MUNICIPAL LIABILITY
2016-2017 UPDATE

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A. Is a Notice of Claim Even Required?

1. Required Where Statutory Duty to Indemnify

Marrone v Miloscio, 145 A.D.3d 996, 44 N.Y.S.3d 502 (2nd Dep't 2016). Plaintiff was rear-ended by a motorist who was (unbeknownst to plaintiff) employed by National Grid LLC but who was driving a vehicle regaistered to the Island Power Authority (LIPA). At the time he filed suit, plaintiff did not know National Grid was the employer, and assumed LIPA was, and thus he sued only the driver and LIPA. (National Grid and LIPA had a contractual arrangement under with National Grid was providing maintenance and operation services for LIPA's electrical infrastructure, which explains why a National Grid employee was driving LIPA's vehicle). For some reason, no notice of claim was served on LIPA prior to suit. More than three years after the accident, LIPA brought a motion to for summary judgment (on the grounds that no notice of claim had been served against it). Plaintiff cross-moved to amend his complaint to substitute National Grid for LIPA as a defendant and, in opposition to the defendants' motion for summary judgment, contended that National Grid, in its agreements with LIPA, had waived its right to indemnification and that, accordingly, LIPA was not entitled to a notice of claim since it could not be held liable. In support of this contention, the plaintiff proffered the Management Service Agreement which appeared to show that LIPA would not have to indemnify National Grid. Supreme Court concluded that, because the defendant driver was operating a vehicle owned by LIPA at the time of the accident, LIPA had a statutory duty, pursuant to General Municipal Law § 50–e(1)(b), to indemnify National Grid and that it was therefore entitled to a notice of claim. It further found that, even if National Grid LLC had waived indemnification via the agreement, a notice of claim was still required as a result of LIPA's statutory duty to indemnify. Accordingly, the court granted the defendants' motion for summary judgment dismissing the complaint and denied the plaintiff's cross motion for leave to amend his complaint. The Appellate Division reversed, indicating that the summary judgment motion was premature, that plaintiff needing more discovery on the exact relationship between the driver, LIPA and National Grid. The Appellate Division also allowed the claim against National Grid to proceed, even though it had not been named in the lawsuit within three years of the accident, based on the relation back doctrine.

2. Not Required for Sheriff (unless there is a statutory duty to indemnify)

Berardi v Niagara County, 147 A.D.3d 1400, 47 N.Y.S.3d 544 (4th Dep't 2017). Inmate at county jail sued Sheriff after being sexually assaulted and subjected to verbal sexual harassment by an employee of sherrif when he was providing medical services to inmates at the jail. Court held that plaintiff was not required to file a notice of claim or comply with General Municipal Law §§ 50–h and 50–i prior to the commencement of the action against the Sheriff. Nevertheless, the amended complaint failed to state a cause of action against the Sheriff. It is well settled that a principal or employer may be vicariously liable for the tortious acts of its employees only if those acts were "committed in furtherance of the employer's business and within the scope of employment" and the sexual assault perpetrated was not an act committed in furtherance of the Sheriff's business and was "a clear departure from the scope of employment".

Villar v Howard, 28 N.Y.3d 74, 64 N.E.3d 280 (2016). Pretrial detainee brought action against county sheriff, seeking damages for injuries he sustained as result of having been sexually assaulted twice by another inmate in county jail. He claimed the sheriff was negligent in the way he ran and supervised the jail, which caused the incident. The main issue on the appeals was whether plaintiff was required to serve a

notice of claim before suing the Sherrif (he had not done so). A notice of claim is required when suing a sheriff only if the County is ***statutorily*** obligated to indemnify the defendant sheriff (GML 50-e). Supreme Court dismissed the Complaint, finding that plaintiff was required to serve a notice of claim pursuant to General Municipal Law § 50–e because the County was statutorily obligated to indemnify the defendant sheriff under "the County legislature's resolution of May 16, 1985." This resolution made the County the "insurer" of the sheriff for the sheriff's negligence. The Appellate Division modified the Order, reinstating the complaint except to the extent it alleged that defendant was *vicariously* liable for the negligence of his employees. The Court held that plaintiff was not required to serve a notice of claim prior to commencing the action against the sheriff because Erie County has no ***statutory*** obligation to indemnify defendant. The Court of Appeals here agrees with the Appellate Division in that no Notice of Claim was required. The May 16, 1985 Erie County resolution entitled "Liability Insurance for the Sheriff's Department" did not "***statutorily***" obligate the county to indemnify defendant Sheriff for purposes of General Municipal Law § 50–e (1)(b). The ""resolution" said that, in exchange for an annual payment of $1 from the Sheriff, the County would act as a liability insurer to the sheriff for the Sheriff's negligence (but not punitive or exemplary damages) and that the County would not be made responsible for the acts of the Sheriff or become a party in actions arising out of the acts of the Sheriff. Absent the existence of any ***statutory*** obligation on the County to indemnify the Sheriff—as opposed to an agreement to act as his insurer—the Court ruled that service of a notice of claim was not required under General Municipal Law § 50–e.

3. Notice of Claim Requirement Not Preempted by Federal Statute

Fernandez v City of New York, 148 A.D.3d 995, 51 N.Y.S.3d 100 (2nd Dep't 2017). Worker was injured at Navy Yard while performing overhaul work in a shipyard work shop on a gate valve that had been removed from a steel-hulled ship. In addition to his federal workers' compensation claim, he brought a third-party action against the City of New York as owner of the property where he was injured alleging, interalia, Labor law 240, 241 and 200 causes of action. He failed to file a timely notice of claim against the City, and the City moved to dismiss the complaint based upon the plaintiff's failure to satisfy the condition precedent of serving a timely notice of claim. The plaintiff opposed the motion, and cross-moved for leave to amend the complaint, arguing that the GML notice of claim requirements were preempted by 33 U.S.C. § 933(a), a provision of the Longshoremen's and Harbor Workers' Compensation Act and by 46 U.S.C. § 30106, which provide for the right of a recipient of benefits pursuant to the LHWCA to interpose third-party claims within six months of an award of benefits, or within three years of an injury arising out of a maritime tort, respectively. The proposed amended complaint asserted that the plaintiff was a recipient of benefits pursuant to the LHWCA, and added a cause of action alleging a "maritime tort" in addition to the causes of action alleging violations of Labor Law §§ 200, 240(1), and 241(6). Court held that, although plaintiff was permitted to sue the City pursuant to 33 U.S.C. § 933(a), this federal statute does not alter the requirement of General Municipal Law §§ 50–e and 50–i that a plaintiff must serve a timely notice of claim. Case dismissed.

4. Split in Departments As to Whether Individual Municipal Employees Must Be Named in N/C in Order to Sue Them.

Blake v City of New York, 148 A.D.3d 1101, 51 N.Y.S.3d 540 (2nd Dep't 2017). The Court here deals with the split in the Departments on the issue of whether a plaintiff is required to ***name individual municipal employees*** of the public corporation in a notice of claim in order to maintain a subsequent action against those employees. The Appellate Division, First Department, has held that General Municipal Law § 50–e

dissalows an action against ***individuals*** who have not been named in a notice of claim. In contrast, the Appellate Division, Third and Fourth Departments have held that naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants. Here, the Second Department agrees with the Third and Fourth. General Municipal Law § 50–e(2) requires that "[t]he notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable." Listing the names of the individuals who allegedly committed the wrongdoing is not required. Accordingly, the Supreme Court should not have granted dismissal of plaintiff's second and third causes of action, alleging common-law false arrest and malicious prosecution, respectively, insofar as asserted against the individual officers.

Young v New York City Health & Hosps. Corp., 147 A.D.3d 509, 48 N.Y.S.3d 316 (1st Dep't 2017). Upon summary judgment motion, the court correctly dismissed the complaint against the defendant-individual doctors because (under the First Department's rule) they were subject to notice of claim requirements and were not named in the notice of claim. The Hospital also got out: Plaintiff's service of a notice of claim on the City of New York, through the City Comptroller's Office, did not constitute service upon the hospital, a separate public entity. Because the time within which to commence an action against the hospital had expired, the motion court "lacked the power to authorize late filing of the notice". Two of the doctors, however, were not entitled to dismissal of the complaint on summary judgment. There was a question of fact as to whether these doctors were employees of the hospital and thus whether a notice of claim was required as against them.

5. N/C Required Not Just for Torts When Suing County

Sager v County of Sullivan, 145 A.D.3d 1175, 41 N.Y.S.3d 443 (3rd Dep't 2016). Plaintiff commenced an action against defendant County, his former employer, asserting a claim for improper termination from his position as Deputy Commissioner of Social Services in violation of Civil Service Law § 75–b, the Public Sector Whistleblower Law. He did not first serve a notice of claim, and the issue was whether he should have. Although this was not a "tort" action, General Municipal Law § 50–e, as applicable to counties pursuant to County Law § 52, provides that "[a]ny claim ... against a county for damage [or] injury ... and any other claim for damages arising at law or in equity, alleged to have been caused ... by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with [General Municipal Law § 50–e]". Thus a notice of claim was a condition precedent to the suit. Plaintiff's reliance on appellate decisions involving complaints asserting a Civil Service Law § 75–b or similar claims against cities, in which the courts have ruled that the filing of a notice of claim is not required were misplaced because the more narrow notice of claim provisions of General Municipal Law §§ 50–e and 50–i apply, limiting the requirement for notices of claim to "tort" claims (General Municipal Law § 50–e[1][a]) or claims for "personal injury, wrongful death or damage to real or personal property" (General Municipal Law § 50–i[1]). By comparison, County Law § 52 applies to the claim against defendant, a county, and mandates notices of claim in a much broader scope of matters than the General Municipal Law, requiring that a notice of claim be filed for "[a]ny claim ... against a county for damage" or "any other claim for damages arising at law or in equity". Case dismissed.

B. 90-Day Time Period Tolled For Continuous Treatment

Hill v New York City Health & Hosps. Corp., 147 A.D.3d 430, 47 N.Y.S.3d 267 (1st Dep't 2017). This case is a reminder that the continuous treatment doctrine tolls the time to serve a notice of claim. Note, however, that the 90-day period is not tolled for infancy, disability, etc., though those may somethimes (but not always) form the basis for a "reasonable excuse" for the delay in serving the notice of claim.

Jianfeng Jiang v. Xue Chao Wei, 54 N.Y.S.3d 278, 54 N.Y.S.3d 278 (1st Dep't 2017). In this medical malpractice action, Court rejected plaintiff's contention that certain visits were part of a continuous course of treatment such that the statutory period for filing a notice of claim was tolled. Although it was clear that the municipal hospital anticipated further treatment at the time of discharge, it was likewise clear that plaintiff did not anticipate any, given his failure to show up for follow-up appointments and his exclusive reliance on codefendant acupuncturist who plaintiff believed to be a licensed physician for treatment during the interim period. Plaintiff's actions indicated an intention to discontinue his relationship with the defendant hospital; his return visit must therefore be deemed a "renewal, rather than a continuation, of the physician-patient relationship".

C. Defects, Insufficiencies and Problems in The Notice of Claim

1. Theory Sufficiently Alleged?

Barone v Town of New Scotland, 145 A.D.3d 1416, 44 N.Y.S.3d 267 (3rd Dep't 2016). Resident brought action against town for injuries he sustained while helping town employees unload wood chips to his home. The threshold issue here pertains to the sufficiency of the notice of claim, which defendant argued failed to provide notice of plaintiff's "negligent supervision" claim and appeared to allege only a "defective tailgate" claim. The notice of claim spoke to the injury having been caused by a defect in the tailgate of the truck that was being hauldrolically lifted to dump wood chips on plaintiff's premises. At his 50-H, plaintiff acknowledged there was no defect in the tailgate that contributed to his injury. That said, although the notice of claim did not specify any "negligent supervision" of the operation, it did specify the date and time of the accident, as well as the nature of plaintiff's injuries, and spoke to defendant's "duty to supervise" the operation of the dump truck. Court held that the notice of claim, coupled with plaintiff's testimony at the General Municipal Law § 50–h hearing, adequately apprised defendant as to the theory of liability and was thus sufficient to enable defendant to investigate the claim.

Puello v. New York City Housing Authority, 150 A.D.3d 1164, 55 N.Y.S.3d 355 (2nd Dep't 2017). Paintiff's notice of claim alledged that while walking down a ramp in the lobby of a building owned and controlled by the defendant, she "was caused to slip and fall and/or trip and fall due to water flooding and/or leaking which was left by the [defendant] all throughout the lobby area of the premises ... [and] due to the defective, water logged ramp, causing her body to strike the ramp and floor." Plaintiff clarified at the General Municipal Law § 50–h hearing that she fell not because the ramp was wet, but because the ramp to the lobby "wobbled" and "moved," which caused her to fall. Court held that the notice of claim sufficiently described the nature of the plaintiff's claim, as well as the time, place, and manner in which the claim arose. The notice of claim had identified the cause of the plaintiff's fall as "the defective, water logged ramp," which led to an inspection of the ramp. Defendant's motion to dismiss denied.

DeGroat v City of New York, 148 A.D.3d 670. 48 N.Y.S.3d 495 (2nd Dep't 2017). The infant plaintiff was injured when a vehicle in which she was a passenger left the roadway and struck a tree. Plaintiff alleged a

dip or depression in the roadway caused the driver to lose control of the vehicle, resulting in the accident. The defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to correctly identify the accident location in the notice of claim and for failure to plead prior written notice, or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against them on the ground that they lacked prior written notice of the alleged defect pursuant to Administrative Code of the City of New York § 7–201(c)(2) (hereinafter the Pothole Law). Defendants failed to establish, prima facie, the absence of any written notice or acknowledgment of the alleged dangerous condition. And there were no grounds to dismiss the complaint insofar as asserted against them for failure to accurately identify the location of the accident in the notice of claim. The plaintiffs consistently maintained that the accident occurred on Bay Street, at the northwest corner of the intersection with Slosson Terrace, and the fact that one of the individual defendants disputed the location of the accident during her deposition did not conclusively establish that the information contained in the notice of claim was incorrect.

2. Failure to Raise Derivative Claim in the Notice of Claim

Gonzalez v Povoski, 149 A.D.3d 1472, 53 N.Y.S.3d 423 (4th Dep't 2017). Infant plaintiff was struck by a car in the vicinity of some excavation work being carried out by defendant Village. Village demonstrated its entitlement to summary judgment dismissing the mother's derivative claim on the ground that the derivative claim was not set forth in the notice of claim served upon the Village. A claimant cannot raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that change the nature of the earlier claim or assert a new one. (NOTE: As indicated in the *Darrin* case immediately below, however, an application to serve a late notice of claim to allege a spouse's derivative claim will be almost certainly granted if the defendant had timely actual notice of the injured spouse's claim).

Darrin v. County of Cattaraugus, 151 A.D.3d 1930 (4th Dep't 2017). Plaintiffs, injured wife and derivative claimant husband, both applied to serve a late notice of claim for wife's injuries and husband's derivative claims. Defendant opposed the motion on the grounds that it did not receive actual knowledge of the facts constituting the husband's derivative claim because it did not receive knowledge of the damages claimed by the husband (although it had timely notice of the claims and injuries of the wife). Motion Court granted wife's petition to late-serve, but denied the application as to the husband (for his derivative claim). Appellate Division finds this result logically flawed. That's because derivative causes of action are predicated upon "exactly the same facts" as the injured party's claims. As a result, where it has been determined that a municipal defendant received timely notice of the injured claimant's claims, there can be no claim of prejudice to the defendant resulting from a late notice of a derivative claim. Thus, both applications granted.

D. Notice of Claim Requirement Waived or Equitably Estopped

Konner v New York City Tr. Auth., 143 A.D.3d 774, 39 N.Y.S.3d 475 (2nd Dep't 2016). Subway doors closed on plaintiff's hand. Plaintiff's attorney served a timely notice of claim together with a cover letter on the Metropolitan Transit Authority (MTA) (She should have served it on the New York City Transit Authority [NYCTA], a separate entity, which was the proper defendant). Approximately a month after the notice of claim was served, the plaintiff's attorney received a letter from the NYCTA requiring plaintiff to appear for a 50-h hearing. But this correspondence bore no letterhead, and did not indicate whether it was from the MTA or the NYCTA. Although this letter directed the plaintiff to appear at the "office of the Authority," it did not state which "Authority", the MTA or the NYCTA. After the 50-h hearing, the

NYCTA sent a copy of the 50-h transcript to plaintiff's attorney with a cover letter indicating "NYCTA". Plaintiff then filed the summons and complaint against the NYCTA alleging compliance with the conditions precedent of GML 50(e). The NYCTA then moved for summary judgment (after the statute of limitations had expired) dismissing the complaint on the grounds that plaintiff had not served a notice of claim on the NYCTA, but rather only on the MTA. In opposition, the plaintiff argued that the NYCTA should be equitably estopped from seeking dismissal of the complaint because its handling of her claim (writing letters to her, asking her to attend a 50-e, taking the 50-e, etc.) misled her into believing that her notice of claim had been accepted by the NYCTA, and that it was unnecessary to seek leave to serve a late notice of claim upon the NYCTA. The Supreme Court dismissed the lawsuit because of plaintiff's failure to serve a notice of claim on the correct entity, but the Appellate Division reversed, holding that, although service of a notice of claim upon the MTA did not satisfy the condition precedent of serving a notice of claim upon the NYCTA, the NYCTA here was "equitably estopped" from asserting lack of notice of claim. The NYCTA had wrongfully or negligently engaged in conduct that misled or discouraged plaintiff from serving a timely notice of claim or making a timely application for leave to serve a late notice of claim, and that conduct was justifiably relied by plaintiff's attorney.

E. Defects in Notice of Claim Waived

1. Defect in Manner of Service Can Be Waived

Lapsley-Cockett v Metropolitan Tr. Auth., 143 A.D.3d 558, 38 N.Y.S.3d 896 (1st Dep't 2016). The court found credible evidence to demonstrate that the notice of claim was served, albeit by regular mail instead of certified mail, on the Transit Authority within 90 days after the claim arose. Without complaining about the deficiency, the defendant requested a 50–h hearing and thus defendant waived any objections to the defect (see General Municipal Law § 50[e][3][c] ["If 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"]).

Carroll v City of New York, 149 A.D.3d 1026, 52 N.Y.S.3d 465 (2nd Dep't 2017) Plaintiff tripped and fell while ascending exterior steps at premises owned and controlled by the defendant New York City Housing Authority (hereinafter NYCHA). Plaintiff served a notice of claim upon NYCHA (and also upon the City of New York) which was directed to "The New York City Housing Authority." The plaintiff sent the notice via certified mail. (Note: service is deemed complete on the date of mailing the certified letter). There was arguably a defect in the manner in which the envelope was addressed. It was addressed to "Comptroller of NYCHA" rather than just NYCHA itself. Whoever received the envelope at NYCHA saw the word "controller" and assumed it was meant for the City of New York, since they have a "controller" but the NYCHA does not. When it arrived at the City of New York's Comptroller's office, someone there signed the return receipt. NYCHA did not get a copy of the Notice of Claim until five days after the 90 day period expired. NYCHA contended that it did not have a "Comptroller" and therefore the Notice of Claim was improperly addressed, which should be grounds for dismissal of the complaint based on failure to complete the conditions precedent to the lawsuit. The Court found that, based upon NYCHA's street address which was correctly on the envelope, NYCHA was entitled to either open the envelope or, if NYCHA did not think it was appropriate to open the envelope because of the words "Comptroller" in front of "NYCHA," reject the delivery. It did not have the right to simply forward it on to the NYC Comproller. Had the envelope been opened, NYCHA would have confirmed that the notice of claim document did not state "Comptroller

of NYCHA." To the contrary, the notice of claim document properly listed both the "Comptroller of the City of New York" and "The New York City Housing Authority," because the plaintiff was also filing a claim against the City of New York. Had the envelope been rejected by NYCHA, the plaintiff would have been notified that NYCHA did not receive the notice of claim, and thereby provided an opportunity to resend the notice of claim or, if necessary, seek leave to serve a late notice of claim. Under these circumstances, the Court found that tthe envelope was properly addressed within the meaning of General Municipal Law § 50–e(3)(b) and the plaintiff properly served the notice of claim upon NYCHA within the requisite 90–day statutory period. Accordingly, motion to dismiss complaint denied and motion to deem the notice of claim sent to NYCHA granted. There was a dissent opining that "the plaintiff failed to properly address his notice of claim to the proper municipal designee as required by statute, and the certified mail receipt card was signed by an employee of the Comptroller of the City of New York, the plaintiff failed to fulfill the purpose and intent of the statute of affording NYCHA an opportunity to investigate the claim".

2. Failure to Object to Late Service Does Not Constitute Waiver

Fixter v County of Livingston, 143 A.D.3d 1294, 38 N.Y.S.3d 506 (4th Dep't 2016). Plaintiff concedeed that she served an untimely notice of claim without first obtaining leave of the court, which makes it "a nullity, requiring dismissal of the complaint". Defendants' failure to reject plaintiff's late notice of claim did not constitute a waiver of the defense of failure to serve a timely notice of claim.

II. LATE SERVICE OF NOTICE OF CLAIM

A. Late-Service of Notice of Claim Without Leave of Court Is Nullity

Mosheyev v New York City Dept. of Educ., 144 A.D.3d 645, 39 N.Y.S.3d 832 (2nd Dep't 2016). Plaintiff's service of a late notice of claim upon the defendant New York City Department of Education (hereinafter the DOE) was a nullity because it was made without leave of court. As the plaintiff failed to seek leave to serve a late notice of claim or to deem the notice of claim timely served nunc pro tunc before the statute of limitations expired, the Supreme Court properly granted that branch of the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint.

B. Permission to Serve Notice of Claim Cannot Be Granted Beyond SOL

Lubin v. City of New York, 148 A.D.3d 898, 50 N.Y.S.3d 405 (2nd Dep't 2017). Plaintiff, a passenger in a motor vehicle which struck an open manhole, sought leave to serve a late notice of claim the City and City DOT within the Statute of Limitations. The petition was denied. Later, after the SOL expired, plaintiff brought a motion for leave to renew the petition. Court held that a motion to renew a prior timely petition for leave to serve a late notice of claim, which renewal motion is made after the statute of limitations has expired, is untimely and does not relate back to the original petition. If the relation-back doctrine were to be applied to such a motion, "the [s]tatute of [l]imitations would have no practical effect for it would impose no time constraint on seeking renewal" (Matter of Rieara v City of N.Y. Dept. of Parks & Recreation, 156 AD2d 206, 207). While the statute of limitations was tolled from the time the petition was filed until the entry of the order denying the petition, that toll was insufficient to render the motion to renew timely.

C. Application to Late-Serve a Notice of Claim Must Include the Proposed Notice of Claim

Bethune v Nassau Univ. Med. Ctr. (NUMC), 149 A.D.3d 798, 49 N.Y.S.3d 909 (2nd Dep't 2017). The action for medical malpractice was properly dismissed on the ground that the plaintiff failed to serve a

notice of claim. As for the application to late-serve a notice of claim, plaintiff failed to submit a proposed notice of claim in support of that branch of her cross motion which was for leave to serve a late notice of claim. General Municipal Law § 50–e(7) provides that "[w]here the application is for leave to serve a late notice of claim, it shall be accompanied by a copy of the proposed notice of claim." Failure to comply with that provision is sufficient justification to deny that relief.

D. Factors Considered in Deciding Whether to Grant Permission to Late-Serve a Notice of Claim

1. "Actual Knowledge" w/I 90 days or a Reasonable Time Thereafter

a. "Actual Knowledge" Gained from Prior Late Notice of Claim

Brunson v New York City Health & Hosps. Corp., 144 A.D.3d 854, 42 N.Y.S.3d 34 (2nd Dep't 2016). Plaintiff was treated in the emergency department of a hospital operated by the defendant for a foot injury, which, about two weeks later, became infected. The plaintiff served a notice of claim on the defendant less than one month after the 90–day period for serving a notice of claim expired and then filed a summons and complaint alleging, inter alia, that the defendant committed medical malpractice. Thereafter, the plaintiff moved, inter alia, for leave to serve a late notice of claim or to deem the proposed notice of claim timely served nunc pro tunc. Court found that defendant acquired actual knowledge of the essential facts underlying the claim within a reasonable time after the expiration of the 90–day period by virtue of the late-filed notice of claim and the 50-h hearing. The Court found the case distinguishable from *Matter of Wally G. v. New York City Health & Hosps. Corp.,* 27 N.Y.3d 672, 37 N.Y.S.3d 30, 57 N.E.3d 1067, on which the defendant relied, because the plaintiff in the present case did not rely upon the hospital records as having supplied the defendant with actual knowledge of the essential facts of his claim, but rather on the slightly late notice of claim and the 50-h hearing.

b. "Actual Knowledge" Gained from Hospital Records

Hudson v Patel, 146 A.D.3d 758, 45 N.Y.S.3d 497 (2nd Dep't 2017). Infant plaintiff's mother sought leave to serve a notice of claim for medical malpractice four years after her birth. Court held the evidence submitted in support of her motion failed to establish defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter by virtue of the hospital records relating to her delivery and follow-up care. Moreover, the plaintiff failed to satisfy her initial burden of showing that the defendants would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay. The plaintiff also did not demonstrate a reasonable excuse for the the delay.

Matter of Rosenblatt v New York City Health & Hosps. Corp., 149 A.D.3d 961, 53 N.Y.S.3d 119 (2nd Dep't 2017). Plaintiff's decedent died in the hospital and almost one year later his estate's representative served a notice of claim alleging conscious pain and suffering and wrongful death. The notice of claim was timely with respect to the wrongful death claim as it was served within 90 days of the *appointment of the public administrator of the decedent's estate* (see General Municipal Law § 50–e[1][a]). But the application to late-serve the claim as to conscious pain and suffering (90-days runs from date of death) was denied, since defendant hospital did not acquire actual knowledge of the essential facts constituting the claim within the requisite 90–day period or a reasonable time thereafter by virtue of its possession of hospital records relating to the decedent's death. A medical provider's mere possession or creation of medical records does not establish that it had "actual knowledge of a potential injury where the records do not evince that the medical

staff, by its acts or omissions, inflicted any injury on" the plaintiff. Plaintiff also failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for the lengthy delay. Even assuming plaintiff met its initial burden to show that the late notice would not substantially prejudice defendant, upon consideration of the balance of the relevant factors the application was denied.

Raut v New York City Health & Hosps. Corp., 145 A.D.3d 1049, 44 N.Y.S.3d 479 (2nd Dep't 2016). Plaintiff's mother served an application to late-serve a notice of claim for her infant nearly three years after he was born, alleging medical malpractice. Application denied because plaintiff failed to demonstrate that the Hospital had actual knowledge of the essential facts constituting his medical malpractice claim. Although the relevant medical records indicated that the mother had suffered an asymptomatic cervical polyp during her pregnancy and that her cervix was friable, they did not suggest that the plaintiff's preterm delivery was attributable to the Hospital's alleged malpractice in failing to treat those conditions. Consequently, the entries in the Hospital's records did not equate with knowledge of the facts underlying the plaintiff's claim. In addition, the plaintiff did not offer an adequate excuse for the failure to serve a timely notice of claim.

c. "Actual Knowledge" of City defendant Gained through Police Reports or Police Involvement in the Incident

Matter of Jaffier v City of New York, 148 A.D.3d 1021, 51 N.Y.S.3d 108 (2nd Dep't 2017). Plaintiff was a passenger in a car struck by another car operated by a detective for the NYPD and owned by the NYPD. Upon plaintiff's application to late-serve a notice of claim, the Court held the City acquired timely, actual knowledge of the essential facts constituting the claim. Although a police report regarding an automobile accident does not, in and of itself, constitute notice of the claim to a municipality, where the municipality's employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that it committed a potentially actionable wrong, the municipality can be found to have notice. Here, the NYPD responded to the scene and conducted an investigation into the facts and circumstances surrounding the accident. Indeed, the police accident report specifically noted that plaintiff, as well as the driver of the vehicle in which she was a passenger, made statements alleging that the detective was liable. The police accident report also noted that the plaintiff was injured and that a copy of the report was being provided to the Office of the Comptroller, as well as the Motor Transport Division and Personal Safety Unit of the NYPD. Thus, the overall circumstances supported an inference that the City effectively received actual notice of the essential facts constituting the claim. These same facts showed there was no substantial prejudice to the City in maintaining a defense. Motion to late-serve granted.

Cuccia v. Metropolitan Trans. Authority, 150 A.D.3d 849, 55 N.Y.S.3d 83 (2nd Dep't 2017). Plaintiff contended that the MTA acquired actual knowledge of the essential facts of the claim by virtue of a police accident report prepared by an MTA Police office. However, neither the police accident report, nor the incident report, which indicated that no injuries were reported, provided actual notice of the facts constituting the claim that plaintiff sustained serious injuries as a result of the MTA's negligence. Further, plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The plaintiff failed to demonstrate through admissible medical evidence that she was incapacitated to such an extent that she could not have complied with the statutory requirement to serve a timely notice of claim. Finally, plaintiff failed to come forward with "some evidence or plausible argument" that the MTA would not be substantially prejudiced in maintaining a defense on the merits as a result of the lengthy delay (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 466).

Matter of Cruz v City of New York, 149 A.D.3d 835, 52 N.Y.S.3d 380 (2nd Dep't 2017). Here, the City of New York acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident, since its employees were directly involved in the accident, and the police accident report gave reasonable notice from which it could be inferred that a potentially actionable wrong had been committed by the City and that the petitioner was injured as a result thereof. Furthermore, the City received a late notice of claim only 22 days after the expiration of the 90–day period, which it accepted, and informed the plaintiff that it would do its best to investigate and, if possible, settle the claim. Moreover, the plaintiff made an initial showing that the City was not substantially prejudiced, since the City acquired timely, actual knowledge through the police accident report and became aware of the negligence claim less than one month after the expiration of the 90–day period. In opposition to the petition, the City provided only its attorney's affirmation, which was insufficient to overcome the the showing of a lack of substantial prejudice.

Fethallah v. New York City Police Dept., 150 A.D.3d 998, 55 N.Y.S.3d 325 (2nd Dep't 2017). Plaintiff was arrested on a public beach charged with resisting arrest and disorderly conduct. He was released the next day. Four months later consulted and retained legal counsel regarding this incident, but apparently could not recall the date on which it occurred. However, a cell phone video of the incident taken by his friend showed a date (which turned out to be the wrong date, a month later than the actual date). Three days before the supposed 90-days from the (wrong date) expired, plaintiff, through his attorneys, served a notice of claim. In fact, however, unbeknownst to plaintiff and his attorney, the notice of claim was almost a month late (based on the real date of his arrest and release). The notice of claim alleged plaintiff was "wrongfully arrested and battered by police officers." About five months later, the plaintiff learned of the actual date of his arrest and informed his attorney. Thereafter, plaintiff through his attorneys commenced a proceeding for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc contending, as a reasonable excuse, that the delay was caused by his failure to recall the actual incident date, and further arguing that defendant had timely acquired actual knowledge of the facts constituting the claim from the involvement of the defendant's police officers in his (wrongful) arrest. As for the "reasonable excuse" argument, the Court rejected it because plaitiff failed to explain why he could not recall the real date of the incident, and why he waited nearly four months to consult and retain counsel. As for the argument that the City had actual knowledge of the essential facts of his claim beause the City's police officers were the ones who wrongfully arrested and battered him, this was not enough to establish actual knowledge of the City of the facts constituting his claim. Further, plaintiff produced no police reports. Finally, the plaintiff failed to present "some evidence or plausible argument" supporting a finding that the defendants were not substantially prejudiced by the nearly six-month delay.

Matter of D'Agostino v City of New York, 146 A.D.3d 880, 46 N.Y.S.3d 635 (2nd Dep't 2017). Passengers in car involved in multicar accident involving city vehicle sought leave to serve a late notice of claim on City. Plaitniffs submitted a copy of a police accident indicating that the police vehicle had struck the car behind the vehicle plaintiffs were in, which in turn made that vehicle strike the vehicle plaintiffs were in. The police accident report did not connect any injuries sustained by the petitioners to any negligent conduct on the part of the operator of the defendant's vehicle. The police report was thus not sufficient to provide the the City with actual notice of the essential facts constituting the claim. Moreover, the direct involvement of the City's employee in the accident itself, without more, is not sufficient to establish that the respondents acquired actual notice of the essential facts constituting the claim. Moreover, plaintiffs failed to meet their initial burden of showing that the 10–month delay would not substantially prejudice the defendant's ability to investigate and defend against the claim.

d. "Actual Knowledge" Gained through School Records

D.M. v. Center Moriches Union Free School District, 151 A.D.3d 970, 54 N.Y.S.3d 161 (2nd Dep't 2017). Infant injured in gym class applied for leave to serve a late notice of claim almost a year after his injury. Plaintiff failed to establish that the School District acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. Although a medical claim form was prepared and submitted to the School District four days after the accident, it merely indicated that the infant lacerated his eyebrow and fractured his wrist when he fell after hanging from a pull-up bar during physical education class. Where, as here, the incident and the injury do not necessarily occur only as the result of fault for which the School District may be liable, the School District's "knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim". Also, the medical claim form did not provide the School District with actual knowledge of the claim inter alia, that it was negligent in its ownership, operation, management, maintenance, and control of the area where the accident occurred, that it was negligent in its hiring, training, and supervision of its employees and agents, or that its employees were negligent in supervising the injured infant and responding to the accident. Furthermore, plaintiffs failed to demonstrate a reasonable excuse for the delay. Finally, as to the issue of substantial prejudice, plaintiff presented no evidence or plausible argument that their delay in serving a notice of claim did not substantially prejudice the School District in defending on the merits.

Matter of A.C. v West Babylon Union Free Sch. Dist., 147 A.D.3d 1047, 48 N.Y.S.3d 422 (2nd Dep't 2017). Student collided with another child during recess. Plaintiff failed to show that the school district obtained actual knowledge of the essential facts constituting the claim within 90 days after the incident or a reasonable time thereafter. While a medical claim form was prepared during the week of the incident and signed by the principal or a designated school authority, this form, which merely indicated that the infant was injured when another student collided into her during recess, did not provide the school district with actual knowledge of the claim that the school failed to properly monitor and supervise the students during school recess. Moreover, plaintiffs did not demonstrate a reasonable excuse for the failure to serve a timely notice of claim. The infant's mother failed to submit any evidence to support her allegations that the delay was attributable to the fact that she was more concerned about dealing with her daughter's alleged injuries than with retaining an attorney. Finally, as to the issue of substantial prejudice, although the conditions of the accident scene had not changed, this was irrelevant to the claim that the district was negligent in its supervision of students during a noon recess, and, thus, to the issue of substantial prejudice as well. Plaintiff failed to present any evidence or plausible argument that the defendant had not been substantially prejudiced by the delay, and thus defendant never became required to make "a particularized evidentiary showing" that they were substantially prejudiced (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d at 467, 45 N.Y.S.3d 895, 68 N.E.3d 714).

Matter of Turlington v Brockport Cent. Sch. Dist., 143 A.D.3d 1247, 39 N.Y.S.3d 338 (4th Dep't 2016). Mother brought application for leave to serve late notice of claim against school district for injuries that her daughter sustained as result of violation of order of protection one year earlier. The Order required that one of the school district's students stay away from school attended by daughter. In support of her application, claimant presented evidence that defendant was aware of the order of protection and argued this this showed defendant had "actual knowledge" of the claim. However, she failed to meet her burden of establishing that defendand had actual knowledge that her daughter sustained any *injury* as a result of any violation of the order of protection. She did not apprise the District of the injuries until she served a proposed notice of

claim with her late notice of claim application, which set forth that her daughter sustained "emotional distress," "lost scholarships" and "lost opportunities". Application denied.

Matter of Ramos v Board of Educ. of the City of N.Y., 148 A.D.3d 909, 49 N.Y.S.3d 539 (2nd Dep't 2017). Seventh grader was injured while performing a floor exercise during her physical education class. She had complained to the physical education teacher about this particular exercise on prior occasions but was nonetheless directed to perform it. The following day, she sought medical attention for a fractured spine. She failed to serve a timely notice of claim. She brought a motion to late-serve the notice of claim. Court pointed out that the mere awareness by school employees that a student has been injured is insufficient to establish that it had actual knowledge of the essential facts constituting the claim. While plaintiff alleged that the physical education teacher invented the particular exercise and was present when she was injured, she failed to submit any evidence that the City acquired actual knowledge of the essential facts underlying their negligence claims. Thus, the City had no reason to conduct a prompt investigation into the purported negligence. While the infancy of the claimant is one of the listed factors for granting leave to late-serve, infancy alone does not constitute a reasonable excuse for the failure to serve a timely notice of claim; the petitioner must generally show a nexus between the infancy and the delay. Where, as here, a parent alleges that he or she was consumed with the infant's medical care and unable to serve a timely notice of claim, this does not constitute a reasonable excuse unless it is supported by evidence demonstrating that the delay was directly attributable to the infant's medical condition. Finally, plaintiff failed to present "some evidence or plausible argument" supporting a finding that the City was not substantially prejudiced by the 11–month delay in serving a notice of claim (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d 455, 45 N.Y.S.3d 895, 68 N.E.3d 714).

e. "Actual Knowledge" Gained from Other Sources

Kumar v. Dormitory Authority of Statem, 150 A.D.3d 1117, 55 N.Y.S.3d 361 (2nd Dep't 2017). Plaintiff fell from a ladder during a project for the Dormitory Authority of the State of New York and waited almost a year to serve an application to late-serve a notice of claim (LL 240). Plaintiff failed to set forth a reasonable excuse for the delay, and specifically failed to substantiate the assertion that the delay was warranted by the injuries suffered or that the delay was justified by their filing of a request pursuant to the Freedom of Information Law. Further, defendant did not have actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The fact that defendant's personnel were present at the project site on the date of the accident and may have acquired knowledge of the incident at that time were vague, speculative, and insufficient. Defendant's receipt of information regarding the accident approximately 37 days after the 90–day statutory period had elapsed did not, under the circumstances, provide it with actual knowledge of the essential facts within a reasonable time after the claim arose. While plaintiff satisfied his initial burden of showing a lack of substantial prejudice as a result of the late notice, and defendant failed to make a particularized evidentiary showing of substantial prejudice in response (see Matter of Newcomb v Middle Country Cent. Sch. Dist), the presence or absence of any one factor is not necessarily determinative in deciding whether permission to serve a late notice of claim should be granted. Application to late serve denied.

Matter of Ficek v Akron Cent. Sch. Dist., 144 A.D.3d 1601, 41 N.Y.S.3d 616 (4th Dep't 2016). Student of the Salamanca School District brought action against said District as well as Akron School District, alleging he contracted herpes from another wrestler during a high school wrestling tournament that took place at the Akron School District. The delay in serving a notice of claim was13 months. And there was no reasonable

excuse: Plaintiff offered only the fact that he was an infant at the time he was diagnosed with herpes. He did not demonstrate any specific nexus between his infancy and the delay. But plaintiff nevertheless was granted permission to late serve against one of the defendants, Salamanca. An excuse is not needed when the defendant had actual notice of the essential facts of the claim within 90 days or a reasonable time thereafter. Salamanca (plaintiff's school) had notice of his Herpes diagnosis with the 90-days (though Akron, which hosted the tournament, did not). Both school districts became aware of a herpes outbreak affecting other wrestlers in the same tournament and another student had timely filed a notice of claim based on the same herpes outbreak against both districts, but only Salamanca knew about *plaintiff's* diagnosis. Akron did not find out about *plaintiff's* diagnosis until it received his application to late serve. The Court found that, from this, one of the two school districts, Salamanca, had actual knowledge of the essential facts within the 90-day time period, and was not prejudiced by this plaintiff's 13 month delay. As for Akron, plaintiff here established, at most, that, Akron had *constructive* knowledge of the claim, which was insufficient. Actual knowledge of the claim is the most important factor, and is accorded "great weight" in determining whether to grant leave to serve a late notice of claim. Even if Akron suffered no prejudice from the delay, Court concluded that the lower court abused its discretion in granting claimant's application for leave to serve a late notice of claim against Akron. **(NOTE: this case was decided pre-*Newcomb*. Would the result have been different had it been decided after Newcomb?)**

Maldonado v. City of New York, 152 A.D.3d 522 (2nd Dep't 2017). The line of duty injury report and unusual occurrence report prepared on the date of the accident were insufficient to provide the defendants with actual knowledge of the essential facts underlying the sanitation worker's claim. These reports merely indicated that plaintiff was injured when his left foot got stuck in the grate of a step of a spreader as he was descending it, and made no reference to the claims listed in the proposed notice of claim, inter alia, that the "step" grate was defective and the defendants were negligent in their ownership, operation, maintenance, management, inspection, and control of the subject vehicle. Further, plaintiff presented no "evidence or plausible argument" that his delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits (Newcomb v. Middle Country Cent. Sch. Dist).

2 "Reasonable Excuse" for Late service

a. Lack of Reasonable Excuse Should Not Be Sole Grounds for Denying Application.

Brege v Town of Tonawanda, 148 A.D.3d 1792, 51 N.Y.S.3d 772 (4th Dep't 2017). Plaintiff moved for permission to file late notice of claim against town for defamation, malicious prosecution, false arrest and false imprisonment. The motion court denied the motion based solely on plaintiff's failure to provide a reasonable excuse for the delay. Appellate Division held that Supreme Court abused its discretion in denying the application based *solely* on plaintiff's failure to provide a reasonable excuse for the delay. Defendant had actual knowledge of the essential facts underlying those claims within the 90–day period. Application to late serve granted.

b. Medical Condition as Reasonable Excuse

Matter of Ramos v Board of Educ. of the City of N.Y., 148 A.D.3d 909, 49 N.Y.S.3d 539 (2nd Dep't 2017). Parent's excuse for the delay was that she was consumed with the infant's medical care and thus unable to serve a timely notice of claim. Court held this does not constitute a reasonable excuse unless it is supported by evidence demonstrating that the delay was directly attributable to the infant's medical condition.

c. "Family Emergency" as Reasonable Excuse

Matter of Hamilton v City of New York, 145 A.D.3d 784, 43 N.Y.S.3d 131 (2nd Dep't 2016). Plaintiff moved to late-serve a late notice of claim alleging false arrest. In support of the application, he contended that his delay in seeking permission to serve a late notice of claim was occasioned by a "family emergency" in Georgia and that the defendant City had timely acquired actual knowledge of the facts underlying the claim, and that the City consequently would not be prejudiced by the delay. But neither the plaintiff's unsubstantiated claim of a "family emergency" nor his purported presence in Georgia for an extended period of time constituted a reasonable excuse for his delay in serving a notice of claim. He did not explain why he neglected to serve the notice before leaving for Georgia, and he also did not demonstrate how his mere presence there rendered him unable to timely serve a notice of claim in New York. Moreover, he provided no explanation for his delay of approximately two months in seeking leave to serve a late notice of claim after his alleged return to New York. Also, he failed to submit evidence establishing that the City acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter. Application denied.

d. Mistaken Identity of Defendant-Entity

Matter of Feysher C. v New York City Hous. Auth., 149 A.D.3d 509, 52 N.Y.S.3d 325 (1st Dep't 2017). Plaintiff failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim. The service of a notice of claim on the City of New York did not excuse her failure to serve the Housing Authority within the statutory period. The actual knowledge of the facts constituting the claim, acquired by the City of New York, through the notice of claim and General Municipal Law § 50–h hearing, cannot be imputed onto the Housing Authority (see Seif v. City of New York, 218 A.D.2d 595, 596, 630 N.Y.S.2d 742 [1st Dept 1995]). Furthermore, there was no showing that a defense on the merits would not be prejudiced by the over 10–month delay in service. Application denied.

King v Niagara Falls Water Auth., 147 A.D.3d 1398, 47 N.Y.S.3d 185 (4th Dep't 2017). Plaintiff's motor vehicle struck a depression in a city roadway and plaintiff timely filed a notice of claim and sued the city. Nearly a year after the accident, in response to a FOIL request, the city provided plaintiff with a copy of a permit for the replacement of a water line in the vicinity of the accident. The permit listed Niagara Falls Water Board as the general contractor on the project. Just about a year after the incident, plaintiff applied for leave to late-serve the Water Board. Plaintiff demonstrated a reasonable excuse for the delay inasmuch as he served a timely notice of claim upon the City, and then promptly applied for leave to serve a late notice of claim upon the Water Board after discovering their alleged involvement. Although the Water Board lacked actual knowledge of plaintiff's injuries, defendants made no particularized or persuasive showing that the delay caused them substantial prejudice. The Water Board was the general contractor for the construction project that allegedly created the defect, and thus their ability to investigate the facts underlying the claim was furthered by their possession of documents and other information related to the construction project. Application granted.

West v City of New York, 143 A.D.3d 810, 39 N.Y.S.3d 65 (2nd Dep't 2016). Plaintiff, was injured when a desk chair he was sitting on in classroom at Community college of City University of New York (CUNY) collapsed. He sued only the City of NY, not the Community College (which was a separate entity). Court held that plaintiff was not entitled to amend the caption to substitute CUNY as defendant instead of the City because plaintiff failed to timely serve CUNY with notice of a claim and the time for moving to late-serve had expired (the SOL). While the plaintiff's initial service of a notice of claim naming the wrong municipal

entity might have constituted a reasonable excuse to support a motion for leave to serve a late notice of claim made within the available one–year–and–90–day statute of limitations, the plaintiff never made such a timely motion. To the extent that the plaintiff's cross motion could be deemed an application to serve a late notice of claim against CUNY, as the one–year–and–90–day statute of limitations has expired, the Supreme Court lacked the authority to extend the time to file a notice of claim beyond the statutory time limit for the asserted claim. Case dismissed.

e. "Ignorance of Notice of Claim Requirement" Is No Excuse

Humsted v New York City Health & Hosps. Corp., 142 A.D.3d 1139, 37 N.Y.S.3d 899 (2nd Dep't 2016). The plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The plaintiff's ignorance of the notice of claim requirement is not a reasonable excuse. The plaintiff also failed to offer any proof to show that either the defendants acquired actual knowledge of the essential facts constituting the claim within the 90–day statutory period or within a reasonable time thereafter. The plaintiff provided only her own unsubstantiated contentions and those of her attorney regarding the contents of a police accident report and her medical records. The plaintiff also failed to establish that the delay in serving her notices of claim would not substantially prejudice the respondents in maintaining their defenses on the merits with respect to the claims. Application denied.

Tate v. State University Construction Fund, 151 A.D.3d 1865 (4th Dep't 2017). Claimant failed to demonstrate a reasonable excuse for his failure to serve the notice of claim within 90 days of the claim's accrual or within a reasonable time thereafter. A claimant's mistaken belief that workers' compensation is his or her sole remedy does not constitute a reasonable excuse. Appliction denied.

3 Whether Public Corporation Has Suffered "Substantial Prejudice". **NEW RULE REGARDING BURDENS OF PROOF**

Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d 455, 45 N.Y.S.3d 895 (2016). The issue here involves one of the factors considered in deciding whether to grant an application to late-servev a notice of claim. The specific factor is in the GML is "*whether the public corporation has suffered substantial prejudice from the delay*". The Court here resolves a split in Appellate Division authority regarding which party has the burden of proof to demonstrate that a late notice of claim substantially prejudices the public corporation. While there were decisions in all four departments that placed the burden on the petitioner to show a lack of substantial prejudice, there were also decisions in all four departments that either placed the burden on the public corporation or shifted the burden to the corporation after the petitioner has made an initial showing of a lack of prejudice. The Court resolves the "spilt" by setting forth a new shifting-of-burdens standard for analyzing the factor. The facts of the case are very sad: A 16-year old highschool boy was struck by a hit-and-run vehicle while attempting to cross an intersection near the high school. He suffered severe brain damage from the incident so he was unable to ever testify. The driver fled the scene but was subsequently arrested. Within days, plaintiffs (student's parents) reported details of the accident, including the location and the nature of his son's injuries, to his son's high school. Less than one month later, plaintiffs' counsel asked the police for the accident file, but the police told him that the record could not be supplied until the police investigation of the hit-and-run driver was closed. Unable to obtain the police file, plaintiffs' attorneys had an investigator photograph the accident site within 90 days of the accident. Plaintiffs timely served timely notices of claim on the State, Town, and County, but at that time had no reason to suspect the school district's involvement in the accident. Over the next several months, plaintiff and his counsel repeatedly asked the police department and district attorney for access to

the police accident file. Eight months or so after the accident, plaintiff's counsel finally received the file. Unlike the photographs taken by plaintiff's investigator, the photographs in the file revealed that, at the time of the accident, there was a large sign at the corner of the intersection where plaintiff's son was struck. The sign advertised a high school play at another high school located within the School District. Plaintiff then promptly served a notice of claim on the School District by certified mail, alleging that the school district was responsible for the sign, and that the sign had contributed to the accident. Plaintiff simultaneously filed an application to late-serve the notice of claim or to deem the notice timely served nunc pro tunc. Regarding the "substantial prejducice" factor, plaintiff argued that the School District was not substantially prejudiced by the late notice for several reasons. These included that the School District or its agents had placed the sign at the intersection and subsequently removed it during the 90–day statutory period; that the School District knew about the accident within a few days of its occurrence because plaintiff had notified the high school; that the School District had access to the police report and photographs from the police file that would permit the School District to reconstruct the scene and to interview witnesses; and that, except for removal of the sign by the School District, the accident scene was unchanged, and could be inspected and investigated by the School District. The School District's opposition consisted solely of an affirmation of counsel. ***The School District did not rebut plaintiff's showing of lack of substantial prejudice other than to argue that plaintiff bore the burden of establishing such lack of prejudice and had failed to do so.*** In reply, plaintiff noted that the School District had failed to submit affidavits or other evidence from a person with personal knowledge of how the School District would be substantially prejudiced by the late notice. The Supreme Court denied the application to late-serve the notice of claim based on a consideration of all the factors. With respect to the "substantial prejudice" factor, Supreme Court placed the burden on plaintiff to demonstrate that the School District was not substantially prejudiced by the delay in service. The court concluded that the matriculation and graduation of students in the interim, as well as personnel changes, "presumably hinder[ed]" the School District's ability to collect information about the sign. Additionally, Supreme Court reasoned that prejudice could be "inferred" because "the mere passage of time creates prejudice with respect to fading memories of witnesses". Thus, Supreme Court held that the School District was substantially prejudiced by the late notice. Based on this, and the other factors, Supreme Court denied the application to late-serve. The Appellate Division affirmed. The Court of Appeals here reverses, and grants permission to late serve, finding that the two lower courts failed to properly consider the ***burdens of proof*** regarding the "substantial prejudice" factor. The Court stated, "we hold that a finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record. . . . ***We hold that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice. Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed. Here, the lower courts applied the incorrect legal standard by placing the burden solely on petitioner to establish lack of substantial prejudice and by failing to consider whether petitioner's initial showing shifted the burden to the School District.*** Note: This rule makes sense because public corporation is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice. The Court also noted that, even if the lower courts had applied the proper standard, ***"speculation and inference do not satisfy the requirement of a particularized showing of substantial prejudice by the School District"***. In this regard, the Court was referring to Supreme Court's "inferring" that, in a school setting, it might be difficult for the

defendant to locate witnesses because, with a new school year, some of the students "might have" graduated and some of the staff might no longer be employeed there. Application to late serve granted (finally!).

Eboni B. v New York City Hous. Auth., 148 A.D.3d 486, 49 N.Y.S.3d 126 (1st Dep't 2017). Mother of infant burned by hot water pipe in his family's apartment brought action against city housing authority. *Although plaintiff did not present a reasonable excuse for the delay in serving a notice of claim, and although defendant did not have actual knowledge of the facts constituting the claim within the statutory period or a reasonable time thereafter, leave to serve a late notice of claim was granted based on other relevant factors (note: This is a highly unusual result and probably was not possible before the Court of Appeals Newcomb case.)* The infant plaintiff was approximately nine months old when he sustained the injuries. Court found that his infancy weighed in favor of granting leave to serve a late notice of claim, regardless of the lack of a nexus between the delay and infancy. In addition, *defendant failed to address plaintiff's showing that defendant would not be substantially prejudiced* by the 10–month delay in seeking leave since the condition of the exposed pipes remained unchanged from the time of the accident. (NOTE: *In the pre-Newcomb world, the defendant did not generally have to prove it was not substantially prejudiced; the burden was on plaintiff to show no substantial prejudice).* Thus, the motion court improvidently exercised its discretion in dismissing the infant plaintiff's claim. Application to late serve granted. To the extent that the complaint stated a derivative claim on behalf of the infant plaintiff's mother, she was not entitled to leave to serve a late notice of claim on her behalf.

Camins v. New York City Housing Authority, 151 A.D.3d 589, 55 N.Y.S.3d 247 (1st Dep't 2017). Pedestrian brought personal injury action against property owner, a city housing authority, alleging negligence regarding trip and fall accident on sidewalk in front of city housing authority's property. Application to file a late notice of claim granted as it was made only 22 days after the statutory deadline had passed. Plaintiff had a reasonable excuse for the delay in that he was in the hospital and then a nursing home, showing that plaintiff was physically incapacitated for 30 days after his alleged accident. Further, plaintiff sustained his initial burden of showing that the late notice of claim would not substantially prejudice defendant, as the record demonstrated that defendant fixed the allegedly defective condition on its premises the day after plaintiff's fall. In response, defendant did not rebut plaintiff's showing of lack of substantial prejudice, and therefore could not convincingly argue that it was prejudiced by any delay in serving the notice of claim. On the contrary, even had plaintiff timely served his notice, the allegedly defective condition would no longer have existed by the time of service, as that condition had already been repaired by the day after the incident. Defendant therefore could not be heard to say that the late notice of claim prejudiced its ability to conduct an investigation of the premises. Similarly, although defendant noted that its security recordings were erased from the database in the normal course of business, it notably failed to mention how often those recordings were actually erased. If recordings were erased, for example, every 30 days, even timely service could have prejudiced defendant, as the recordings would already have been erased even had a notice of claim been timely served 45 days (or even fewer) after the incident. Application to late serve granted.

Matter of Diegelman v City of Buffalo, 148 A.D.3d 1692, 51 N.Y.S.3d 279 (4th Dep't 2017). Police officer and his wife sought leave to serve late notice of claim on city, relating to officer's exposure to asbestos at city-owned properties used by police department. This Court previously held that the application should have been denied as patently without merit on the ground that the claim was barred by General Municipal Law § 207–c, but the Court of Appeals then concluded that the claim was not so barred (Matter of Diegelman v. City of Buffalo, 28 N.Y.3d 231, 43 N.Y.S.3d 803, 66 N.E.3d 673, revg. 129 A.D.3d 1527, 11 N.Y.S.3d 762). The Court of Appeals reversed this Court's Order and remitted the matter"for consideration

of issues raised but not determined on the appeal". This Court then concluded that Supreme Court did not abuse its discretion in granting claimants' application to late-serve. Even assuming plaintiffs failed to provide a reasonable excuse for their delay, the remaining factors supported granting their application. Although defendants did not obtain knowledge of the facts underlying the claim until approximately *nine months after the expiration of the 90–day period*, under the circumstances of this case that "this was a reasonable time, particularly in light of the fact that respondent[s] do[ ] not contend 'that there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of this action' ". Moreover, claimants made a sufficient showing that the late notice would not substantially prejudice defendants, who failed to "respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" (Newcomb, 28 N.Y.3d at 467). Note: This is another case that might have turned out differently but for the Court of Appeals *Newcomb* case.

Kranick v. Niskayuna Central School District, 151 A.D.3d 1262, 56 N.Y.S.3d 636 (3rd Dep't 2017). Plaintiff stepped into a depression in the parking lot when getting off defendant's bus, thus injuring his knee. He reported the injury to his supervisor three days later and had his knee X-rayed. Several months later, an MRI revealed a torn meniscus and plaintiff underwent surgery. A notice of claim was then filed (12 weeks late) and thereafter plaintiff sought leave to file a late notice of claim. The Appellate Division here finds that Supreme Court correctly deemed the excuse for late-filing (that plaintiff did not realized the severity of his injuries) reasonable, but disagreed with SC's denying the application to late serve based on the other factors. Although defendant did not have actual knowledge of the essential facts constituting the claim until the filing of the notice of claim, Supreme Court's conclusion that plaintiff failed to meet his burden to show a lack of substantial prejudice was not supported by the record. The Court noted that plaintiff had submitted evidence showing that he had identified the precise location of the incident during his 50-h hearing by marking a map with a box showing where the bus was parked as he stepped off into the depression, and he represented, through his attorney, that the parking lot defect had not changed since the time of the incident. Photographs of the defect had been taken and provided to defendant. Plaintiff thus met his initial burden under *Newcomb* of showing lack of substantial prejudice to defendant. Defendant in turn was required to rebut this evidence of lack of prejudice "with particularized evidence". The Supreme Court, with no such evidence presented by defendant, surmised (*pre-Newcomb*) that "snow plowing, traffic, weather, or even repairs performed in the interim *could have* altered the condition" was not based on any evidence in the record and, thus, constituted the kind of unsupported assertion of prejudice that the Court of Appeals would deem "speculation and inference" under the *Newcomb* rule. Thus, the record was devoid of any basis to conclude that the 12–week delay in filing the notice of claim caused substantial prejudice to respondent. Accordingly, Supreme Court improvidently exercised its discretion in denying petitioner's application. Application thus granted here. Note: This is another case that might have turned out differently but for the Court of Appeals *Newcomb* case.

Kerner v. County of Nassau, 150 A.D.3d 1234 (2nd Dep't 2017). Plaintiff's decedent fell out of the rear bed of a dump truck after the truck hit a bump in a roadway. His estate blamed the County's maintenance of the roadway. Leave to late-serve a notice of claim was sought, supported by a police accident report, but that report did not show that the County had actual timely notice of the incident. Plaintiff lost that motion, and then brought a motion to renew/reargue in which he presented new facts contained in County "work order summary reports" and the letter of the Department of Public Works, which had not been presented with the original petition because they had been provided by the County only after the petition had been denied. Accordingly, plaintiff had reasonable justification for failing to present those facts initially. Moreover, those new documents demonstrated that the County had timely, actual knowledge of the facts constituting the

claim and that the County would not be prejudiced by the delay in serving the notice of claim. Inasmuch as the County acquired timely, actual knowledge of the essential facts of the claim and actually conducted an investigation, the plaintiff made an initial showing that the County was not prejudiced by his delay in serving a notice of claim. The County nevertheless claimed that it would be prejudiced by the delay because the roadway where the accident occurred has been repaved and because it would be unable to locate witnesses. The County, however, had recognized the need for repairs of the roadway *before* the plaintiff was appointed as administrator, and it issued work orders to repair the roadway only a few days after the plaintiff was appointed. Thus, any prejudice resulting from the changed condition of the road was not caused by the plaintiff's delay in serving a notice of claim. The County also failed to make a showing that any of the witnesses were unavailable.

K.A., ex rel D.A. v. Wappingers Cent. School Dist., 151 A.D.3d 828, 54 N.Y.S.3d 683 (2nd Dep't 2017). A mostly nonverbal 18–year–old with developmental disabilities was sexually assaulted by a bus attendant employed by the defendant School District while traveling between her parent's home and the residential facility where she lived. The bus attendant eventually pleaded guilty to criminal sexual act in the first degree. The motion to late-serve was here granted. Under the circumstances of this case, the School District acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. Pursuant to her individualized education plan (IEP), the School District transported the child and hired the bus attendant who sexually assaulted her during the course of his employment. Thus, an employee of the School District was not only "directly involved" in the incident but he committed the intentional tortious conduct giving rise to the claim. Further, the School District itself conducted the investigation that yielded the bus attendant's admission of abuse, and reported its findings to the police. Accordingly, the School District acquired timely, actual knowledge of the essential facts constituting the claim, which enabled it to conduct an appropriate investigation. With respect to the issue of whether the School District would have been prejudiced by a late notice of claim, the plaintiffs were not required to make an extensive initial showing, merely "some evidence or plausible argument that supports a finding of no substantial prejudice" (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 466). Under the circumstances present here, the fact that the School District acquired actual knowledge of the essential facts constituting the claim within only a few weeks of the abuse, coupled with the fact that the notice of claim was served only two days late, demonstrated that a late notice would not have substantially prejudiced the School District.

Ronness v. City of New York, 151 A.D.3d 976, 55 N.Y.S.3d 450 (2nd Dep't 2017). Pedestrian tripped and fell in a tree well. More than five months later, he served a notice of claim on the City of New York and then applied for leave to serve a late notice of claim. The late notice of claim, served upon the City 76 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. The petitioner also failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. Finally, the petitioner failed to make an initial showing that her delay in serving a notice of claim would not substantially prejudice the City in maintaining a defense on the merits (*see*, *Newcomb*).

Shun Mao Ma v. New York City Health & Hospitals Corp., 2017 WL 3273230 (2nd Dep't 2017). Plaintiff's decedent died at the defendant hospital and, almost a year later, plaintiff filed a notice of claim with the municipal hospital alleging conscious pain and suffering and wrongful death and at the same time applied for permission to late-serve. Plaintiff failed to establish that the defendant had actual knowledge of the essential facts constituting the claim to recover damages for conscious pain and suffering within the

requisite 90–day period or a reasonable time thereafter. Further, the notice of claim served nine months after the 90–day statutory period had elapsed was served too late to provide the defendant with actual knowledge of the essential facts constituting the conscious pain and suffering claim within a reasonable time after the expiration of the 90–day statutory period. Even assuming that plaintiff made an initial showing that the late notice would not substantially prejudice the defendant, and defendant failed to make "a particularized evidentiary showing that they will be substantially prejudiced if the late notice is allowed" (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 467), the Court denied the petition based on a weighing of all the relevant factors, including a lack of reasonable excuse by plaintiff for the delay.

III. AMENDING THE NOTICE OF CLAIM

Castillo v Kings County Hosp. Ctr., 149 A.D.3d 896, 52 N.Y.S.3d 451 (2nd Dep't 2017). Plaintiff underwent a surgical procedure at the defendant Hospital to remove a bony mass from his left hip. Plaintiff served a timely notice of claim on defendant alleging that his *urethra* was injured due to the negligent insertion of a Foley catheter. Just before the SOL, plaintiff moved for leave to amend his notice of claim to allege that, during the operative procedure, the defendants caused injury to his *left superficial femoral cutaneous nerve*. Motion denied because a notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability. Here, the proposed amendments to the notice of claim asserted a new injury and added a new theory of liability and as such the amendments were not technical in nature.

Fast v. County of Nassau, 150 A.D.3d 827, 54 N.Y.S.3d 121 (2nd Dep''t 2017). The plaintiff sustained in a bicycle accident on the Long Island Expressway service road in Nassau County. The plaintiff served a timely notice of claim, which included a detailed description of the accident location and photographs of that site. The notice of claim alleged that the plaintiff was "lawfully traveling" on the service road when she was injured as a result of a defective roadway condition, but did not mention she was on a BICYCLE. After suit was filed (which did allege she was on a bicycle) plaintiff moved for leave to serve an amended notice of claim to specify that the incident occurred while she was bicycling. The defendant County of Nassau cross-moved to dismiss the complaint based on the failure to serve a sufficient notice of claim. The record did not show any bad faith on the part of the plaintiff, and the County failed to show that it would be prejudiced by the amendment. In particular, the County did not allege that the condition of the roadway changed prior to the service of the summons and complaint, which alleged that the plaintiff was injured while bicycling. Moreover, the record showed that Nassau County Police Department EMS personnel responded to the scene of the accident, and EMS personnel prepared a written report indicating that the plaintiff fell from a bicycle. In light of the lack of bad faith and the absence of demonstrable prejudice to the County, leave to serve an amended notice of claim granted.

Aleksandrova v. City of New York, 151 A.D.3d 427, 52 N.Y.S.3d 866 (1st Dep't 2017). Plaintiff tripped over a protruding manhole cover near the entrance to a park, and alleged in her n/c and s/c that defendants were negligent in "failing to timely and/or properly repair [the] sidewalk," or to warn of the dangerous condition. After the applicable one–year–90–day limitations period elapsed (General Municipal Law § 50–i[1]), plaintiff moved to ***amend*** the notice of claim and complaint in order to plead, as an exception to the prior written notice rule (Administrative Code of City of N.Y. § 7–201[c]), that defendants had caused and created the condition or made "special use" of the sidewalk. Court held that the allegations of negligent maintenance in the notice of claim did not provide notice of plaintiff's new theory of affirmative negligence.

Thus, General Municipal Law § 50–e(6), which "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" did not apply. Further, General Municipal Law § 50–e(5) (permission to late-serve a notice of claim) does not authorize serving a new (late) where, as here, the limitations period has expired.

Bowers v City of New York, 147 A.D.3d 894, 47 N.Y.S.3d 409 (2nd Dep't 2017) In her verified bill of particulars, the plaintiff alleged that the accident took place on March 3, 2012, at approximately 12:00 a.m. (just after midnight), whereas in her previously filed notice of claim she had alleged it was March 2, at 11:30 p.m. The Transit Authority moved to dismiss the complaint on the ground (among others) that the notice of claim did not apprise it of the correct *date* of the accident. The plaintiff cross-moved pursuant to General Municipal Law § 50–e(6), for leave to amend the notice of claim and the pleadings to reflect that the correct date of the accident as March 3, 2012. In support of her cross motion, she submitted, inter alia, a police department aided report containing a March 3, 2012, date and a pre-hospital care report summary indicating that an ambulance was dispatched shortly after midnight on the morning of March 3, 2012. The The Court denied the Transit Authority's motion to dismiss and granted the plaintiff's cross motion. Court noted that "mere minutes" constituted the difference between whether the plaintiff's fall occurred on March 2, 2012, or March 3, 2012. There was no indication that the date originally set forth in the notice of claim was set forth in bad faith, and the Transit Authority did not demonstrate any actual prejudice.

IV 50-H EXAMINATION ISSUES

Doe v. Onondaga County, 151 A.D.3d 1743, 53 N.Y.S.3d 847 (4th Dep't 2017). Plaintiff sued County for injuries that she sustained as a result of her placement in a foster home where she was subjected to sexual abuse. Defendant's motion to dismiss the claims based plaintiff's alleged failure to comply with their demand for a hearing pursuant to GML § 50–h was denied. Plaintiff complied with the statute inasmuch as, after defendants demanded a General Municipal Law § 50–h hearing, she requested and was granted an adjournment of the hearing. It was incumbent upon them to reschedule the adjourned hearing.

V DISCOVERY ISSUES INVOLVING MUNICIPALITIES

Abate v. County of Erie, 152 A.D.3d 177, 54 N.Y.S.3d 821 (4th Dep't 2017). An unusually intense winter storm stranded plaintiff's decedent inside his vehicle during early morning hours. The decedent called 911 at 3:50 a.m. to report his predicament. The dispatcher instructed the decedent to remain in his vehicle, and assured him that help would be forthcoming. Help did not arrive for almost 24 hours, and by that time the caller was dead, still inside his vehicle. Plaintiff, the estate representative, sued the County and County Sheriff's Office alleging the decedent's death resulted from defendants' negligent failure to rescue him during the storm. As for the required "special duty", plaintiff claimed decedent's communications with defendants' 911 service formed that duty. In the course of discovery, plaintiff sought disclosure of 911 records concerning the decedent and his plight but also *sought disclosure of 911 records pertaining to other stranded persons at eight specified locations in the decedent's vicinity*. Defendants voluntarily disclosed the decedent's 911 records, but they refused to disclose any 911 records pertaining to other stranded persons, relying on County Law § 308(4), which states, in pertenint part, that 911 records "shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services . . .". Defendant argued that, since neither plaintiff nor his lawyer were a member of any of the entities listed in the Statute, the 911 records "shall not be made available to them". Plaintiff moved to compel production. Court here hold that, though the words of this Statute seem to support

defendant's position, one must look beyond the "superficial" appearance of the Statute, and instead to the context and legislative history. The Statute was passed to save 911 providers from the *cost* of producing 911 documents upon FOIL requests. It was a Statute intended to save municipalities monies from having to comply with FOIL requests. But the Statute was "not enacted in order to exempt 911 records from the scope of discovery authorized by CPLR article 31, *at least not where the County or other agency providing 911 services is the defendant*". (Note: The Court does not discuss directly what would happen if the 911 records were subpoenaed in a civil action in which the 911-service providing agency was not a party to the action. But Court did note in passing that discovery of 911 records occurs with great regularity in criminal cases and the County's interpretation of section 308(4) would seem to call that longstanding and salutary practice into considerable question. Since the 911-agencies are not parties in those criminal proceedings, it stands to reason that 911 records should also be discoverable to civil litigants even when the 911 service-providing agency is not a defendant).

VI GOVERNMENTAL IMMUNITY

A. Governmental v Proprietary Function

Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs., 28 N.Y.3d 709, 49 N.Y.S.3d 362 (2017). Student was sexually assaulted while attending classes at BOCES operated by North Amityville Community Economic Council (NACEC). NACEC leased the facility where classes were held from Suffolk County for a nominal amount. Additionally, NACEC agreed that the facility would be a work site for the Suffolk Works Employment Program (SWEP), a "welfare to work" program operated by Suffolk County Department of Labor (DOL). NACEC agreed to accept referrals of individuals who did not have criminal records. The DOL referred a man (plaintiff's future assailant) to NACEC for a potential position as a maintenance worker notwithstanding that it knew the man was a level three sex offender. NACEC accepted the referral and months later, while working at NACEC's facility, the man sexually assaulted plaintiff in an empty classroom. County moved for summary judgment on the grounds that it did not owe plaintiff a duty of care and, in any event, was entitled to absolute ***governmental*** immunity for discretionary acts. Plaintiff argued that the County's negligence arose out of its ***proprietary*** function as a landlord, and that the County's failure to provide minimal security or a warning to protect those on the premises against foreseeable harm raises issues of fact that preclude summary judgment. In the alternative, plaintiff argued that, assuming the County was found to have acted in a ***governmental*** capacity, the County had a ***special duty*** to plaintiff and the act of referring Smith to NACEC was ***not discretionary***. The Appellate Division granted the County's motion for summary judgment on the ground of governmental immunity, holding that the County was acting in a governmental capacity and did not voluntarily assume a special duty to plaintiff. As to plaintiff's argument that the County should be liable because it acted in a proprietary capacity as a landlord, the Appellate Division held that the "essential act complained of ... that the County negligently referred [plaintiff's future assailant] to NACEC ... was a governmental act" and, therefore, plaintiff could not "avoid the attachment of governmental immunity". The Court of Appeals agreed. The Court of Appeals then turned its attention to whether a "***special duty***" was assumed toward plaintiff, but found there was no "direct contact" nor any "justifiable reliance" and thus no special duty. Even if the County promised that it would not refer anyone with a criminal background, that promise was made only to NACEC and not directly to plaintiff. Because the Court determined there was no triable issue of fact as to the existence of a special duty, the Court noted it need not decide whether the County's referral of plaintiff was ministerial or discretionary.

Abrahams v. City of Mount Vernon, 152 A.D.3d 632 (2nd Dep't 2017). Infant plaintiff was attacked by a pit bull while visiting his brother who was volunteering at an animal shelter owned and run by the City. It was undisputed that the City operated the Shelter pursuant to a statutory mandate (Agriculture and Markets Law § 114) which required each town or city that issues dog licenses to establish and maintain a pound or shelter for dogs. Court found that the City's act of providing an animal shelter constituted a g*overnmental function* and, therefore, it could not be held liable absent the existence of a special relationship between it and the plaintiffs giving rise to a special duty of care. Here, there was no special relationship as a matter of law between it and the plaintiff. The City's employees at the shelter did not voluntarily assume a duty toward the plaintiff and it did not affirmatively act to place the plaintiff in harm's way (see Sutton v. City of New York, 119 AD3d 851). In any event, the City neither knew nor should have known of any vicious propensities on the part of the dog that attacked and bit the infant plaintiff.

Moore v. Del-Rich Properties, Inc., 151 A.D.3d 1817 (4th Dep't 2017). Infant plaintiff was exposed to lead paint while he was visiting and then residing with his grandmother in an apartment owned by a private landlord. The landlord applied to enroll in the Lead Hazard Control Project (Project), which is a federally-funded grant program designed to address the high rate of lead poisoning in and around defendant City of Buffalo. Employees of defendant City of Buffalo Urban Renewal Agency (BURA) helped manage the Project, and properties enrolled in the Project would receive lead abatement work performed by contractors chosen by the Project. The lead abatement work was performed at plaintiff's apartment but a year later retested at dangerous levels of lead. Plaintiff sued, *inter alia*, the City and BURA for alleged negligent lead abatement work performed. The municipal defendants moved for summary judgment contending their role was "*governmental*" and not "*proprietary*", and thus governmental immunity rules applied, and that plaintiff had no "special relationship" with them and, even if there was a "special relationship, they were immune from suit because their actions were discretionary. The Court held that as a matter of law that defendants' actions were *proprietary* and therefore not subject to governmental immunity. *The acts and omissions of defendants essentially substituted for or supplement traditionally private enterprises. Contrary to defendants' contentions, they did not merely inspect the premises and order that abatement work be performed. They coordinated and oversaw the entire abatement process at plaintiff's residence.* It is well established that maintenance and care related to buildings with tenants is generally a proprietary function. Defendants thus voluntarily assumed the homeowner's duty to remediate the lead paint at plaintiff's residence. Once defendants assumed that proprietary duty, they "also assumed the burdens incident thereto".

Nachamie v County of Nassau, 147 A.D.3d 770, 47 N.Y.S.3d 58 (2nd Dep't 2017). Homeowners brought actions against county and contractors, seeking damages for flooding that damaged their homes after pond owned by county overflowed while County and contractors were performing environmental improvement project. The County failed to show that it was entitled to summary judgment based on its prior written notice statute (see Nassau County Administrative Code § 12–4.0[e]) because plaintiffs alleged in their respective pleadings that it affirmatively created the alleged defect that caused their damages, and it failed to establish, prima facie, that it did not do so. Defendant's qualified governmental immunity defense also failed because, although a governmental entity may be entitled to immunity from liability arising out of claims that it negligently *designed* a sewerage or storm drainage system, *the immunity does not extend to claims that it negligently maintained the* system (see Weiss v. Fote). Here, even assuming the subject project fell within the ambit of a governmental function, the plaintiffs were contending that the County was negligent, inter alia, in its maintenance of the pond and oversight of the dredging operations. Accordingly, defendant was not immune. The County also failed to prove as a matter of law that

Full v. Monroe County Sheriff's Department, 152 A.D.3d 1237, 54 N.Y.S.3d 920 (4th Dep't 2017). On the day of the accident, to accommodate the vehicular traffic in the vicinity of an "air show" (involving airplanes), an inter-agency task force involved in the planning of the air show temporarily designated Beach Avenue, normally a two-way street, as a one-way street in which the traffic could travel only westbound. Side streets were barricaded, and parking was banned along the length of the Beach Avenue corridor. Just prior to the accident, plaintiff drove along the corridor, pulled into a private driveway, exited his vehicle, and crossed the street to seek parking advice from pedestrians. As plaintiff re-crossed the street, he was struck by an oncoming vehicle, suffering severe brain injuries. Upon summary judgment motion, court found that the creation of the Beach Avenue corridor was a *governmental* function, since traffic regulation is a traditional governmental activity, and thus, the allegedly negligent conversion of Beach Avenue into a one-way street was not actionable in the absence of a special duty to plaintiff, and none was established (since there was no "direct contact" between the municipal agents and plaintiff). Court rejected plaintiff's arguments that the traffic control became a *proprietary* function merely because it was undertaken in furtherance of a *proprietary* air show. Plaintiff did not allege that defendants failed in their responsibility to *physically* maintain Beach Avenue, which would be a breach of a proprietary duty. However, the alleged negligence of defendants in sponsoring the air show, including their decision to locate the show at Ontario Beach Park, and their alleged failure to keep greater distance between the purportedly distracting planes and nearby pedestrians and drivers, arose from *proprietary* functions. Nevertheless, defendants established as a matter of law that any negligent operation of the air show was not a proximate cause of plaintiff's injuries. The undisputed evidence establishes that neither plaintiff nor the driver of the vehicle was distracted by the overhead airplanes in the moments before the accident, and plaintiff has failed to raise any triable issues of fact. Case dismissed.

B. Don't Confuse "Governmental Immunity" with "Qualified" Governmental Immunity

Turturro v City of New York, 28 N.Y.3d 469, 45 N.Y.S.3d 874 (2016). Child was struck by speeding automobile while riding his bicycle on a city street. During trial, plaintiffs presented evidence that the City had received several letters from local residents, including children, and elected officials between 2002 and 2004 complaining of speeding on the street, some of which stated that the roadway was being used for "drag racing" and was being treated as a "racetrack." Several individuals requested traffic signals to curb the speeding. Some requested a traffic study. Those complaints were routed to the Intersection Control Unit (ICU) of the Department of Transportation (DOT). Plaintiffs' witnesses testified that the role of ICU was to study particular intersections and determine whether those intersections needed installation of traffic signals or alteration of existing signals. ICU conducted four studies of three intersections on Gerritsen Avenue before plaintiff's accident—two studies in 2002 and two in 2004. Three of the four ICU studies also examined the approach speed of vehicles traveling through the particular intersection that was the subject of the study. ICU found that many vehicles were speeding at each of the intersections studied. ICU notified police of the speeding problem after each study. After trial, the jury returned a verdict finding that the at-fault driver and City were both negligent, and that the negligence of each of them was a substantial factor in causing injury. The jury apportioned 40% to the City. The City moved to set aside the verdict pursuant to CPLR 4404, arguing that it was entitled to ***qualified immunity*** because the ICU studies were adequate to address the problem of speeding, and that its failure to conduct a traffic calming study or implement traffic calming measures was not a proximate cause of the accident. The City also argued the City was acting in a ***governmental capacity and therefore plaintiffs were required to prove special duty***. The Appellate Division rejected the argument that the "governmental immunity" doctrine applied and thus rejected the argument that plaintiff needed to establish a "special duty". As for the "Qualified Immunity defense", the

jury could rationally conclude that the studies were inadequate and the City's negligence contributed to the accident. The Court of Appeals affirms. Regarding the argument that governmental immunity applied such that plaintiff needed to show a "special duty", the Court noted that there are categories of actions that have long been held to fall definitively within either the proprietary or the governmental end of the spectrum. For example, police and fire protection are examples of long-recognized, quintessential governmental functions. Highway planning, design, and maintenance, by contrast, are proprietary functions, arising from a municipality's "proprietary duty to keep its roads and highways in a reasonably safe condition. In the specific proprietary field of roadway safety, a municipality is afforded only qualified immunity' from liability arising out of a highway planning decision." The Court also addressed the City's argument that that plaintiffs' claims actually arose from an alleged police failure to enforce the speed limit in the area, and that this was not roadway design or maintenance, but rather "police activity" and thus a quintessential government function triggering governmental immunity. The Court disagreed. The determination of the primary capacity under which a governmental agency was acting turns solely on the acts or omissions claimed to have caused the injury. (World Trade Ctr., 17 N.Y.3d at 447, 933 N.Y.S.2d 164, 957 N.E.2d 733). The essence of the complaint was that the City failed to maintain this particular street in a reasonably safe condition, including by failing to implement traffic calming measures that would have reduced speeding on that roadway. Plaintiffs did not allege that the City was negligent in failing to allocate adequate police resources to enforce the speed limit. To the contrary, part of plaintiffs' theory of the case was that although ICU referred the speeding problem to the police for enforcement, the problem was not, and could not be, alleviated solely through police enforcement. The **dissent** found that the City was acting in a *governmental capacity* because plaintiffs claimed that the City failed to prevent unlawful behavior (speeding), and thus that all the "governmental immunity" rules applied, including the need to show a special duty. But the **majority** countered that "it is not the characterization of the behavior sought to be prevented that determines whether the municipality was acting in a proprietary or governmental capacity, but rather the specific act or omission by the municipality claimed to have caused the injury". Although the behavior sought to be prevented (speeding) was unlawful, plaintiffs presented evidence that roadway design changes in the form of traffic calming measures were available to the City to accomplish that purpose. Caveat: The Court left a window open to future municipal defendants by stating, "we do not suggest that a municipality has a proprietary duty to keep its roadways free from all unlawful or reckless driving behavior, [but rather] ***under the particular circumstances of this case*** . . . plaintiffs demonstrated that the City was made aware through repeated complaints of ongoing speeding along [this particular] Avenue, that the City could have implemented roadway design changes in the form of traffic calming measures to deter speeding, and that the City failed to conduct a study of whether traffic calming measures were appropriate and therefore failed to implement any such measures. Finally, as for the City's contention that the driver's reckless and criminal speeding was the sole proximate cause of the accident, and that the jury's conclusion that the City's negligence was a proximate cause of the accident was irrational, the Court disagreed. There was a rational process by which the jury could have concluded that traffic calming measures deter drivers such as this driver from speeding, and that the City's failure to conduct a traffic calming study and to implement traffic calming measures was a substantial factor in causing the accident. Based on the evidence presented at trial, there was a rational process by which the jury could conclude that the ICU studies—which were intended primarily to determine whether traffic control signals were appropriate for particular intersections on this particular Avenue—did not study the "very same" question of risk that was before the jury, i.e., the danger presented by vehicles speeding down the length of the Avenue. In other words, the jury could have reasonably concluded that the ICU studies were "plainly inadequate" because they did not examine the speeding problem of which various local residents and elected officials complained.

In summary:

(1) the Court held that the City was acting in a proprietary capacity (dissent disagrees);
(2) Thus, plaintiff had no obligation to prove special duty as the City could not rely on the governmental function immunity defense;
(3) there was a rational process by which the jury could conclude that the defendant-driver's speeding was a foreseeable consequence of the City's failure to study or implement traffic calming measures;
(4) the jury could have rationally concluded that the four ICU studies did not examine the very same question of risk presented to the jury—the danger of vehicles speeding along the length of this road—and that the ICU studies were inadequate to address that problem.

C. "Duty", "Special Duty", "Special Relationship"

1. Special Duty Formed By Municipal Agent Assuming Duty toward Plaintiff

Destefano v City of New York, 149 A.D.3d 696, 52 N.Y.S.3d 374 (2nd Dep't 2017). Middle school student grabbed bus's steering wheel, causing driver to brake suddenly and plaintiff "bus matron" to fall. Although a school district owes a special duty to its students, that duty does not extend to teachers, administrators, or other adults on or off school premises, and as such this bus matron was required to show a "special duty" from the School toward her. Here, there was no rational process by which the jury could have found that a special relationship was formed between the plaintiff and the school district, i.e., no promises of protection or assumption of duty upon which the plaintiff relied to her detriment. (NOTE: If a student had been injured, he/she would not have to show "special duty").

Murphy v County of Suffolk, 149 A.D.3d 854, 49 N.Y.S.3d 907 (2nd Dep't 2017). Members of the Suffolk County Police Department were called to assist emergency medical services personnel at the home of the third-party defendant. When the officers arrived, third-party defendant was agitated and belligerent, refused to comply with one officer's commands, approached that officer with a raised fist, and backed him into a corner. The officer then discharged Mace into third-party defendant's face, after which third-party defendant became calm and complied with the officer's orders. Ambulance personnel then transported him to the Emergency Department at the hospital where the plaintiff worked as a nurse, declining a police escort. The plaintiff was injured when third-party defendant became agitated and pulled her feet out from under her, causing her to fall. Plaintiff sued the County defendants, who moved for summary judgment on the issue of governmental immunity. Since the officers made no promises nor undertook actions to assume a duty to the plaintiff, and plaintiff had no direct contact with the the officers, there was no "special duty" formed.

Trimble v City of Albany, 144 A.D.3d 1484, 42 N.Y.S.3d 432 (3rd Dep't 2016). Property owner whose home was destroyed, when fire re-ignited from undiscovered embers after municipal fire department employee represented that it had been fully extinguished, brought negligence action against municipality. Defendants moved to dismiss the complaint on the grounds that plaintiff's allegations failed to establish the existence of a special relationship giving rise to a duty of care and, further, that the firefighters on the scene were performing discretionary governmental functions for which liability cannot be imposed. Court concluded that plaintiffs raised a triable issue of fact as to whether a special relationship existed. With regard to the first element, there was no dispute that defendants' agents dispatched the Department to plaintiffs' residence in response to their 911 call for assistance and that the responding crew thereafter

assumed control over the ongoing fire. By making affirmative representations to plaintiffs that the fire had been fully extinguished and that it was safe to reenter the home, the Department assumed an affirmative duty to plaintiffs. As for the second and third elements, knowledge on the part of the Department that inaction could result in harm can be reasonably inferred from the circumstances, and the Department's employees undisputedly had direct contact with plaintiffs. With respect to the final element (justifiable reliance), plaintiffs allege that they relied upon the Department's assurances that the fire was completely extinguished in choosing to leave their home unattended for the evening. Under these circumstances, a jury could find that plaintiffs' reliance on the Department's assurances was reasonable and that such assurances "lulled [them] into a false sense of security and ... thereby induced [them] ... to forego other available avenues of protection" with regard to the property (*Cuffy*). As for the governmental immunity defense, the governmental function of fighting fires involves the exercise of judgment and discretion based upon a divergence of factors varying from fire to fire and the urgencies of a particular situation. However, focusing on "the conduct on which liability is predicated" as the law requires, the Court could not conclude as a matter of law that the decisions involved the exercise of "reasoned judgment which could typically produce different acceptable results" (*Tango v. Tulevech*). The negligence asserted by plaintiffs here was the Department's failure to overhaul the area underneath the window well which, according to the Department's own investigation, was the location at which the second fire originated. More specifically, plaintiffs alleged that, in violation of its own standard operating procedures and protocols, the Department failed to remove loose debris and damaged material—including a stack of firewood and the remains of certain lawn furniture—from the area of the window well following the first fire. Also, the firefighters could not remember pulling the burned lawn chair or the wood pile away from the building over the casement window well. Thus, it could not be said that the asserted negligence—failing to remove and fully extinguish a stack of firewood and damaged lawn furniture—was the consequence of an actual decision or choice on the part of the Department (*Haddock v City of NY).* Instead, the proof adduced at this stage of the proceeding showed that the Department had not "made a judgment of any sort" (*Haddock*) in connection with the nonremoval of the debris and damaged material. Thus, defendants did not demonstrate their entitlement to governmental immunity.

Alvarado v. City of New York, 150 A.D.3d 500, 57 N.Y.S.3d 3 (1st Dep't 2017) Plaintiff was assaulted by a neighbor's boyfriend after the police had requested her assistance translating for a domestic dispute. She sued NYC claiming the police failed to protect her and that the boyfriend targeted her due to her involvement in this incident. Court finds no "special duty" established. Even if a jury could have found that defendants told the boyfriend to leave the area and that they told plaintiff that they would be on patrol in the area, and plaintiff justifiably relied on this promise, plaintiff could not have "justifiably relied" on defendants' assurances after the boyfriend returned and asked to borrow her cell phone, and then crossed the street and sat on a bench before returning to attack her. At that point, it was clear that defendants had not prevented the boyfriend from returning and therefore plaintiff did not justifiably rely on the police' promises.

2. Special Duty from Statute

Green v. City of New York, 150 A.D.3d 439, 57 N.Y.S.3d 1 (1st Dep't 2017). Plaintiff was standing on the sidewalk when a taxicab hopped the curb and struck her. The taxi driver had numerous penalty points on his license that might have supported a suspension of his license prior to the accident, and plaintiff alleges that the failure to suspend the driver sooner was the result of a "computer glitch" at defendant Taxi & Limousine Commission. Plaintiff sued the City for failure to enforce their own rules and regulations. However, absent a

special relationship giving rise to a duty on the part of the municipality to exercise care for the benefit of a particular class of individuals, no liability could be imposed. Plaintiff alleged no facts sufficient to show a special duty by statute owed by the City defendants to her. She set forth no statutory provisions or other facts to show that the taxi licensing regulations she sued under were for the benefit of a limited class of persons that included her, as opposed to the public at large. Nor did she allege that the their way of forming a "special duty", i.e., that the City "assumed positive direction and control in the face of a known, blatant and dangerous safety violation". Accordingly, the complaint was properly dismissed as against the City defendants.

Rennix v. Jackson, 152 A.D.3d 551 (2nd Dep't 2017). Restaurant worker became ill and had difficulty breathing. She was six months pregnant and suffered from asthma. A coworker escorted her to a back room where the plaintiff said she wanted to go to a hospital. The coworker returned to the restaurant area where she had noticed to EMT's having lunch. She asked them for help with the coworker, but instead one of them just called 911. Both EMTs were on duty, in uniform, and on duty. One of them was not authorized to be on break or away from the nearby Dispatch Center at the time. The EMTs left the restaurant before an ambulance arrived, without ever going to the back room to check on the plaintiff. An ambulance arrived 13 minutes after the 911. During those minutes, plaintiff had lost consciousness and stopped breathing. Paramedics were unable to resuscitate her, and she was later pronounced dead, as was her baby. Plaintiff's estate sued the New York City Fire Department, New York City Emergency Medical Services, and the City of New York alleging that the deaths were caused by the negligence of the EMT restaurant customers for refusing to render emergency medical aid. The defendants moved for summary judgment on the ground that they could not be liable in negligence to the plaintiffs unless they owed a special duty to plaintiff, and no such duty was owed here. The plaintiffs contend a special duty arose from Jackson's violation of Penal Law § 195.00(2), which criminalizes official misconduct. Under said Statute, a public servant is guilty of official misconduct when, with intent to obtain a benefit, she or he knowingly refrains from performing a duty which is imposed upon her or him by law or is clearly inherent in the nature of her or his office. (*see* Penal Law § 195.00[2]). The plaintiffs alleged that the EMT who was not supposed to be on break had a duty to render assistance to plaintiff, but knowingly refrained from so doing so as not to be caught on an unauthorized break outside of the Dispatch Center. Court held that, even assuming the plaintiffs could establish that the EMT was guilty of misconduct, the violation of Penal Law § 195.00(2) did not give rise to a special duty so as to impose tort liability. A private right of action from a Statute may be implied only where (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme. Case dismissed.

T.T. v. State of New York, 151 A.D.3d 1345 (3rd Dep't 2017). For four years, a developmentally disabled woman with moderate to severe autism resided in a facility owned and operated by a private, nonprofit corporation that was, at that time, certified by a State agency called "the Office of Mental Retardation and Developmental Disabilities" to provide care and treatment to persons with developmental disabilities. Eventually, plaintiff (through a family member) sued the State for failure to adequately regulate and oversee her care and treatment, and to conduct a sufficient investigation into claimant's reports of the suspected abuse. The first issue on appeal was whether the State's actions were proprietary or governmental. While the ***provision*** of psychiatric care by a governmental actor is deemed "proprietary" in nature, the care and treatment at issue here was not actually ***provided*** by the State agency, who merely certified and regulated and oversaw the private providers' services (see Mental Hygiene Law §§ 16.03, 16.11). The State agency's oversight over, and regulation of, the private provider of mental health services, was plainly ***undertaken to***

further the general goal of protecting the health and safety of persons with developmental disabilities. Thus, the actions, or inactions, in question were governmental in nature. The next question was whether defendant owed the resident a ***special duty***. Plaintiff argued that the requisite special relationship was formed by Statute: Mental Hygiene Law former § 13.07(c), which charged the State agency with ensuring that the care and treatment provided to persons with developmental disabilities were of high quality and that the personal and civil rights of persons receiving such care and treatment were protected. Although the statutory and regulatory provisions were enacted for the benefit of persons with developmental disabilities, a class within which the resident certainly fell, and thus they might appear to create a duty from the State to the plaintiff, the Court found no private right of action was created. The Legislature did not leave residents or their legal guardians without recourse to address those perceived instances in which the State agency did not adequately discharge its duty to protect the personal and civil rights of residents. Indeed, the Legislature created a Commission, which was responsible for, among other things, reviewing and investigating complaints of patient abuse and mistreatment and, where necessary, recommending to the State agency that preventative and remedial actions be taken (Mental Hygiene Law § 45.07[c][1], [3]). Given the detailed statutory scheme of which Mental Hygiene Law § 13.07(c) was a part and the creation of a means by which residents or legal guardians could seek the Commission's independent review of the actions or inactions of the State agency, it was fair to infer that the Legislature considered carefully the best means for enforcing the statutory duties bestowed upon [the Agency], and would have created a private right of action against [said Agency] if it found it wise to do so". Accordingly, claimant failed to demonstrate that defendant owed the resident a special duty. Case dismissed.

D. Discretionary v. Ministerial

Feeney v. County of Delaware, 150 A.D.3d 1355, 55 N.Y.S.3d 737 (3rd Dep't 2017). An angry, violent husband had resisted arrest in a domestic dispute and was taken into custody, subdued and transported by ambulance to a local hospital. While in the ambulance, he was administered a sedative and his hands were handcuffed to the sides of a gurney. The arresting deputy sheriffs followed the ambulance in separate vehicles while another deputy accompanied plaintiff in the ambulance. A State Trooper took over at the hospital where the husband was still belligerent and uncooperative. The State Trooper handcuffed him to a bed. Later, as a physician's assistant approached the bed to provide medical treatment to the husband, he kicked at and injured the PA. In his lawsuit against the county and the sheriff, the injured PA alleged that the husband's legs should have been restrained. Court held that the County defendants did not owe any special duty to plaintiff because plaintiff was not in their custody at the time of his alleged assault on plaintiff. Although plaintiff may have been in the custody of the County defendants while riding in the ambulance, plaintiffs failed to proffer any evidence suggesting that he remained in such custody at the time of his alleged attack on plaintiff. Accordingly, the complaint against the County defendants was dismissed. With regard to the State Trooper, even assuming that triable issues of fact existed as to whether he voluntarily assumed a special duty to protect plaintiff based on his communications with plaintiff and the hospital staff, his *discretionary acts* of not restraining plaintiff's legs and leaving the examination room before the attack took place were protected by governmental immunity. The State Police field manual provides that, when prisoners are not being transported to or from jail, the decision to use leg restraints is left to the troopers' discretion based on the consideration of various factors, such as "the gravity of the offense(s), the temperament of the prisoner, the propensity of the prisoner to attempt to escape, and whether or not assistance is immediately available." Although the State Trooper had access to plastic leg restraints, the undisputed evidence established that, at the time that he left the examination room, the husband was still handcuffed, was "extremely calm" and had allowed a nurse to remove pieces of glass from his feet without

kicking or otherwise resisting the nurse's efforts. The trooper thus made a "reasoned judgment" not to utilize the leg restraints. As for the Trooper's decision to leave the examination room to permit the medical personnel to examine the husband in private, this was also discretionary. Although the husband was combative when he first arrived at the hospital, the Trooper did not leave the examination room until approximately 20 minutes after that time and only after ensuring that the husband had calmed down.

Farrago v. County of Suffolk, 151 A.D.3d 935, 54 N.Y.S.3d 168 (2nd Dep't 2017). Motorcycle operated by the plaintiff struck a car. At the time of the accident, the plaintiff was participating in a charity motorcycle run. The plaintiff sued the car's driver who in turn sued the County for contribution alleging County law enforcement agents failed to properly control traffic along the route of the motorcycle run, and specifically, at the location of the accident. The County defendants won their summary judgment motion based on governmental immunity with evidence that the conduct complained of involved the exercise of the police officers' professional judgment, and was therefore *discretionary*.

Hines v City of New York, 142 A.D.3d 586, 37 N.Y.S.3d 136 (2nd Dep't 2016). Mother of seven-year old child was beaten to death by child's father. She brought a wrongful death suit against the City, alleging that the City's negligent investigation of a previous report of child abuse (in which father had beaten the child) was proximate cause of her child's death. Court dismissed the claim because this was not a situation in which no *discretion* or judgment was exercised and also because New York does not recognize a cause of action sounding in negligent investigation or negligent prosecution.

Malay v. City of Syracuse, 151 A.D.3d 1624 (4th Dep't 2017). A landlord in his tenants' building shot his own wife and took several hostages. An intense, 24–hour standoff with police officers ensued. When negotiators were unable to end the standoff, police officers fired CS gas canisters into the entire building. Unbeknownst to the officers, plaintiff was inside her apartment. Following her telephone call to 911, plaintiff was extracted from the apartment, whereupon she was interviewed by police officers for several hours without any medical assistance or decontamination efforts. The Court here agrees with defendants that they are immune from liability under the "professional judgment rule" (Johnson v. City of New York, 15 NY3d 676). Although the professional judgment rule "presupposes that judgment and discretion are exercised in compliance with the municipality's procedures" here there was no evidence presented by plaintiff of any immutable departmental procedures that had to invariably be followed in the use of CS gas canisters. Although plaintiff contended that the police officers did not comply with the chemical munitions manual provided by the Defense Technology Federal Laboratories, there was no evidence that the manual was ever adopted by the City of Syracuse Police Department and thus no evidence that the police officers violated their own internal rules and policies. Moreover, the manual did not even contain mandatory directives but rather afforded officers discretion to make a judgment call as to when, and under what circumstances, it was necessary to discharge the gas canisters. Similarly, the decision to interview plaintiff immediately in order to obtain vital information to end the standoff was a discretionary determination and was not in violation of any internal policies and procedures. As for plaintiff's cause of action concerning negligent supervision and training of the officers, such an action does "not lie where, as here, the employees are acting within the scope of their employment, thereby rendering the employer liable for damages caused by the employees' negligence under the theory of respondeat superior". Case dismissed.

E. Governmental Immunity Pursuant to Specific Statute

Dunlop v County of Suffolk, 148 A.D.3d 993, 51 N.Y.S.3d 538 (2nd Dep't 2017). Social Services Law § 473 requires social services officials to provide services to individuals who, because of mental or physical

impairments, are unable to manage their own resources or carry out the activities of daily living. Social Services Law § 473(3) provides immunity from any civil liability that might result by reason of providing such services, provided that the municipal employees were "acting in the discharge of [their] duties and within the scope of [their] employment, and that such liability did not result from the willful act[s] or gross negligence" of those employees (Social Services Law § 473[3]). Here, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that they are immune from liability pursuant to Social Services Law § 473(3) by demonstrating that the caseworkers assigned to the plaintiff's decedent acted in the discharge of their duties and within the scope of their employment. In response, the plaintiff failed to raise a triable issue of fact as to whether the decedent's death was the result of willful acts or gross negligence of those caseworkers.

F. Judicial Immunity

Town of Turin v. Chase, 151 A.D.3d 1873, 54 N.Y.S.3d 269 (4th Dep't 2017). Town brought action against former town justice to recover damages arising from alleged mishandling of fines and fees and failure to maintain complete and accurate books and records while in office. Defendant's motion for summary judgment dismissing the complaint was granted on the grounds that the alleged actions and omissions took place within the context of his judicial capacity and thus were cloaked with judicial immunity. None of the acts or omissions alleged in the complaint were outside of defendant's judicial capacity or were beyond the scope of his jurisdiction and thus were protected by judicial immunity.

VII DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Design – Qualified Immunity

Ramirez v State of New York, 143 A.D.3d 880, 39 N.Y.S.3d 220 (2nd Dep't 2016). Plaintiffs, passengers of a a cargo van with 12 unrestrained passengers drifted into the median of Interstate 87 over the tapered, turned-down portion of a guardrail, and struck a concrete support pillar of a pedestrian bridge, sued the State of New York and the New York State Thruway Authority, alleging liability for not installing a longer guardrail which could have greatly reduced the severity of their injuries. While a municipality owes the traveling public the absolute duty of keeping its highways in a reasonably safe condition and that duty extends to furnishing guardrails, a the State is accorded *qualified immunity* from liability arising out of a highway safety planning decision. To establish qualified immunity, the State must demonstrate "that the relevant discretionary determination by the governmental body was the result of a deliberate decision-making process." Therefore if the decision made by the municipality or was not the product of a governmental plan or study, the doctrine of qualified immunity is inapplicable. Qualified immunity was applied in this case based the State's evidence that the guardrail was designed pursuant to design standards set forth by the New York State Department of Transportation, which were the result of a deliberate decision-making process of the type afforded immunity from judicial interference. Case dismissed.

Warren v Evans, 144 A.D.3d 901, 42 N.Y.S.3d 37 (2nd Dep't 2016). Motorcyclist's estate brought action against county, alleging county's negligence in failing to install appropriate traffic control devices for left turns at intersection. Motorcyclist was attempting to make a left turn into a shopping center at intersection controlled by a traffic light. Intersection had a designated left turn lane, but the traffic light did not have a separate indicator for traffic turning left. County claimed it was entitled to qualified immunity arising out of a highway planning decision. Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly

inadequate, or there is no reasonable basis for its traffic plan. The Court held that the County failed to establish that the design of the subject traffic signal, including the determination that no left-turn signal was warranted, was based on a study which entertained and passed on the very same question of risk that the plaintiff would put to a jury. Summary Judgment denied.

Schroeder v State of New York, 145 A.D.3d 1204, 43 N.Y.S.3d 558 (3rd Dep't 2016). Volunteer ambulance employee was injured when the ambulance he was riding in hit a stone wall located along the shoulder of a State Road. Claimant alleged the state was negligent in failing to correct a dangerous condition presented by a stone wall situated less than two feet from the fog line of the westbound lane. The State claimed qualified immunity and lack of proximate cause. The Court found no proximate cause, but it also found the State was entitled to qualified immunity. The State may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan. Here, the stone wall had been in place since the late 1800s. There were two DOT projects along the road in the vicinity of the stone wall, one in 1993 and one in 2000. In the 1993 project, DOT's regional traffic engineer suggested that "[i]t would be beneficial to make this wall as crashworthy as possible (end sections, guide rail protection, etc.). If this can be done within the scope of the project, it should be considered." The 2000 project involved the guide rail directly across from the stone wall. The DOT engineer opined that the limited history of property damage accidents did not validate any corrective measures. He further explained that relocating the wall, which included a driveway running above and along the wall to a residence, was an involved project not justified on a cost-benefit ratio. He further pointed out that while no countermeasures were necessary, a guide rail is a countermeasure. Lastly he testified that while one resolution extensively explored was to straighten out Route 17B in the area of the stone wall, that would have been a major project impacting the timing of a remedy, therefore DOT opted only to replace the guide rails. Based on this explanation, the Court ruled that the State's planning decision not to install a guide rail or relocate the wall was reasonable, entitling defendant to qualified immunity. Case dismissed.

Aminov v. State of New York, 52 Misc.3d 1218, 43 N.Y.S.3d 766 (2016). Pedestrian struck by a vehicle as he walked along the pedestrian pathway and/or dirt triangle separation located between two roads in Queens. The vehicle and driver were never identified. Pedestrian sued the State claiming that the placement of the marked crosswalk was improper because the markings were improperly maintained and eroded; the illumination of the roadway and crossing is insufficient; and it did not provide a direct and convenient crossing expected and anticipated by pedestrians and that the barrier curb should have an exposed face on the traffic side of the curb of six inches. The Court held that the State had qualified immunity for road design and planning. The "qualified" immunity can be overcome by showing that the design was put in place without adequate study, or lacked a reasonable basis. Summary Judgment denied.

Gagliardi v. State of New York, 148 A.D.3d 868, 49 N.Y.S.3d 504 (2nd Dep't 2017). Wrongful death claim where decedent motorist's car suddenly left State roadway, struck a guardrail, became airborne, and struck a highway sign. Plaintiff claimed State was negligent in its design and placement of the guardrail. Defendants claimed qualified immunity and that liability could arise with proof that the State's traffic design plan "evolved without adequate study or lacked a reasonable basis." Here, State showed that the design and placement of the guardrail were the result of a deliberate decision-making process after an adequate study and had a reasonable basis and Court held that plaintiff failed to demonstrate that the State had prior notice that the subject guardrail constituted a dangerous condition at the accident site. Case dismissed.

Chang v. City of New York, 142 A.D.3d 401, 37 N.Y.S.3d 236 (1st Dep't 2016). Plaintiff motorist sued city for injuries sustained in car accident because the intersection lacked a "stop here on red" sign and a stop bar. Several years earlier, the City had determined that "stop here on red" signs with a stop bar should be placed at the intersection, but at the time of the accident, the "stop here on read" sign had been absent from the intersection for two months (probably knocked down by another vehicle). The Court noted that installation of a traffic control signal, such as a "stop here on red" sign, where it had not previously existed, is a *design* decision, and thus a discretionary governmental function that does not give rise to state liability. However, failure to properly *maintain* signs that are already posted constitutes a highway *maintenance* failure, and is not subject to the governmental immunity rule. The Majority held that in failing to reinstall a previously established traffic control (the "stope here on read" sign) the City breached its nondelegable duty to maintain the roadway in safe condition. As for proximate cause, the plaintiff testified that he had never been to the intersection before the accident and when he started to turn across the median at the intersection, he was "confused" as to whether or not the lights facing eastward traffic on E. 65th Street controlled plaintiff's movements. The Majority held that in light of plaintiff's testimony that he was confused by which lights controlled his movements, a question of fact exists as to whether plaintiff had all the notice of danger that a stop sign would have afforded and as to whether the City's failure to reinstall the required "stop here on red" signs at the intersection was a proximate cause of the accident, even if plaintiff's conduct was also negligent and a proximate cause of the accident. Summary judgment denied.

Johnson v State of New York, 151 A.D.3d 1672, 56 N.Y.S.3d 723 (4th Dep't 2017). Claimant's tractor-trailer rolled over on State Road. Claimant alleged State was negligent in failing to install "rumble strips" in the proper location on the shoulder to properly alert driver of hazard and in failing to repave the entire shoulder, resulting in a two-to-four-inch drop-off in the shoulder. State claimed that claimant's inattention and failure to reduce her speed were the cause of accident. "When the State or one of its governmental subdivisions undertakes to provide a paved strip or shoulder alongside a roadway, it must maintain the shoulder in a reasonably safe condition for foreseeable uses" Claimant's expert opined that the two-to-four-inch drop-off on the highway's shoulder was unsafe and was a contributing cause of claimant's accident, this was credited by the Court. Defendant's expert opined that the placement of the rumble strips was a proper exercise of engineering discretion and was not a proximate cause of claimant's accident, but that claimant's inattention and failure to reduce her speed were significant factors contributing to the accident. This was also credited by the Court. Appellate division affirmed Court of Claims apportionment of 30% liability to Defendant State and 70% to claimant.

Brown v. State of New York, 144 A.D.3d 1535, 41 N.Y.S.3d 628 (4th Dep't 2016). Motorcycle's passenger sued a pickup truck driver and the State on her own behalf and on behalf of the estate of her deceased husband who was driving the motorcycle State for her husband's wrongful death resulting from right-angle motor-vehicle accident with pickup truck in intersection. The Court of Claims dismissed the claims, the Fourth Department reversed and remitted to the lower Court to find whether the State's negligence was a proximate cause of the collision. On remittal, the court found that "the sight restrictions created by the vertical curve ..., when combined with the 55 miles per hour speed limit ..., prevented [the pickup truck driver] from observing [the motorcycle] as [it] approached the intersection on Route 350." The trial court thus concluded that the dangerous condition of the intersection was a proximate cause of the accident. In determining that the pickup truck driver was not negligent, the trial court concluded that he "carefully entered the intersection after looking both ways, but simply was unable to see the motorcycle ... at any time before the accident occurred." The court thus found that the State was 100% liable for the accident. Here, the Fourth Department rejects the State's argument that the trial court's apportionment of liability should be

modified. Although the pickup truck driver was convicted of failure to yield the right-of-way, the mere fact of the conviction is insufficient to establish his negligence as a matter of law.

B. Defective Roadway Maintenance

Dutka v Odierno, 145 A.D.3d 661, 43 N.Y.S.3d 409 (2nd Dep't 2016). Passengers in car where driver ran stop sign brought claim against drivers of both vehicles, owners of property at intersection, village, county, and town. The plaintiffs claimed property owner's hedges obstructed view of oncoming traffic and stop sign at the intersection. Plaintiffs also claimed that the Village, the County, and the Town, were negligent in failing to maintain the roadways and traffic control devices, permitting obstructions to remain at the location that interfered with clear lines of sight for drivers operating vehicles. Village claimed no prior written notice and was let out on summary judgment. (The town was also let out based on no prior written notice in a separate decision). Homeowners failed to demonstrate that the hedge on their property did not constitute a visual obstruction in violation of Town Code and remained in the case. The County remained in the case as "it has long been established that a governmental body, be it the State, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty" The County failed to demonstrate that the subject street was maintained in a reasonably safe condition with unobstructed sight lines.

Fu v County of Washington, 144 A.D.3d 1478, 43 N.Y.S.3d 159 (3rd Dep't 2016). Driver, who lost control of her vehicle after hitting icy patch on county road forcing her into a culvert, brought action against county, alleging negligent design and construction of the road and in allowing a dangerous condition to exist on the road by virtue of the presence of snow and ice. Defendant County establishing that it did not receive prior written notice of the alleged dangerous condition as required by the applicable written notice statutes. This was conceded by Plaintiff. However, the claim of negligence in the design and construction of the County Road by failing to install a guardrail or other barrier where the accident occurred fell outside the purview of the prior written notice statutes. A municipality has a nondelegable duty to the public to construct and maintain its roads in a reasonably safe condition, and this duty extends to furnishing and maintaining adequate barriers or guardrails where appropriate. Court held that defendant failed to establish that the design of the road comported with the applicable standards at the time that the County Road was constructed (in the late 1940s). Defendant's engineering expert did not identify what standards were in effect at the time that the County Road was designed or constructed but cited to the 1970's DOT Highway Design Manual in concluding that there was little justification for the placement of a guardrail at the location of Plaintiff's accident. Defendant therefore did not meet its prima facie burden and summary judgment was denied.

Jeffries v. State of New York, 148 A.D.3d 1125, 50 N.Y.S.3d 476 (2nd Dep't 2017). Motorist injured when his vehicle collided with a downed light pole on town parkway. State claimed it had neither actual nor constructive notice of the defective light pole. While the State has a nondelegable duty to maintain its roads in a reasonably safe condition, it is "not an insurer of the safety of its roads". A landowner who erects a pole that later becomes dangerous will be held liable if it is shown that a reasonable inspection would have revealed the dangerous condition of the pole. State claimed it had neither actual nor constructive notice of any dangerous condition of the subject light pole and that the evidence established that the rot on the pole was at the bottom of the pole, which was buried between six and seven feet below ground - a reasonable inspection would not have revealed the dangerous condition. Plaintiff's evidence that a witness noticed rot

on some of the wooden poles along Ocean Parkway during the prior 15 years was insufficient to provide notice regarding the specific pole involved in the accident. Case dismissed.

VIII PRIOR WRITTEN NOTICE AND OTHER SIDEWALK/STREET LIABILITY ISSUES

A. Prior Written Notice

Mood v City of New York, 53 Misc.3d 1205, 43 N.Y.S.3d 768 (Queens Co. Sup. Ct. 2016). Pedestrian injured when he tripped over a slab of concrete raised two inches near a Fire Alarm Box. The City claimed no prior written notice of the defect. The City produced a FDNY Electrician's work request which took place two months after the accident, and could not explain what instigated the work request. The plaintiff argued that this lack of explanation precluded summary judgment. However, City was able to show, based on an earlier email correspondence, that the work request was likely due to subsequent discovery of the defect and subsequent repair. Since there was no prior written notice, summary judgment was granted.

Benjamin v City of New York, 55 Misc.3d 1217 (New York Co. Sup. Ct. 2017). On a rainy night, Plaintiff driver lost control of his vehicle and veered from the middle lane of traffic to the left, crashing into a concrete median and then across traffic where it collided with a guardrail rendering him paralyzed. Plaintiff claimed that City: a) had a duty to shore, guard, equip, repair construct and illuminate the roadway at or near the accident location and by not doing so, created a "trap-like condition" on the roadway, b) was negligent in its ownership, maintenance and design of the particular section of guardrail that plaintiff's vehicle encountered on the right hand side of the Parkway after he had collided with the center concrete median; c) was negligent in its maintenance of the catch basins in the roadway which allegedly resulted in an accumulation of water on the roadway; and, d) was negligent in failing to maintain the lane markings on the roadway were deficient and contributed to his accident. As to the guardrails and road design claims, plaintiff's attempts to demonstrate that there were prior similar accidents was lacking; the proof simply did not demonstrate the existence of a dangerous condition that would have triggered the City's obligation to upgrade the roadway to conform to the standards noted by plaintiff and his experts. As for the "turned-down" guardrail, the record failed to show that the City had notice of any safety issues pertaining to it. As to the catch basins and lane markings, which would (unlike the other claims) require prior written notice, the City did not have prior written notice, nor did it fall into any of the exceptions to the prior written notice law, Administrative Code § 7–201(c).

Ragolia v City of New York, 143 A.D.3d 596, 40 N.Y.S.3d 63 (1st Dep't 2016). Bicyclist brought action against city to recover for personal injuries sustained while riding her bicycle through intersection. In support of her motion, Plaintiff's submitted a January 2010 inspection report identifying a roadway defect at a different location in the area. The Court granted summary judgment holding "[A]wareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident."

B. The "Affirmatively Created" Exception to Prior Written Notice Requirement

Lewak v Town of Hempstead, 147 A.D.3d 919, 47 N.Y.S.3d 412 (2nd Dep't 2017). Bicyclist claimed he fell when he encountered depression on a roadway maintained by defendant City. Bicyclist claimed city affirmatively created defect when Sewer Maintenance Department opened street. The City claimed it had no prior written notice, nor did it create the defect. Since City did not establish prima facie it did not create the alleged defect, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact. Summary Judgment denied.

Fornuto v County of Nassau, 149 A.D.3d 910, 52 N.Y.S.3d 435 (2nd Dep't 2017). Plaintiff bicyclist claimed he fell from his bicycle when the wheels lost traction on loose pebbles on a section of a paved trail that had recently been repaired. The plaintiffs alleged that the County defendants affirmatively created the dangerous condition by leaving excess patching material at the scene of the repair, an exception to the County's prior written notice law. Defendant failed to meet its burden of establishing that they did not create the condition.

Puzhayeva v. City of New York, 151 A.D.3d 988 (2nd Dep't 2017). Pedestrian slipped and fell on ice while walking on the sidewalk to a subway station. She claimed City affirmatively created the condition by construction on the tracks above that creating runoff onto the sidewalk below. Court held prior written notice was required and that this was not a created affirmative condition because "Transitory conditions ...such as debris, oil, ice, or sand have been found to constitute potentially dangerous conditions for which prior written notice must be given before liability may be imposed upon a municipality". Case dismissed.

C. Affirmative creation must "immediately result in the existence of a dangerous condition"

Hockett v City of Ithaca, 149 A.D.3d 1378, 52 N.Y.S.3d 575 (3rd Dep't 2017). Pedestrian claimed she tripped on uneven sidewalk. Height differential between the two slabs of concrete was approximately one inch. Plaintiffs claimed defendant City negligently created the dangerous condition by failing to install reinforcing bar under the sidewalk 13 years prior to pedestrian's fall. Pedestrian was required to show that reconstruction of the sidewalk "immediately result[ed] in the existence of [the] dangerous condition". However, Pedestrian did not produce any evidence of the sidewalk's condition immediately after its reconstruction and plaintiffs' expert opined that a failure to install reinforcing bars in the sidewalk in question would cause the slabs to "undoubtedly settle unevenly," a process that inherently occurs over time, and with a result that is not immediate. Summary Judgment granted.

Guss v City of New York, 147 A.D.3d 731, 46 N.Y.S.3d 652 (2nd Dep't 2017). Pedestrian brought action against city and DOT for trip and fall in large hole in street after exiting a taxicab. The NYC DEP had excavated in the area approximately six weeks prior to the fall and installed a temporary cold patch. After Plaintiff's verdict, City tried to set aside verdict claiming it had no prior written notice, did not create the defect, and even if it did, the negligent repair deteriorated over time and did not "immediately result" in a defect. The Court held that the defect resulted from the affirmative act of creating a hole, and thereafter, failure to complete the restoration of the street and that the jury's verdict as to liability was not contrary to the weight of the credible evidence.

Loghry v Village of Scarsdale, 149 A.D.3d 714, 53 N.Y.S.3d 318 (2nd Dep't 2017). Pedestrian tripped on a slab of bluestone sidewalk which protruded up from surrounding walkway. He alleged that the village affirmatively created the defect through its negligent design, selection, and installation of the bluestone sidewalk, and negligent maintenance and repair. Deposition testimony from two Village officials (one of which was an engineer) testified that the bluestone was "suitable" for the local climate and the bluestone sidewalk pieces were level when the firm installed them. The Court found that this did not "immediately result" in the existence of a dangerous condition and therefore the written notice requirement applied.

Beiner v Village of Scarsdale, 149 A.D.3d 679, 51 N.Y.S.3d 578 (2nd Dep't 2017). Pedestrian tripped on an unlevel slab of bluestone sidewalk in the defendant village. Plaintiff alleged that defendant affirmatively created the defective condition by virtue of its design, selection, and installation of the sidewalk and that it negligently maintained and repaired the sidewalk. Court found Plaintiff's expert and statements from the

defendant "at most established that environmental effects created the alleged defect over time, which is not sufficient to establish the defendant's liability." Therefore written notice was required, of which there was none. Summary Judgment granted.

Cornish v City of Ithaca, 149 A.D.3d 1321, 52 N.Y.S.3d 565 (3rd Dep't 2017). Pedestrian tripped and fell after catching her foot on exposed pipe protruding through the surface of the public walkway alleging that the defective condition was affirmatively created as a result of the walkway surface around the pipe having sunken in or eroded. The Court held that since plaintiff alleged that the defective condition resulted from the sidewalk either sinking or eroding, rather than immediately resulting from action taken by defendant, the affirmatively created defect exception to the written notice law did not apply. While written notice of other nearby defects were made, none applied to this particular defect. As there was no prior written notice, summary judgment was granted.

Arkin v. Village of Owego, 55 Misc.3d 1219 (Tioga Co. Sup. Ct. 2017). Pedestrian fell while walking on a defective sidewalk in Defendant Village. Village moved to dismiss in lieu of answering (CPLR § 3211(a)(7)) arguing that Plaintiff did not allege in its complaint that defendant received prior written notice or any exception. Plaintiffs argued that they alleged the defendant created the defect and cross moved to amend their complaint to add an allegation of prior written notice, and to further allege that the defendant created the defect. The Court held that the allegations in the complaint were of defects that occurred over time, and existed for years, rather than immediate. Dismissal of the complaint was proper. The plaintiffs' motion to amend was accompanied by a proposed Amended Complaint. In the amended complaint, there was no claim of prior written notice to the Defendant, merely actual notice. The proposed complaint also alleged that the village could have created the defect through an affirmative act of negligence by improperly installing the walkway atop tree roots which cause heaving. However, the Court held that these allegations do not amount to *immediate* defects, rather effects that occur gradually over time and therefore, the amended complaint failed to allege prior written notice or an exception to that rule. Case dismissed.

Simpson v City of Syracuse, 147 A.D.3d 1336, 46 N.Y.S.3d 347 (4th Dep't 2017). Pedestrian tripped and fell on a sidewalk owned and maintained by defendant where bricks had become depressed. Pedestrian conceded that the Defendant City had no prior written notice, however plaintiff was unable to present evidence that depression of bricks were present immediately after completion of work following removal of a temporary traffic pole. The affirmative negligence exception to the prior written notice rule does not apply to defects which occurred gradually over time.

Ahern v. City of Syracuse, 150 A.D.3d 1670, 53 N.Y.S.3d 787 (4th Dep't 2017). Pedestrian tripped and fell on a broken curb that he claimed had been caused by excavation work. Plaintiff alleged that the defendants affirmatively created the defect. Defendant claimed any defect occurred over time after they had performed the work. *Plaintiff countered that he often had occasion to pass through this area on foot and had observed, immediately after the excavation work, that the curb had been damaged.* Plaintiff also testified that no other repairs took place at the site from the time of the excavation until his fall approximately six months later. The Court held that plaintiff created an issue of fact that the Defendant's acts immediately resulted in the existence of a dangerous condition. Summary Judgment was denied.

D. Snow And Ice And Affirmative Creation

Larenas v Incorporated Vil. of Garden City, 143 A.D.3d 777, 39 N.Y.S.3d 204 (2nd Dep't 2016). Pedestrian slipped and fell on sidewalk with a dangerous ice condition. Plaintiff claimed the condition was caused by

the affirmative act of piling snow on both sides of sidewalk, causing snow to melt and pool into the sunken area of the sidewalk and then refreezing. "A municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous icy condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement." The evidence showed that the temperature dropped below freezing on the date of the accident and plaintiff testified there was no salt or sand on the sidewalk when he fell. Summary judgment denied.

Piazza v. Volpe, 2017 WL 3272300 (2nd Dep't 2017). Pedestrian walking on sidewalk claimed she was forced to walk on roadway alongside the sidewalk due to accumulated snow obstructing the sidewalk. She was then struck by a defendant motorist. Pedestrian blamed County's negligent plowing of snow, which created or contributed to the obstruction of the sidewalk. Defendant County claimed lack of prior written notice of the dangerous condition that allegedly caused the accident, and that it did not create the dangerous condition through an affirmative act of negligence or, alternatively, lack of proximate cause of the accident. The Court held that although the defendant County demonstrated that it did not receive prior written notice, the defendant County failed to establish, prima facie, that its snow removal operations did not create or exacerbate a dangerous condition. Additionally, the County also failed to make a prima facie showing that its negligence was not a proximate cause of the accident. Summary judgment denied.

E. Remoteness of Notice

Gellman v Cooke, 148 A.D.3d 1117, 51 N.Y.S.3d 549 (2nd Dep't 2017). Pedestrian tripped over a raised portion of a sidewalk and sued City. City claimed it did not have prior written notice. Plaintiff claimed there was prior written notice by virtue of a claim that was filed in connection with a different case in 1990. Court held that "to satisfy a prior written notice statute, the notice relied upon by a plaintiff must not be too remote in time" and the Court held that plaintiffs' submission of a notice of claim, filed almost 19 years prior to the accident, was too remote. Summary Judgment granted.

F. GML 50-e(4): Prior Written Notice Required Only for "Streets, Bridges, Culverts, Sidewalks and Crosswalks"

Walker v County of Nassau, 147 A.D.3d 806, 46 N.Y.S.3d 647 (2nd Dep't 2017). Pedestrian slipped on ice in front of government building. The accident occurred on the *landing* between two sets of exterior steps leading to the building entrance. County claimed it had not received prior written notice of the alleged icy condition at the accident location as required by Nassau County Administrative Code § 12–4.0(e). Pedestrian argued that the County could not require prior written notice of the icy condition on the landing of an exterior stairway because it was not a location enumerated in General Municipal Law § 50–e(4). Court held County could require prior written notice of the icy condition because "the landing on the exterior steps of the building where the accident occurred provided the public with a general right of passage, and thus served the same functional purpose as a *sidewalk*, which is one of the locations specifically enumerated in General Municipal Law § 50–e(4)." Summary Judgment granted.

Fancett v City of Syracuse, 148 A.D.3d 1803, 49 N.Y.S.3d 336 (4th Dep't 2017). Infant plaintiff's foot went through a gap between two sections of a steel grate covering a debris basin. Defendant claimed that the grate and debris basin were part of a culvert on a City street, and prior written notice was required. Court held that defendant was required to establish as a matter of law that the debris basin was indeed a culvert or part of a City street for purposes of the prior written notice requirement and that the debris basin is not a culvert.

Additionally, Defendant failed to submit evidence establishing the precise location of the debris basin to determine whether or not it was within the metes and bounds of a "City street". Summary Judgment denied.

Chance v County of Ulster, 144 A.D.3d 1257, 41 N.Y.S.3d 313 (3rd Dep't 2016).Bicyclist fell from bicycle riding along portion of State Road maintained by Defendant County. She alleged she fell as a result of improper maintenance of the road and failure to provide adequate road shoulder. Plaintiff claimed that County's prior written notice law did not apply to a State road, however, as the code, Ulster County Code § 258–2, encompasses defects in "any road" within the County, the prior written notice law applied. Plaintiff also claimed that defendant created the condition through affirmative act and that the dangerous pavement edge drop off that caused the fall resulted from a lack of monitoring and maintenance. This did not qualify as an affirmative act as it did not immediately result from defendant's actions. As there was no prior written notice, the case was dismissed.

IX NEW YORK CITY SIDEWALK LAW

A. "Sidewalk" v. "Curb" v. "Pedestrian Ramp"

Martin v Rizzatti, 142 A.D.3d 591, 36 N.Y.S.3d 682 (2nd Dep't 2016). Pedestrian tripped and fell after stepping into a hole in a sidewalk abutting a storefront deli. The premises were owned by the defendant Rizzatti, and the storefront was leased by a Deli. The plaintiff commenced an action against Rizzatti and the deli, and a separate action against the City of New York. The City argued that it had no prior written notice of the alleged defect and that the owner of the premises was responsible for sidewalk defects pursuant to Administrative Code § 7–210. The Plaintiff argued that the City failed to establish that the subject defect was not part of a "curb-cut/pedestrian ramp," such that the City's liability was not transferred to the abutting property owner pursuant to Administrative Code of the City of New York § 7–210. The Court held that the City established its entitlement to summary judgment by submitting evidence that the plaintiff fell on an alleged defect located on the sidewalk and not on the pedestrian ramp and therefore Administrative Code § 7–210 precluded City's liability.

Puello v Georges Units, LLC, 146 A.D.3d 561, 46 N.Y.S.3d 28 (1st Dep't 2017). Pedestrian tripped on defect near corner pedestrian ramp. City maintains control over corner pedestrian ramp pursuant to Administrative code § 7-210[a]. Defendant City claimed defect was on sidewalk and not pedestrian ramp and supported claim through photos and plaintiff testimony. Co-Defendant private owners of sidewalk claimed that "pedestrian ramp" definition encompasses the landing area on top of the ramp and entire corner quadrant. Court held this to broad a definition and held that the area in which the plaintiff fell was considered the co-defendant's sidewalk. Summary judgment granted.

B. Abutting Land-Owner Liability

Koronkevich v Dembitzer, 47 A.D.3d 916, 48 N.Y.S.3d 188 (2d Dept. 2017). Pedestrian tripped and fell on a sidewalk defect abutting premises owned by private defendants. Plaintiff sued private defendants and City. Private defendants claimed that they were exempt from liability pursuant to Administrative Code Section 7-210 as owners of a two-family residential real property, which was entirely occupied by them and their children, and used exclusively for residential purposes. Plaintiff claimed that since private defendant used basement as office space, City was responsible. 7-210 of the Administrative Code of the City of New York does not shift liability from City when the premises is "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (*see* Administrative Code of City of NY § 7-210 [b]). Court held the defendants' partial use of the basement

as an office space was merely incidental to their residential use of the property, private defendant was the director of a summer camp and during the off-season, he used the basement to conduct the camp's business.He did not claim the home office as a tax deduction, and their home address was only used to receive the camp's mail during the off-season. Case dismissed against Defendant City.

C. Landowner Repair Exception

Gelstein v City of New York (2017 NY Slip Op 06064). Pedestrian injured when he stepped "into" the side of a sidewalk abutting real property owned by a private defendant. The private defendant moved for summary judgment, contending that plaintiff's injuries were caused, not by a defective sidewalk condition, but by the dangerous condition of the curb. The curb remains the responsibility of the City pursuant to Administrative Code 7-210(a). There is an exceptions to this rule when, among other things, the landowner actually created the dangerous condition or made negligent repairs that caused the condition. The private defendant, in 1995, had replaced the subject sidewalk where the plaintiff alleges to have fallen. Private defendant's expert opined that the sidewalk was installed correctly but the curb was "problematic" because it did not meet City Department of Transportation height regulations. The Court held that since the plaintiff testified to a "[l]ittle gap" between the curb and the sidewalk, the private defendant failed to eliminate all triable issues of fact regarding whether it had a duty to maintain the area of the plaintiff's fall, and whether the improper setback from the curb was attributable to the private defendant's negligence and contributed to the plaintiff's fall. Summary judgment denied.

D. Big Apple Map Notice

Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 44 N.Y.S.3d 404 (1st Dep't 2017). Pedestrian tripped and fell over a raised manhole cover on a city sidewalk. Court found that affidavit of associate production manager company responsible for the legend on Big Apple Maps, averring that the symbol for a raised or uneven portion of the side walk also applied to the manhole cover (which would have been considered part of the sidewalk) was competent evidence of the business or professional custom or practice of the designations used by the company and reversed lower Court's granting of summary judgment to defendant.

Foley v. City of New York, 151 A.D.3d 431 (1st Dep't 2017). Plaintiff pedestrian tripped and fell after she stepped on a curb and her foot caught on something in the nearby crosswalk. She noted that the curb was separated from the sidewalk and raised. Plaintiff entered Big Apple Map into evidence which denoted an "X" in front of several storefronts near the subject address. According to the Big Apple Map Legend, an "X" indicates a "broken, misaligned or uneven curb." The Majority held that despite the fact that the big apple map did not have an "X" at the precise corner of plaintiff's fall and the "X" in front of the storefronts encompassed multiple storefronts, jury verdict in plaintiff's favor could not be overturned: While the awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident, where there are factual issues as to the precise location of the defect that caused a plaintiff's fall and whether the defect is designated on the map, are issues of fact for the jury. Jury verdict reinstated. The dissent argued that plaintiff's (and the Majority's) interpretation of the big apple map was overbroad and the evidence was insufficient to show that the markings on the Big Apple Map constituted notice of defects at the location of her accident.

Rodriguez v. City of New York, 152 A.D.3d 810 (2nd Dep't 2017). Pedestrian fell due to a defect ("something like a hole") in the sidewalk abutting private premises. Defendant city claimed it did not have prior written notice of the defect. Defendant City submitted, inter alia, photographs of the accident site, and

a Big Apple map with a "key to map symbols" served upon the New York City Department of Transportation in 2003. Plaintiff contended that the Big Apple map constituted prior written notice of the defect since it contained a straight vertical line in the area where the accident occurred. According to the key to the Big Apple map symbols, a straight vertical line denoted a "[r]aised or uneven portion of sidewalk." The big apple map's indication of raised or uneven portion of the sidewalk did not give notice of what plaintiff tripped on which broken sidewalk "something like a hole." Case dismissed.

E. Special Use Exception

Spencer v City of New York, 149 A.D.3d 557, 52 N.Y.S.3d 342 (1st Dep't 2017). Pedestrian claimed he fell when his foot became caught in a crack on a sidewalk in front of a building owned by private defendant. The crack was next to a metal plate, or marker, owned by the City. City established that it did not have prior written notice of the alleged defective sidewalk and that none of the exceptions to the statutory rule requiring such notice applied nor did the marker on the sidewalk confer a special use or benefit upon the City, and therefore the "special use" exception does not apply. Summary Judgment granted.

Chambers v City of New York, 147 A.D.3d 471, 47 N.Y.S.3d 17 (1st Dep't 2017). Bicyclist sued city alleging bicycle's front wheel came into contact with gravel located around large hole near manhole cover. Bicyclist claimed that city's ownership of manhole cover, which allows city access to sewer system to perform maintenance and repairs, provided city with a "special benefit" from the property unrelated to public use, therefore falling into exception of prior written notice requirement. Court held this does not provide city with "a special benefit" from that property unrelated to the public use and therefore Administrative Code § 7–201(c)(2) applies, requiring written notice. Summary Judgment granted.

F. 15-Day Grace Period

Brown v. City of New York, 150 A.D.3d 615, 56 N.Y.S.3d 67 (1st Dep't 2017). Pedestrian tripped and fell over the stump of a pole sign protruding about three to four inches from the sidewalk near the bus stop. Defendant city claimed lack of prior written notice of the sidewalk defect, that the sign was in good condition two years before the accident; and that the Defendant City received a citizen complaint through 311 less than 15 days before plaintiff's accident, repairing it a few days after her accident. The Court held that even if the complaint less than 15 days before the accident was in writing, it could not constitute prior written notice for purposes of the statute, since it was received within the 15–day grace period provided by the statute for the City to make repairs after receiving notice. Case dismissed.

G. Snow and Ice – Responsibility of Out of Possession Landlord

Cepeda v. KRF Realty LLC, 148 A.D.3d 512 (1st Dept. 2017). Plaintiff slipped and fell on snow and ice outside of premises owned by out-of-possession landlord. Landlord established that it was an out-of-possession landlord where, pursuant to its lease with tenant, landlord was not responsible for removing snow or ice from the sidewalk of the subject premises. Administrative Code 7-210 imposes a nondelegable duty upon property owners to remove snow and ice from abutting sidewalks. However, 7-210 only applies to out-of-possession landlords where: 1. the landlord is contractually obligated to maintain the premises or maintains a right to reenter in order to repair, and 2. the defective condition is a significant *structural or design defect* that is contrary to a specific statutory safety provision. Here, the Court held that since snow or ice is not a significant structural or design defect for which an out-of-possession landlord may be held liable, summary judgment was granted as to them. **Note: There is a split in the departments and the Second**

Department imposes liability upon the landlord for failure to remove snow and ice notwithstanding its out-of-possession status. See eg. James v. Blackmon, 58 A.D.3d 808 (2d Dept. 2009)

X EMERGENCY VEHICLES (VTL 1104) AND HIGHWAY MAINTENANCE VEHICLES (VTL 1103)

A. Exempted Conduct Must Have Been The Cause of The Accident to Get Benefit of VTL 1104

Dwyer v. Town/Village of Harrison, 54 Misc.3d 1002, 48 N.Y.S.3d 872 (Westchester C. Sup. Ct. 2016). Plaintiff driver rear ended by police officer while she was stopped waiting to make left turn. Defendant Officer asserted privilege under the emergency doctrine pursuant to VTL 1104, as he was responding to a burglar alarm. Defendant Officer admitted he was speeding: traveling 50 MPH in a 35 MPH zone. He testified that he knew the approaching intersection had a very limited sight distance due to the crest of a hill, and , importantly, that *his vehicle struck the rear of plaintiff's vehicle because he was looking at the computer screen in his police vehicle*. In his internal review, defendant stated cause of the accident was "distracted by computer, elevated speed due to response call, and limited sight distance due to hill crest." But VTL 1104(e) applies only when a driver of the emergency vehicle engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law 1104(b) -any other injury causing conduct is governed by the principles of ordinary negligence. Defendant was not entitled to the benefit of VTL 1104 since he acknowledged that the *injury-causing conduct was his attention to the computer screen*, not the road. *Thus cause of accident was not his speed*, but his failure to look where he was going. Additionally, VTL 1104(b)(2) does not unconditionally permit the driver of an emergency vehicle to exceed the speed limit, only "so long as he does not endanger life or property." Here, officer knew, or should have known, he was endangering life and property when he was speeding while looking at the computer screen as he approached a dangerous intersection.

Reid v. City of New York, 148 A.D.3d 739, 48 N.Y.S.3d 462 (2nd Dep't 2017). Motorist entered intersection with the green light in his favor and struck an unmarked police vehicle. Defendant, claiming privilege under VTL 1104(b), testified that he entered the intersection slowly, with his sirens and lights activated and that his conduct was not reckless as a matter of law. Court held that defendant City failed to establish, prima facie, that the officer was engaged in specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b) and thus entitled to the reckless disregard standard of care and that they also failed to establish that officer not at fault under ordinary negligence. Summary judgment denied.

B. Reckless Disregard v. Ordinary Negligence

Perkins v. City of Buffalo, 151 A.D.3d 1941 (4th Dep't 2017). Plaintiff's vehicle collided with a City police vehicle after officer ran red light at an intersection responding to an emergency without emergency lights or sirens. Defendants claimed that reckless disregard standard applies. Plaintiff claimed that since defendant did not slow down prior to entering the intersection on a red light (as is required by VTL 1104), his conduct was not privileged. Appellate Division held that this was incorrect, that defendant should have been held to reckless standard. However, Court noted that the fact that defendant failed to slow down when he entered the intersection on a red light went to the issue of whether the defendant acted with "reckless disregard" to the safety of the public. Plaintiff thus raised a triable issue of fact whether defendant acted with reckless disregard when he entered the intersection.

Rios v. City of New York, 144 A.D.3d 1011, 42 N.Y.S.3d 54 (2nd Dep't 2016). Motor vehicle passenger sued police officer for injuries in a car accident between a police car operated by the defendant. At the time of the

accident, the Officer entered an intersection while responding to a call of a fellow officer requesting assistance. The Court held that the City defendants failed to establish, prima facie, that the Officer did not act in reckless disregard for the safety of others in proceeding into the subject intersection where accident occurred (pursuant to 1104(e)) and the denial of summary judgement was proper regardless of the sufficiency of the plaintiff's opposition papers.

Lacey v. City of Syracuse, 144 A.D.3d 1665, 41 N.Y.S.3d 830 (4th Dep't 2016). Bicyclist sued city after his bicycle collided with a police vehicle. Shortly before the collision, defendant officer observed a motorist commit a traffic violation and followed the motorist with the intention of giving the driver a verbal warning. The motorist stopped at a red light and Defendant Officer moved the vehicle into the intersection in an attempt to speak with the driver about the violation. Plaintiff entered the intersection on his bicycle with the green light and collided with the police vehicle. According to plaintiff, defendant was moving the police vehicle into plaintiff's path of travel at the time of the collision. Defendants moved for summary judgment on the ground that defendant officer's conduct was measured by the "reckless disregard" standard under Vehicle and Traffic Law § 1104 and that his operation of the vehicle was not reckless as a matter of law. Plaintiff cross-moved for summary judgment. Court held it was irrelevant whether defendant officer *believed* he was involved in an emergency operation. But Court nevertheless concluded that defendant officer's actions constituted an "emergency operation" as contemplated by VTL § 114–b and that defendants established as a matter of law that defendant officer's conduct did not constitute the type of recklessness necessary for liability to attach. Case dismissed.

C. Lights and Sirens

Rice v. City of Buffalo, 145 A.D.3d 1503, 44 N.Y.S.3d 281 (4th Dep't 2016). Vehicle passengers proceeding through a green light at an intersection were struck by a Fire Department Vehicle which was responding to a call regarding a suspicious package that possibly contained an explosive device. Defendants claimed that the correct standard to determine liability was not ordinary negligence, but reckless disregard for the safety of others pursuant to VTL 1104(e) and that their conduct had not risen to the reckless disregard level as a matter of law. Plaintiffs contended that ordinary negligence applied as the defendant was not using his siren (NOTE: Sirens and lights must be used to trigger VTL 1104(e) for emergency responders but not police officers). Defendant testified that he "would turn the siren on and off" as he "was trying to communicate with the alarm office." However, he testified the sirens were on just before he turned into the intersection. Court found issue of fact as to whether the officer sounded his siren "loud enough to be heard and soon enough to be acted upon". The Court thus denied Plaintiff's motion inasmuch as it sought to apply an ordinary negligence standard. Additionally, the Court found the defendant was engaged in an "[e]mergency operation" as undisputed evidence demonstrated that he was responding to a call regarding a possible explosive device. Plaintiff's motion for summary judgment denied.

Bonafede v. Bonito , 145 A.D.3d 842, 43 N.Y.S.3d 523 (2nd Dep't 2016). Plaintiff's vehicle collided with an ambulance which proceeded against a red light. The defendant claimed privilege under VTL 1104(e), however the Court held that the defendants failed to eliminate triable issues of fact as to whether the ambulance's sirens were activated at the time of the accident, so as to give rise to the privilege to proceed against a red signal light. Summary judgment denied.

D. Highway Maintenance Vehicles Must Be Actually Engaged in Work on a Highway to Get Benefit of VTL 1103

Ferrand v Town of N. Harmony, 147 A.D.3d 1517, 47 N.Y.S.3d 207 (4th Dep't 2017). Plaintiff injured in a collision between a pickup truck and a snowplow, Defendants claim VTL § 1103[b] in that the snowplow was "actually engaged in work on a highway" and therefore is exempt from rules of the road except when acting with reckless disregard for safety of others. Court found Defendant snowplow was actually engaged in work on a highway and plaintiffs failed to raise issue of fact as to whether snowplow acted recklessly. Case dismissed.

Arrahim v. City of Buffalo, 151 A.D.3d 1773, 55 N.Y.S.3d 848 (4th Dep't 2017). Plaintiff driver collided with a snowplow truck owned by City. Defendants complained that the reckless disregard rather than the ordinary negligence standard of care applies based on the applicability of Vehicle and Traffic Law § 1103(b), and defendant did not act with reckless disregard for the safety of others. However, there was a triable issue of fact whether the plow was plowing or salting the road *at the time* of the accident and thus, contrary to defendants' contention, the ordinary negligence standard of care may indeed apply. Summary judgment denied.

Martinez v City of Buffalo, 149 A.D.3d 1469, 53 N.Y.S.3d 419 (4th Dep't 2017). Plaintiff was struck by a snowplow while he was driving in the lane adjacent to the snowplow. In attempting to make a U-turn with the snowplow, the driver proceeded into plaintiff's lane of travel, and the two vehicles collided. Plaintiff moved for partial summary judgment on the issues of negligence and serious injury. The issue was whether the snow plow driver was "actually engaged in work on a highway" at the time of the accident. Although the snow plow driver testified at his that he was "done checking the area" and was not plowing, salting, or sanding the roadway at the time of the accident, plaintiff testified at his General Municipal Law § 50–h hearing that, shortly before the accident, the snowplow was salting the road and had its hazard lights engaged. At another point in his testimony, the snow plow driver stated that, shortly before the accident, he was checking the road for ice build-up, but that he could not recall if he was salting the road at the time of the accident. He also testified that his destination at the time of the accident was a local park where he would "take a break," but the record failed to establish if the snowplow was actually on a City street or a town road at the time of the accident and also failed to establish the precise route the plow driver was assigned to service that day. Court denied summary judgment application and found an issue of fact for trial.

XI SCHOOL LIABILITY

A. School Bus Liability

Wittman v Nice, 144 A.D.3d 1675, 41 N.Y.S.3d 646 (4th Dep't 2016). Pedestrian was struck by a motorist while crossing street to go from his mailbox to his residence. Just before the collision, a school bus passed by plaintiff, activating its yellow flashing lights. Motorist was approaching from the opposite direction, but the bus continued past motorist without activating its red lights or stopping. When pedestrian saw bus's yellow flashing lights, plaintiff looked left in the direction from of approaching motorist, and observed oncoming vehicles slowing down. Plaintiff then looked right, observing vehicles stopping behind the bus. At that point, plaintiff proceeded into the road, and was struck by the motorist. Pedestrian claimed that school bus was negligent by, "flashing the yellow signal and failing to come to a complete stop." Pedestrian's expert said that "a driver of a school bus has to stop at each and every designated stop," but

cited no industry standard, treatise or other authority to support the opinion. There is no VTL or other rule mandating that a school bus driver stop at a designated bus stop if no child is waiting there for the bus. The expert also contended that that the bus driver's testimony that he used the lights to illuminate the roadway was an improper use of those lights, but again cited no authority to support the opinion. The Court found the Defendants had set forth, prima facie, that the bus driver acted reasonably and therefore plaintiff was unable to raise an issue of fact. Case dismissed.

Destefano v City of New York, 149 A.D.3d 696, 52 N.Y.S.3d 374 (2nd Dep't 2017). Middle school student grabbed bus's steering wheel, causing driver to brake suddenly and plaintiff "bus matron" to fall. Although a school district owes a special duty to its students, that duty does not extend to teachers, administrators, or other adults on or off school premises, and as such this bus matron was required to show a "special duty" from the School toward her. Here, there was no rational process by which the jury could have found that a special relationship was formed between the plaintiff and the school district, i.e., no promises of protection or assumption of duty upon which the plaintiff relied to her detriment. (NOTE: If a student had been injured, he/she would not have to show "special duty").

B. Negligent Supervision

J.M. v North Babylon Union Free Sch. Dist., 145 A.D.3d 978, 42 N.Y.S.3d 860 (2nd Dep't 2016). Infant child in Pre-K program fell onto the surface of a suspension bridge, part of a playground apparatus. The school was under the control of the defendant, and the infant fell as a result of other students jumping up and down on the surface of the bridge. Defendant failed to submit evidence sufficient to establish, prima facie, that it properly supervised the infant plaintiff or that its alleged negligent supervision was not a proximate cause of his injuries. Summary Judgment denied.

Roth v Central Islip Union Free Sch. Dist., 145 A.D.3d 1056, 43 N.Y.S.3d 525 (2nd Dep't 2016). Plaintiff, a middle school student injured after another student had been running around gym throwing basketballs at another student before he fell on plaintiff and this behavior had been transpiring, unimpeded for approximately 10 minutes prior. Defendants were unable to establish prima facie entitlement to summary judgment and it was properly denied.

Simon v Comsewogue Sch. Dist., 143 A.D.3d 695, 39 N.Y.S.3d 180 (2nd Dep't 2016). Plaintiff, attending her high school pep rally at dusk with 700-1,000 attendies was walking from football field to a bonfire and plaintiff tripped over a chain suspended between two poles. Defendant claimed it was open and obvious, but the Court found the defendant was unable to establish this given the crowd and the lighting conditions at the time of the accident. Summary judgment was denied.

Cruz-Martinez v Brentwood Union Free Sch. Dist., 147 A.D.3d 722, 46 N.Y.S.3d 180 (2nd Dep't 2017). Infant plaintiff, claiming negligent supervision, at the beginning of gym class ran toward a fellow classmate, placed his hands on his shoulders, and jumped over him. The classmate asked the infant plaintiff to do it again, and the infant plaintiff jumped over the classmate again, without incident. The classmate then asked the infant plaintiff to jump over him once again, and when the infant plaintiff attempted to do so, "something popped" in his knee, which caused him to fall to the gym floor and allegedly sustain an injury. At the time of the incident, two teachers were nearby but neither saw the incident. The infant plaintiff stated that about four to five minutes elapsed between the first and third time he jumped over his classmate. The Court held that the school failed to establish, prima facie, that it adequately supervised the plaintiff or that,

even if it had, the incident occurred in such a short span of time that it could not have been prevented by the most intense supervision. Summary Judgment denied.

Guerriero v. Sewanhaka Cent. High School Dist., 150 A.D.3d 831, 55 N.Y.S.3d 85 (2nd Dep't 2017). Infant plaintiff, student at high school, sued school after classmate punched him in the face while they were in a classroom. Infant plaintiff said that one month before the incident he informed the teacher that the same classmate of prior incidents of aggressive conduct and assault. Schools have a duty to adequately supervise the students in their care, and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision, however, an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence- absent proof of prior conduct sufficient to put a reasonable person on notice to protect against the injury-causing act. Here, the Court held that the School District failed to demonstrate, prima facie, that the classmate's punching of the infant plaintiff was not foreseeable or that the School District's alleged negligent supervision was not the proximate cause of the infant plaintiff's injuries. Additionally, as to Proximate Cause, the defendants did not demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously "that even the most intense supervision could not have prevented it." Summary Judgment denied.

Ranous v Gates-Chili Cent. Sch. Dist., 54 Misc.3d 1207, 52 N.Y.S.3d 248 (Monroe Co. Sup. Ct. 2016). Student- infant plaintiff was knocked to the ground from behind by another student while roller skating at the school during physical education. She claimed the defendant school district failed to provide adequate supervision and mandated participation in the roller skating. Defendant argued that no amount of supervision could have prevented the unforeseeable and sudden nature of the accident, and plaintiff was not mandated to attend. The Court held that this was a "sudden and abrupt" incidident and therefore, plaintiff had no claim for negligence based on inadequate supervision. Additionally, the Court held that even if the infant plaintiff were "compelled" to skate, the plaintiff was not exposed to any greater risks other than those inherent in roller skating. Summary judgment denied.

Chynna A. v City of New York, 143 A.D.3d 623, 40 N.Y.S.3d 72 (1st Dep't 2016). Infant student plaintiff injured thumb during game of tag at gym class. Defendant school submitted evidence showing that plaintiff's injury was proximately caused by a sudden and unexpected collision with a fellow student during a regularly played game of tag. Defendant alleged that no amount of supervision could have guarded against the injurious event, and therefore the inadequacy of the gym teacher's supervision of the students playing the tag game was not a substantial factor in the cause of the injury. In opposition, plaintiffs offered no expert opinion or any facts from which reasonable inference could be drawn to substantiate their contention that the tag game was a hazardous activity for infant plaintiff's gym class nor was there any evidence of any prior injuries sustained during the tag game that was regularly played in the school gym. Case dismissed.

C. Sports and Recreation Liability

Legac v. South Glens Falls Cent. School Dist., 150 A.D.3d 1582, 52 N.Y.S.3d 750 (3rd Dep't 2017). During baseball tryouts at indoor hardwood gymnasium, infant plaintiff student was struck in the face by a baseball after he unsuccessfully attempted to field a ground ball hit by teacher of defendant school. Defendants claimed plaintiff assumed the risk. Generally, where a consenting participant in an athletic or recreational activity is aware of the risks of the activity, has an appreciation of the nature of the risks and voluntarily assumes those risks, it "commensurately negates any duty on the part of the defendant to safeguard him or her from th[ose] risk [s]" Defendants established that plaintiff was an experienced and knowledgeable

baseball player who voluntarily assumed the risk of being struck by a ground ball. Plaintiff testified he had previously been hit with a baseball while at bat, that he had witnessed a line drive hit a third baseman and that he had observed, on televised games, instances in which professional baseball players were hit by baseballs and acknowledged that it was common for baseballs to take unexpected bounces. Additionally, as to the conditions of the gymnasium, defendant established that, prior to the accident, Plaintiff had an adequate opportunity to observe the less than optimal conditions of the gymnasium, and how baseballs reacted to the particular flooring of the gymnasium. In opposition, plaintiffs failed to raise a triable issue of fact plaintiff's expert who testified that the defendant conducted the practice in a manner that unreasonably increased the risk level inherent in the activity, but failed to cite industry standards, scientific studies, regulations or other objective bases for his conclusory opinions. The Court held the expert's speculative and conclusory opinions were insufficient to raise a triable issue of fact. Split appellate division dismissed the case.

Yuan Gao v City of New York, 145 A.D.3d 939, 43 N.Y.S.3d 493 (2nd Dep't 2016). Infant plaintiff fell from monkey bars at playground in citypark claimed that monkey bars and flooring were maintained in dangerous and defective condition. Defendants established that the monkey bars and the flooring below them were not in a dangerous or defective condition. Plaintiff's unworn expert affidavit in opposition was inadmissible and the sworn version submitted in surreply was not entertained. Case dismissed.

D. Assault on School Grounds

Hernandez v City of New York, 147 A.D.3d 821, 47 N.Y.S.3d 362 (2nd Dep't 2017). The infant plaintiff and her father were both assaulted outside of the defendant's school by students of the school. The assaults took place approximately 30 to 100 feet beyond the school's entrance, and off school grounds. Plaintiffs claimed defendants failed to provide the infant plaintiff with adequate supervision and failed to provide both plaintiffs with adequate security. Generally, "When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases." The defendants established that, at the time of the assault, the infant plaintiff was no longer in their custody or under their control and was, thus, outside the orbit of their authority. Additionally, Court held that there was no liability for failure to provide adequate security, since the defendants did not affirmatively assume a duty to protect either plaintiff from criminal activity which occurred off the school premises.

XII FIREFIGHTER AND POLICE CAUSES OF ACTION

A. 205-E Right of Action against Employers Who Opt for 207-C as Opposed to Workers' Compensation

Matter of Diegelman v City of Buffalo, 28 N.Y.3d 231, 43 N.Y.S.3d 803 (2016). Retired Police Officer sued City, his former employer, for lung injuries from exposure to asbestos that he had sustained during his long period of employment with City. An action against an employer pursuant to GML § 205-e is, pursuant to the precise language of § 205-e, barred by the Workers' Compensation Law, however, the City of Buffalo elected not to provide Workers Compensation benefits, and instead provided statutory benefits of GML § 207–c. The Plaintiff argued that since benefits under GML § 207–c is not "workers' compensation", it is not a bar to a claim under GML § 205-e against his employer. The City argued that GML § 207–c is "essentially a super workers' compensation scheme" and that the Workers' Compensation Law "features a more lenient and more inclusive standard of covered activity than is intended to be covered and

compensated in a General Municipal Law § 207–c benefits universe." The Court of Appeals rejected the City's argument (adopted by the dissent) that GML § 207–c benefits can be equated to workers' compensation benefits for purposes barring action against an employer pursuant to GML § 205–e. The Court of Appeals concluded that where the municipal employer has elected not to provide coverage pursuant to the Workers' Compensation Law, and instead provides GML § 207–c benefits, a police officer's 205–e claim against his employer is not barred.

B. GML 205-a and 205-e

Lewis v Palazzolo, 143 A.D.3d 783, 40 N.Y.S.3d 138 (2nd Dep't 2016). Police officer tripped on sidewalk in front of owner's property while responding to a 911 call. Plaintiff asserted causes of action for common-law negligence and pursuant to General Municipal Law § 205–e predicated upon violations of 2007 Property Maintenance Code of New York State §§ 301.2 and 302.3, Code of the Town of Hempstead (hereinafter the Town Code) § 181–11, and Code of the Village of East Rockaway (hereinafter the Village Code) §§ 250–27 and 250–29. The defendant moved for summary judgment. As to the Common Law claim, summary judgment was granted: The village code imposed liability on the adjoining landowner if the landowner created the defective condition, made any repairs to the sidewalk or made a special use of the sidewalk which caused the defect. Defendant submitted an affidavit indicating he did none of these things and Plaintiff was unable to overcome this evidence. As to the GML § 205–e claim, the Court denied summary judgment holding that 2007 Property Maintenance Code of New York State § 302.3, Town Code § 181–11, and Village Code § 250–27 as statutory predicates for her General Municipal Law § 205–e cause of action. Section 302.3 of the 2007 Property Maintenance Code of New York State (see 19 NYCRR 1226.1) has been found by the Appellate Division to be a proper predicate for recovery under General Municipal Law § 205–e (see Byrne v. Nicosia, 104 A.D.3d 717, 719, 961 N.Y.S.2d 261). Moreover, the Court held that there was no merit to the defendant's contention that 205-e did not apply because the defendant did not own the sidewalk abutting his property. Those codes are well-developed bodies of law that impose clear duties upon every property owner to keep his or her sidewalk in good and safe repair.

Frunzi v. Sonn, 150 A.D.3d 700, 51 N.Y.S.3d 432 (2nd Dep't 2017). The plaintiff, a detective with the New York City Police Department, claimed he was injured while responding to an automobile accident caused by the intoxicated defendant. Plaintiff was about 1/2 block away from the accident when he slipped on an oily substance and injured his right knee. Plaintiff sued the property owner alleging GML § 205–e. The Court noted that pursuant to § 205–e the plaintiff must, "set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm" which has been interpreted as a "practical or reasonable connection" between the statutory or regulatory violation and the claimed injury". The Court held that the defendant established, prima facie, that there was no connection between the statutory violation at issue and the plaintiff's injuries and in opposition, the plaintiff failed to raise a triable issue of fact.

Blake v City of New York, 144 A.D.3d 1071, 41 N.Y.S.3d 755 (2nd Dep't 2016). Police officer *previously* brought action against city under Labor Law after the officer was injured during an attempted arrest. A cannister of mace she had tried to deploy failed. In the prior action against her employer, the City of New York, the plaintiff alleged a cause of action pursuant to GML § 205–e, predicated upon an alleged violation of Labor Law § 27–a(3)(a)(1). The City moved to dismiss under CPLR 3211(a)(7) and the appellate division found dismissal appropriate concluding that "[a]lthough Labor Law § 27–a(3) may serve as a proper predicate for a cause of action alleging a violation of General Municipal Law § 205–e," the plaintiff had "failed to allege that her injuries resulted from a 'recognized hazard[ ]' within the meaning of the Labor

Law" (Blake v. City of New York, 109 A.D.3d 503, 504, 971 N.Y.S.2d 4). The plaintiff then commenced an action pursuant to GML § 205–e, predicated upon Labor Law § 27–a(3)(a)(1), *alleging the same facts* as the first complaint but merely adding the verbiage that the plaintiff's injuries resulted from a "recognized hazard within the meaning of Labor Law § 27–a(3)(a)(1)." The City moved to dismiss pursuant to CPLR 3211(a)(5) as barred by the doctrine of res judicata, which motion was granted. Although, generally, a matter dismissed pursuant to CPLR 3211(a)(7) is not a determination on the merits, *there is* a preclusive effect as to "a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" The Appellate Division explained that it did not dismiss the prior General Municipal Law § 205–e for a mere failure to include the statutory language in the complaint, but rather determined the complaint, when taken as a whole, even if true, did not state a cause of action predicated upon violation of that statute. Since the present complaint alleged the same facts as alleged in the first complaint, and merely added an express allegation that the plaintiff's injury was caused by a recognized hazard within the meaning of the Labor Law, the present complaint failed to cure the defect in the first complaint. The Complaint was dismissed.

XIII COURT OF CLAIMS ISSUES

Kealos v State of New York, 150 A.D.3d 1211, 55 N.Y.S.3d 411 (2nd Dep't 2017). Claimant, while recovering from kidney transplant surgery at State Hospital fell, sustained subdural hematoma requiring two craniotomies. He remained in a coma until his death a year later. Nearly two years later, and more than 2 ½ years after the surgery, Estate moved for leave to file late claim for medical malpractice, lack of informed consent, negligence and wrongful death. Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim. However, the claim must be filed within the statute of limitations provisions set forth in CPLR article 2. CPLR 208 tolls the statute for disability. Claimant established that the decedent was under a legal disability from the day of the accident until the disability was removed by his death. Thus, the claimant's motion to file late notice of claim was within the 2 1/2 year statute. The claim for lack of informed consent was dismissed, however, as the physician did not address this claim in his affidavit. (*NOTE: Although the time to file a Claim or Notice of Intention of Claim against the State is tolled by infancy and disability, the time to serve a notice of claim against a public corporation is* ***not*** *tolled by either (although both may constitute a "reasonable excuse" for the delay and thus may be grounds for getting leave to late-serve the notice of claim. The Statute of Limitations for filing the S&C against the public corporation is tolled by both infancy and disability*).

Artibee v. Home Place Corp., 28 N.Y.3d 739, 49 N.Y.S.3d 638 (2017). Court of Appeals issue: Can a Factfinder in Supreme Court apportion fault to the State under Article 16 when plaintiff claims State and private party are liable for noneconomic losses in personal injury action. Split Court held this apportionment is not permitted. Plaintiff driver was driving on state highway when a tree branch bordering the road broke off and fell through plaintiff's car striking her in the head. Private Defendant owned property where tree is located. Plaintiff claimed private defendant should have trimmed/removed dead/diseased tree and filed a Court of Claims action against the state alleging that DOT failed to monitor this open and obvious hazard along state highway. In State Court, Private Defendant moved for permission to introduce evidence at trial of the State's negligence and for a jury charge directing the apportionment of liability for plaintiff's injuries between private defendant and the State. Plaintiff objected to allowing the jury to apportion fault against the State. The Court noted that apportionment against a nonparty tortfeasor (here the State) is available under CPLR 1601 unless "the claimant proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor "in said action (or in a claim against the state, in a

court of this state)." While the statute permits the State to seek apportionment in the Court of Claims against a private tortfeasor if the claimant could have sued the tortfeasor in any court, the statute does not contain language allowing apportionment against the State in a Supreme Court action. Because of sovereign immunity, plaintiffs plainly face a jurisdictional limitation inasmuch as they are unable to implead the State as a codefendant. Therefore, assuming a claimant were able to sue all tortfeasors but neglected to do so, the culpability of the nonparty should be considered. Here, the plaintiffs are barred from bringing the State into Supreme Court. The Court held that, based on its reading of Article 16, it does not recognize the availability of apportionment where the statute does not expressly permit it, and therefore, a Supreme Court is without authority to apportion fault upon the State based upon Article 16. The Court noted that if a defendant believes that it has been held liable in Supreme Court for what is actually the State's negligent conduct, the defendant can sue the State for contribution in the Court of Claims. The motion for a jury charge apportioning fault upon the State was denied. Judge Abdus-Salaam dissented, opining that the majority's reading of the statute defeats the legislature's goal of limiting liability of any and all tortfeasoers who are 50% or less responsible was too narrow. and that "there is no reason why the State should be permitted to demonstrate the culpability of nonparties in the Court of Claims but defendants in Supreme Court should not have the parallel right to demonstrate the State's culpability."

XIV MUNICIPAL BUS LIABILITY

Benvenuto v. New York City Transit Authority, 56 Misc.3d 130 (2017). Plaintiff injured when municipal bus that she had just boarded suddenly pulled away from the bus stop. Plaintiff required to establish a prima facie case of negligence by establishing that the movement consisted of a jerk or lurch that was "extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel" The proof must consist of more than a mere characterization of the stop in those terms by the passenger. Defendant established that plaintiff's deposition testimony demonstrated 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. Case dismissed.

XV FALSE ARREST, MALICIOUS PROSECUTION AND EXCESSIVE FORCE

A. Probable Cause and Summary Judgment

Gonzalez v. City of New York, 56 Misc.3d 1215 (Bronx Co. Sup. Ct. 2017). In an action for common law malicious prosecution and violations of 42 USC § 1983 premised upon alleged excessive force, false arrest, false imprisonment, and malicious prosecution, defendants moved for summary judgment. Plaintiff alleged that there were issues of fact as to the existence of probable cause, Defendants contended that probable cause did exist. Plaintiff claimed that the defendants battered, falsely arrested and imprisoned, and thereafter, maliciously prosecuted him. Plaintiff claimed (and established) that during a fight with another group of individuals, one from the other group brandished a gun, the plaintiff knocked the gun from that person's hand, picked it up from the floor and, fearing for his safety, fled. Plaintiff claims he exited the building, walked to a parked car and hid the gun behind one of the wheels. In order to hide the gun, plaintiff crouched low to the ground. As plaintiff stood outside the building, he was struck on the head and immediately arrested by an undercover police officer. Plaintiff was told to get up against a gate, searched and handcuffed. Plaintiff went to the hospital where he received staples to his head. After returning to the precinct from the hospital, plaintiff gave the police a written statement indicating the circumstances leading him to possess a gun. After indictment, the charges against plaintiff were dismissed. The plain clothed arresting officer was deposed and stated that he received a call indicating that there was a man with a gun in

the immediate area. With a clothing description of the plaintiff. He stopped plaintiff and another police officer informed the arresting officer that he had just observed plaintiff crouching near a parked van. The police recovered the gun. The Court held that this testimony from the plaintiff and defendant prima facie entitled defendants to summary judgment insofar as premised on false arrest and false imprisonment as the evidence establishes that plaintiff was arrested based on ample probable cause. Specifically he was arrested because he was observed by two witnesses with a gun and by a police officer who saw him deposit something under a car—that something, turning out to be a gun. Plaintiff failed to raise an issue of fact in opposition. Summary judgment was also granted as to plaintiff's claim for malicious prosecution because of the existence of probable cause for the arrest and, therefore, the subsequent prosecution.

B. Excessive Force

Boyd v City of New York, 149 A.D.3d 683, 52 N.Y.S.3d 370 (2nd Dept 2017). Plaintiff, a 72 year old woman, made claim against the city for excessive force, alleging high blood pressure, racing heart and head and stomach pain. Defendant claimed qualified immunity and that injuries were insufficient to carry 1983 claim. Defendant police officers executed search warrant for drugs and paraphrenalia at plaintiff's home where she was handcuffed for several minutes. At trial, judgment in the total sum of $847,087.48 was entered in favor of the plaintiff. Appellate division set aside verdict holding that Defendant did not use excessive force, established qualified immunity and lack of sufficient injury. Court held that there was no dispute here as to the validity of the search warrant authorizing defendants to detain an occupant of the place to be searched and to use reasonable force. An excessive force claim is analyzed under the objective reasonableness standard of the Fourth Amendment and here, the actions of the officers in handcuffing a 72 year old were reasonable given that they had reason to believe that illegal drugs were being sold from the premises, and that a known drug dealer might be present. The Court also held that a plaintiff did not sufficiently establish injury-although that injury need not be severe- emotional pain and suffering cannot form the basis of an excessive force claim. The Court found that Defendant's actions were privileged under qualified immunity, as they were objectively reasonable and the police conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known: mere handcuffing the plaintiff did not violate the plaintiff's clearly established statutory or constitutional rights.