y.S.2d 60 (2nd Dep't 2014). Firefighter injured at high-rise apartment asserted a cause of action under GML § 205–a predicated on violations of Multiple Dwelling Law § 79, Multiple Residence Law § 173, and Administrative Code of the City of New York § 27–2029, all of which required a landlord to provide heat sufficient to maintain a temperature of 68 degrees Fahrenheit between the hours of 6 a.m. and 10 p.m. The defendant moved pursuant to CPLR 3211(a)(7) to dismiss on the ground that the statutes and Code provision cited were not proper predicates for the GML § 205–a cause of action. Motion denied because Multiple Dwelling Law § 79 and Administrative Code of City of N.Y. § 27–2029 are part of well-developed bodies of law and regulation that impose clear legal duties, or mandate the performance or nonperformance of specific acts, and thus are proper GML 205-a predicates. Also, the plaintiff set forth facts sufficient to support a cause of action based on the defendant's alleged failure to provide sufficient heat, and set forth facts sufficient to allege that this failure was a factor that played a part in the tenant's decision to utilize the stove top burners to heat the apartment. Contrary to the defendant's contention, the act of the tenant's child in lighting paper material on a burner while the tenant was occupied elsewhere in the apartment, resulting in the fire which led to the plaintiff's injuries, was not, under the circumstances presented here, an intervening act that defeats, at the pleading stage, the causes of action alleging liability.

3. Use of Labor Law § 27 as a Predicate

Gammons v. City of New York, 24 N.Y.3d 562 (2014). This Court of Appeals case definitively established that Labor Law § 27 can form a statutory predicate for a GOL 205-a or 205-e claim. Plaintiff, a police officer with the New York City Police Department working on "barrier truck detail" in Brooklyn, was injured during the course of loading wooden police barriers onto a police flatbed truck. According to plaintiff, she was standing at the rear of the truck holding a barrier when another officer who was helping to load the truck pushed the barrier into plaintiff's chest, causing her to fall backwards and off the truck onto the street. Plaintiff sued defendants City of New York and the New York City Police Department seeking damages, asserting causes of action under GML 205-e for failure to comply with Labor Law § 27–a (""[e]very employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees"), known as the Public Employee Safety and Health Act (PESHA), based, in part, on the alleged unsafe and dangerous condition of the truck. At her deposition plaintiff stated the truck was too short to accommodate the full length of the barriers being loaded, the back was left open and unprotected, the side railings were only three feet high, and only one officer could comfortably fit on the truck during the

loading process. The question was whether LL section 27–a contains a "clear legal duty, expressed in a well-developed body of law" as required to form a predicate for a GOL 205-a or 205-e claim. Court held that it does. In its prior *Williams* case, the Court had left open the question whether PESHA may serve as a statutory predicate to a GOL 205-e cause of action, deciding only that the *Williams* plaintiffs failed to establish a violation of Labor Law § 27–a because that provision "does not cover the special risks faced by police officers because of the nature of police work". Here, plaintiff's claim did not involve the type of special risks faced by police officers that *Williams* found were outside the scope of PESHA, and thus the Court was finally able to decide the issue of whether Labor Law § 27 (PESHA) can form a statutory predicate for a GOL 205-a- or 205-e claim.

Stolowski v 234 E. 178th St. LLC, 129 A.D.3d 512, 12 N.Y.S.3d 28 (1st Dep't 2015). Estates of firefighters and firefighters sued City after firefighters were killed or injured when they jumped from windows during fire. The Court declined to dismiss their General Municipal Law (GML) § 205–a claims predicated on an alleged violation of Labor Law § 27–a(3)(a)(1). The City unavailingly contended that Labor Law § 27–a(3)(a)(1) could not provide a valid predicate for any General Municipal Law § 205–a claim. However, the statute (PESHA), which imposes a general duty on an employer to provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees" (Labor Law § 27–a[3][a][1]), is sufficient since it is "a requirement found in a well-developed body of law and regulation that imposes clear duties". Moreover, the City failed to "show that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries". There was evidence, including testimony and an investigative report, that the failure to issue personal ropes to the firefighters contributed to the injuries and deaths suffered when the firefighters jumped from windows using either no safety devices or a single rope that had been independently purchased by one of the firefighters. The City was also not entitled to dismissal of these claims pursuant to governmental function immunity, since the evidence concerning the removal of existing personal ropes in 2000, and the failure to provide new ropes in the period of more than four years from then until the fire giving rise to these claims, raised issues of fact concerning whether the absence of ropes "actually resulted from discretionary decision-making—i.e., the exercise of reasoned judgment which could typically produce different acceptable results" (see Valdez v. City of New York, 18 N.Y.3d 69, 79–80, 936 N.Y.S.2d 587, 960 N.E.2d 356 [2011]).

4. Need for Causal Connection

Parkman v. 149-151 Essex Street Associates, LLC., 122 A.D.3d 439, 996 N.Y.S.2d 32 (1st Dep't 2014). Firefighter alleged that he was injured when he fell over "something" while supervising the other firefighters, who were extinguishing a rooftop fire that erupted as a result of defendant property owner's actions in discarding charcoal embers in a plastic trash can on the roof. When asked at his deposition what he fell over, plaintiff responded, "I don't know." Plaintiff's GML § 205–a claim was dismissed since defendants established that they did not violate a fire safety statute or ordinance. Section 307.5.1 of the New York City Fire Code (Administrative Code of City of N.Y. tit. 29) upon which plaintiff relied prohibits the installation or operation of a charcoal grill within 10 feet of any combustible waste or material, and there was no evidence that defendants violated this provision. Even if they did, there was no evidence that the violation even indirectly caused plaintiff's injuries. The evidence showed that the fire arose out of the activities of a tenant more than 12 hours after his operation of the grill. The connection between plaintiff's claimed injury and the defendants' alleged Code violation was too attenuated.

Jollon v. City of New York City, 124 A.D.3d 556, 998 N.Y.S.2d 637 (1st Dep't 2015). Pursuant to Labor Law § 27–a(3)(a)(1), defendant was required to furnish to plaintiff "employment and a place of employment ... free from recognized hazards ... and reasonable and adequate protection to [his] li [fe], safety or health." But plaintiff was injured not because of a defect in the facility or his equipment but because of a training

instructor's failure to ensure that his personal protection system was properly attached to his bunker gear before he self-repelled from a training building. There was no evidence that his injury was caused by any violation of 29 CFR 1910.156(d), which requires the employers of fire brigades to inspect firefighting equipment at least annually, "to assure the safe operational condition of the equipment." Thus, there was no evidence that plaintiff's injury was directly or indirectly caused by a violation of either the statute or the regulation upon which his GML § 205–a claim is predicated.

5. Need to Prove Negligence

Desthers v. Espinal, 121 A.D.3d 1035, 995 N.Y.S.2d 177 (2nd Dep't 2014). Firefighter fell off scuttle ladder he was climbing in order to gain access to roof. The ladder detached from the wall and caused him to fall from the second to the first floor. He sued under GML § 205–a and common-law negligence. Defendant got SJ on the 205-a and common law negligence case by demonstrating that she neither created nor had any knowledge of any alleged defect and thus that the violations of the Administrative Code of the City of New York, including section 28–301.1, were not the result of some neglect, omission, or culpable negligence on her part.

B. Common Law Claims / Firefighter Rule

Moore v. City of New York, 126 A.D.3d 679, 5 N.Y.S.3d 199 (2nd Dep't 2015). Plaintiff police officer's brakes failed, during an emergency operation, causing him to crash. He sued only under common law negligence. Defendant moved for SJ under the firefighter rule and also claimed it did not have actual or constructive notice of any defect in the brakes of the subject police vehicle. Court barred plaintiff's claim because the injury occurred while the plaintiff was responding to an emergency call, an act taken in "furtherance of a specific police ... function which exposed him to a heightened risk of sustaining the particular injury" (i.e., firefighter's rule applied). The lack of a connection between the defendant's alleged negligence and the incident which gave rise to the emergency call was "of no moment" since the plaintiff's injury was connected to the special hazard that the plaintiff assumed as part of his duties. The plaintiff's attempt on appeal to characterize the complaint as stating a cause of action pursuant to GML § 205–e was without merit, as the allegations in the complaint could not be read as supporting that theory of liability.

VIII. CLAIMS BY INMATES

Anderson v. State of New York, 125 A.D.3d 1273, 3 N.Y.S.3d 211 (4th Dep't 2015). Claimant assaulted by other inmate testified that there were about 30 inmates and one correction officer in the mess hall at the time of the incident. The evidence established that there was no history of violence between the two inmates and no indication that the other inmate posed a threat to claimant. Claimant presented evidence that the inmate stabbed him with the handle of a plastic toothbrush that had been sharpened to a point, and that the correction officer ordered them to stop fighting and banged his baton on a table to call for assistance. The State submitted evidence that inmates had to empty their pockets and go through a metal detector before entering the mess hall. The State further submitted evidence that it was appropriate to have one correction officer supervising up to 40 inmates, and that the correction officer's response to the attack was appropriate. Case dismissed on summary judgment.

Williams v. State of New York, 125 A.D.3d 1472, 3 N.Y.S.3d 846 (4th Dep't 2015). Prior to the plaintiff-inmate's assault, the claimant was involved in an altercation with an apparent gang member at Attica Correctional Facility. The gang member was not one of the subject attackers, but claimant testified that the attackers were in the same housing unit and the same "company" with that apparent gang member at Attica. On the same day, during a bus ride to Southport Correctional Facility, the attackers brought up the earlier altercation with claimant and claimant felt threatened to some extent, but he did not alert any prison officials. Subsequently, claimant and the three subject attackers were all placed in the same holding pen

during a stop at Wende Correctional Facility to change buses. Here the Appellate Court reverses the Court of Claims trial verdict, which had ruled in favor of the assaulted inmate. Court says the verdict "was not based on a fair interpretation of the evidence". The mere occurrence of an inmate assault, without credible evidence that the assault was reasonably foreseeable, cannot establish the negligence of the State. The State owed a duty to inmates only to protect them from risks of which the State is actually aware as well as risks that the State should reasonably have foreseen in the circumstances presented. There was no evidence here to establish that prison officials were aware of a risk of harm to claimant posed by the three Attica inmates and, similarly, there was no evidence that the State should have foreseen the assault upon claimant.

Freeland v. Erie County, 122 A.D.3d 1348, 997 N.Y.S.2d 860 (4th Dep't 2014). Cause of action for county jail prisoner's allegedly wrongful death and other claims here brings up several interesting legal issues: (1) Plaintiffs' notice of claim was deemed sufficient to alert defendants to the allegations supporting the action regardless of the purported capacity in which the notice of claim was executed; (2) The claim against the County Executive individual or official capacity was dismissed because he was not the subject of any allegations in that action; (3) Wrongful death action alleging that substandard housing at the Erie County Holding Center was a proximate cause of decedent's death survived sj because the County's duty to provide and maintain the jail building was distinguishable from defendant Sheriff's duty to "receive and safely keep" prisoners in the jail over which he has custody (Correction Law § 500–c; see County Law § 217); (4) Wrongful death action against County not time barred because SOL was tolled until the appointment of an administrator of the estate; (5) Causes of action alleging County vicariously liable for the negligent acts of the Sheriff or his deputies dismissed because County is not vicariously liable for Sheriff or deputies actions; (6) The statute of limitations for Civil Rights violations was three years and, thus, that cause of action was not time-barred; (7) civil rights action against the Sheriff and Undersheriff dismissed because the identified regulation upon which it was based, 9 NYCRR 7010.1, did not confer a private right of action and plaintiff did not make any state constitutional claims.

IX. FALSE ARREST

Smolian v. Port Authority of New York and New Jersey, et al., 128 A.D.3d 796, 9 N.Y.S.3d 329 (2nd Dep't 2015). Plaintiff was at a parking garage at John F. Kennedy International Airport to scout out a suitable location from which he could watch the Concorde supersonic transport airplane make one of its final departures. He had with him various papers and diagrams pertaining to areas of the airport that were open to viewing by the public. After a security guard deemed him to be "suspicious," police officers employed by the defendant Port Authority of New York and New Jersey arrived at the parking garage and, with the plaintiff's consent, searched his shoulder bag and reviewed his papers. The plaintiff testified at his deposition that, although he told them and that he was there to watch planes, he was handcuffed and transported to the Port Authority police station located at the airport. On appeal, the Port Authority did not dispute that the plaintiff had not committed any crimes. The Port Authority police contacted the Joint Terrorism Task Force of the FBI and the New York City Police Department. It was eventually determined that the plaintiff did not pose a threat to national security, and those entities did not intend to respond to the situation. Nonetheless, the Port Authority Police Department contacted EMT's based on the theory that the plaintiff was an emotionally disturbed person. The EMT's transported the plaintiff to the defendant Jamaica Hospital and Medical Center against his will, accompanied by a Port Authority police officer. While at JHMC, the plaintiff was evaluated by a psychiatrist (also a defendant). He determined that the plaintiff was suffering from bipolar disorder, and directed the forcible injection of a tranquilizer into the plaintiff, as well as the drawing of blood from the plaintiff. The plaintiff was kept overnight involuntarily in JHMC's emergency room and was discharged the following morning by a different psychiatrist. The plaintiff asserted causes of action against the Port Authority, JHMC, the psychiatrist, and others. Upon summary judgment motions, the Court held that the submissions of the Port Authority and the individual Port Authority police officers revealed the existence of triable issues of fact as to whether the plaintiff's arrest

was based on probable cause. The Port Authority contends that, even if the record is devoid of any reference to what crime the plaintiff was thought to have committed, the plaintiff's arrest was lawful by virtue of Mental Hygiene Law § 9.41. That provision states, in relevant part, that "[a]ny peace officer, when acting pursuant to his [or her] special duties, or police officer who is a member of the state police or of an authorized police department or force or of a sheriff's department may take into custody any person who appears to be mentally ill and is conducting himself [or herself] in a manner which is likely to result in serious harm to himself [or herself] or others ... Such officer may direct the removal of such person or remove him [or her] to any such hospital specified in subdivision (a) of section 9.39 [or any comprehensive psychiatric emergency program specified in subdivision (a) of section 9.40,] or, pending his [or her] examination or admission to any such hospital [or program], temporarily detain any such person in another safe and comfortable place, in which event, such officer shall immediately notify the director of community services or, if there be none, the health officer of the city or county of such action." However, the submissions of the Port Authority and the individual Port Authority police officers revealed the existence of triable issues of fact as to whether the individual Port Authority police officers could reasonably have concluded, under the circumstances confronting them, that the plaintiff had a mental illness and that he was conducting himself in a manner likely to result in serious harm to himself or others.

X. MUNICIPAL BUS PASSENGER CASES

Dowdy, v. MTA-Long Island Bus, 123 A.D.3d 655, 998 N.Y.S.2d 204 (2nd Dep't 2014). Plaintiff was injured shortly after she boarded a bus when it suddenly accelerated, causing her to fall.
Defendant established that the movement of the bus was not "unusual or violent" or of a "different class than the jerks and jolts commonly experienced in city bus travel" and plaintiff failed to raise a question of fact. SJ granted to defendant.

Alandette v. New York City Transit Authority, 127 A.D.3d 896, 8 N.Y.S.3d 347 (2nd Dep't 2015). While she was walking to the rear of the bus to find a seat, the plaintiff fell backwards when the driver applied the brakes. The defendants established their prima facie entitlement to judgment as a matter of law by submitting a transcript of the plaintiff's deposition testimony, which demonstrated that the stop of the bus was not "unusual or violent" or of a "different class than the jerks and jolts commonly experienced in city bus travel". In opposition, the plaintiff failed to raise a triable issue of fact.

Batista v. MTA Bus Company, 129 A.D.3d 1003, 13 N.Y.S.3d 144 (2nd Dep't 2015). Bus passenger brought negligence action against bus operator when he slipped and fell on wet steps of bus on snowy day. Bus operator was grated summary judgment because, given the inclement weather conditions when the accident occurred, "it would be unreasonable to expect the [defendant] to constantly clean the steps of the subject bus."

XI. COURT OF CLAIMS

Polanco v. State of New York, 130 A.D.3d 1494, ---N.Y.S.3d--- (4th Dep't 2015). Prisoner brought action for damages against State when he was denied parole, alleging the negligence of State Parole Board employees in performing their official duties. As for subject matter jurisdiction, "regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims". Although claimant characterized his claim as one for money damages, the adjudication of his claim required a review of the underlying administrative determination, over which the Court of Claims lacked subject matter jurisdiction. In any event, the claim was also denied based on absolute governmental immunity. Determinations pertaining to parole and its revocation are deemed strictly sovereign and quasi-judicial in nature and, accordingly, the State, in making such determinations, is absolutely immune from tort liability.

Sommer v. State of New York, 2015 WL 4643653 (3rd Dep't 2015). Claimant's notice of intention stated he slipped and fell on unseen ice on a sidewalk "on the campus of the State University of New York at Oneonta." There was no further description. Court held that, "while we recognize that notices of intention are reviewed less strictly than claims, we nevertheless find that this generalized description of the location at which claimant fell was insufficient to permit defendant to investigate its liability". Further, because claimant's notice of intention was deficient, claimant did not receive the benefit of the two-year extension and was obligated to file his claim within 90 days of its accrual, and since he did not do so, case dismissed.