Municipal Liability 2018-2019 Update

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I. THE NOTICE OF CLAIM

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

1. Whom To Name In the Notice of Claim

Roberts v Coeymans Hollow Volunteer Fire Co., 168 A.D.3d 1144, 91 N.Y.S.3d 590 (3rd Dep't 2019). House-fire victim brought action against volunteer fire company which had responded to the scene. Her notice of claim named the volunteer fire company only, as did her subsequent Complaint. Defendant contended plaintiff had failed to comply with the notice of claim requirements provided by the General Municipal Law, failed to name a necessary party, the Fire District, and failed to name the proper defendant, and eventually moved for summary judgment dismissing the complaint. Plaintiff then cross-moved to, among other things, amend the complaint to add the Fire District as a defendant. Defendant's motion was granted and plaintiff's denied. A volunteer fire company "shall be under the control of the ... fire district ... having, by law, control over the prevention or extinguishment of fires therein" (N–PCL 1402[e][1]). Indeed, the Fire District was responsible for preventing and extinguishing fires within its jurisdiction and trained and supervised the volunteer fire company's members. Furthermore, when defendant's members responded to the fire, they acted under the direction of the Chief of the Fire District. Because the volunteer fire company and the Fire District are separate entities and fire company did not exert control over its members, the fire company could be held liable for the alleged negligence of its members. Plaintiff's motion seeking to add the new defendant – the Fire District – was denied because she had failed to comply with the condition precedent of serving them with a notice of claim. Furthermore, although defendant conducted a 50–h hearing of plaintiff, equitable estoppel did not preclude the defendants from maintaining that plaintiff failed to serve the notice of claim upon the proper party. Defendants were not obligated to inform plaintiff that she had failed to name the proper party.

2. Always Serve the Notice of Claim with a Copy of the Notice of Claim

Brown v. City of New York, 2019 WL 3310177 (2nd Dep't 2019). Several claimants, apparently represented by the same lawyer, alleged they suffered emotional injuries and property damage as a result of certain practice drills conducted by unspecified firefighters employed by the FDNY in the apartment building where they resided. In support of their petitions to late-serve a notice of claim, petitioners submitted separate proposed notices of claim. Leave to serve a late notice of claim was denied to some of them because they failed to submit a copy of the proposed notice of claim as required by the GML. As to another claimant, his leave to serve a late notice of claim was denied because his proposed notice of claim did not provide the time when, the place where, and the manner in which her claim arose, the items of damages or injuries, or the total amount claimed. As to another claimant, leave was denied because he failed to present, under *Newcombe*, "some evidence or plausible argument" supporting a finding that defendants would not be substantially prejudiced by the more than one-year delay from the expiration of the 90–day statutory period. Thus, all claimants were denied leave to late-serve.

3. Problems with Service of the Notice of Claim

Davis v. New York City Housing Authority, 172 A.D.3d 815, 101 N.Y.S.3d 65 (2nd Dep't 2019). Plaintiff tripped and fell while descending an interior staircase at a housing authority building. The plaintiff claimed

to have served a notice of claim on the Housing Authority and the City, and subsequently commenced the action. Defendant Housing Authority moved for summary judgment dismissing the complaint on the ground that the plaintiff failed to timely serve the notice of claim. Plaintiff claimed to have timely served it by certified mail but the Housing Authorty had no record of ever having received it. The Comptroller of the City of New York timely received a copy of the notice of claim, bearing the same certified mail number ascribed by the plaintiff to the mailing of the notice of claim sent to Housing Authority. But the record contained no affidavit of service with respect to service of the notice of claim on the Housing Authority. Moreover, although a paralegal for plaintiff's counsel submitted an affidavit attesting that she mailed the notice of claim to the Housing Authority, she did not aver that she sent it by registered or certified mail. Under these circumstances, the plaintiff's submissions were insufficient to give rise to a presumption that the plaintiff served the Housing Authority by registered or certified mail, or to raise a presumption that the Housing Authority received the notice of claim. Plaintiff's argument that service was timely made pursuant to the saving provision of General Municipal Law § 50–e(3)(c) [service is deemed valid even if the procedure for serving it was wrong, as long as the public corporation received it in time and then either asks for a 50-h hearing or fails to return the notice of claim, specifying the defect in the manner of service, within thirty days after the notice is received] was raised for the first time in the plaintiff's reply brief on appeal. The defendant has had no opportunity to respond to this argument and, therefore, the argument was not properly before the Court.

Keeney v. New York City Housing Authority, 168 A.D.3d 581, 93 N.Y.S.3d 13 (1st Dep't 2019). Plaintiff's submission of an affidavit by an associate of plaintiffs' former counsel, who asserted that he sent the notice of claim to defendant by fax, was insufficient to meet plaintiffs' burden to show that defendant received the notice of claim on that date, because he failed to disclose the telephone number to which he faxed the notice of claim, submit a copy of the facsimile he sent to defendant or identify the individual he spoke with in order to confirm that the notice was actually received by defendant on that date. Even if his affidavit was entitled to a general presumption of regularity under CPLR 4520, that presumption was overcome by the affidavits defendant submitted in opposition to the cross motion, which plaintiffs failed to rebut with any additional evidence showing that service of the notice of claim was made by fax. The Court also denied plaintiffs' cross motion seeking to have the notice of claim, untimely served by certified mail, deemed timely served nunc pro tunc. Even if defendant had received the reports and witness statements from nonparty the New York City Police Department during the statutory period, knowledge of the accident did not constitute notice to defendant of plaintiffs' intention to file a civil suit based on a negligence claim. Finally, there was no basis to equitably estop defendant from seeking dismissal of the complaint simply because it engaged in litigation, including conducting a 50–h hearing, without raising plaintiffs' failure to properly serve a timely notice of claim as an affirmative defense in its answer. Plaintiffs' failure to petition for leave to serve a late notice of claim within one year and 90 days.

4. Problems with Insufficient Specificity in the Notice of Claim

Ruark v. City of Glen Cove, 164 A.D.3d 1492, 84 N.Y.S.3d 205 (2nd Dep't 2018). Plaintiff fell when she stepped off a curb and into a trench located in a bike lane. By timely notice of claim served upon the defendant, the plaintiff alleged that the location of her accident was approximately 200 feet from the intersection. Thereafter, a few months after the 90-days had expired, at the § 50–h hearing, the plaintiff testified that the accident occurred between 200 feet and one-quarter mile from the intersection, and she identified the side of the street on which the accident took place, the direction in which she had been

traveling when she fell, and two witnesses to the accident. The plaintiff further testified that the road was resurfaced approximately three weeks after the accident. By supplemental bill of particulars more than a year after the accident, plaintiff identified the exact address of the accident, which was approximately 740 feet from the subject intersection. The defendant moved for summary judgment dismissing the complaint on the basis that the plaintiff did not sufficiently describe the location of the accident in her notice of claim, and that amending the notice of claim more than three years after the accident would cause prejudice. The plaintiff cross-moved for leave to amend the notice of claim to state the address of the accident. Court held that defendant did not demonstrate, prima facie, that the notice of claim was insufficient. The information contained in the notice of claim, supplemented by the testimony of the plaintiff given a few months thereafter at the General Municipal Law § 50–h hearing, was sufficient to allow the defendant to conduct a meaningful investigation into the plaintiff's claim. Moreover, the defendant did not demonstrate, prima facie, that it would be prejudiced by the plaintiff's proposed amendment to the notice of claim, which was to state the address of the accident. The plaintiff had testified that there were witnesses to the accident. As such, the defendant could have ascertained the location of the accident with a modicum of effort. Moreover, the defendant did not submit any evidence demonstrating that it was misled by the error, or that it conducted an investigation at the wrong location. Finally, even if the original notice of claim had contained the address of the defect, the plaintiff testified that the road was resurfaced approximately three weeks after her fall, which was prior to service of the notice of claim.

Fontaine v. City of Amsterdam, 172 A.D.3d 1602, 100 N.Y.S.3d 394 (3rd Dep't 2019). Plaintiff brought action against city asserting claims for false arrest, false imprisonment, battery, excessive use of force, and intentional neglect of medical needs. Defendant argued that its claims for false imprisonment, false arrest, battery and intentional neglect of medical needs should have been dismissed because they were not specifically identified in plaintiff's notice of claim. Court noted that although plaintiff's notice of claim did not specifically list claims for false imprisonment, false arrest, battery or "intentional neglect of medical needs," it clearly identified possible culpable conduct by defendant on a specific date and at a specific location. In particular, plaintiff alleged that while at the "Police Headquarters," she sustained personal injuries, pain and suffering and emotional distress as a result of an incident during which she "was forcibly restrained by excessive force." In addition, plaintiff alleged that defendant's negligence arose out of the inadequate supervision and training of its employees, as well as its employees' use of "excessive and unwarranted force." Such allegations, coupled with plaintiff's testimony at the General Municipal Law § 50–h hearing, provided sufficient information to alert defendant that plaintiff had potential causes of action for false arrest, false imprisonment, battery and intentional neglect of medical needs and, thereby, afforded defendant an ample opportunity to investigate the incident giving rise to plaintiff's claims.

6. Wrong Entity Served with Notice of Claim

Townsend v. City of New York, 173 A.D.3d 809, 99 N.Y.S.3d 681 (2nd Dep't 2019). The Comptroller of the City of New York received a timely notice of claim alleging that the plaintiff was injured as a result of the negligence of the defendant City of New York and the defendant New York City Health and Hospitals Corporation (HHC), Kings County Medical Center. About a year after the incident, without leave of court, the plaintiff also served a (late) notice of claim on HHC. The action was then commenced against both entities and was actively litigated for several years, before being removed from the calendar. It was not actively litigated for the next 10 years, but then Supreme Court granted the plaintiff's motion to restore the case to the active calendar. HHC then moved to dismiss the complaint on the ground that the plaintiff failed

to serve it with a timely notice of claim. The plaintiff cross-moved for leave to serve a late notice of claim or, alternatively, to deem her notice of claim that was served on the City timely served on HHC nunc pro tunc. The Court denied the plaintiff's cross-motion, noting that the City and HHC are separate entities. Moreover, the plaintiff's late service of a notice of claim on HHC, without leave of court, was a nullity. Since the plaintiff's cross motion for leave to serve a late notice of claim on HHC was made well beyond the expiration of the one–year–and–90–day statute of limitations, the Supreme Court lacked the authority to grant it. Plaintiff's "estoppel" argument against HHC was also rejected.

Town of Aurora v. Village of East Aurora, 32 N.Y.3d 366, 116 N.E.3d 64, 91 N.Y.S.3d 773 (2018). Although not a personal injury case, this Court of Appeals decision might have implications for personal injury cases against towns and villages, specifically in deciding which entity to sue for roadway and sidewalk defects. The issue was which party, plaintiff **Town** of Aurora or defendant **Village** of East Aurora, was responsible for the maintenance and repair of a roadway bridge **located within both of the municipalities**. Village Law § 6–604 provides, in pertinent part, that "every public bridge within a village shall be under the control of the ... town in which the bridge is wholly or partly situated, ... and the expense of constructing and repairing such bridge and the approaches thereto is a town charge, unless the village assumes the whole or part of such expense". The Town asserted that the Village assumed control of the bridge, as was evidenced by its unilateral construction of the bridge, its uninterrupted exclusive supervision and control thereof. The Village argued that it had never assumed control, care, and maintenance of the bridge in accordance with Village Law § 6–606, pursuant to which there are only two ways a village may assume control—namely by **passing a resolution**, **subject to a permissive referendum**, or by **entering into an agreement with the town, also subject to a permissive referendum**, neither of which happened here. Court agreed with Village. The Town was responsible because, pursuant to Village Law §§ 6–604 and 6–606, despite the fact that the Village built the bridge and maintained it, the Town was legally responsible for it.

Revella v. Metro North Commuter Railroad, 172 A.D.3d 462, 97 N.Y.S.3d 866 (1st Dept. 2019). Plaintiff slipped and fell on ice that was on a train platform. The Court held that the complaint was properly dismissed as against defendant Metropolitan Transportation Authority since " '[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility'" In addition, the Court held that plaintiff's testimony, as well as certified meteorological records, established prima facie that plaintiff fell during an ongoing storm.

7. Adding an Additional Claimant to the Notice of Claim

Conn v. Tutor Perini Corporation, 2019 WL 3210581 (2nd Dep't 2019). Decedent was injured while working on the excavation of a trench at JFK Airport. He served a notice of claim upon the defendant City of New York, as the owner of the property, and a separate notice of claim upon the Port Authority as the owner and/or lessee of the subject property, alleging that he was injured as a result of their common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). The decedent specified in the notices of claim that he was seeking to recover damages for his "personal injuries, loss of earnings, pain and suffering and medical expenses." Thereafter, the decedent commenced an action against the City, the Port Authority, and another defendant, alleging common-law negligence and violations of the Labor Law. Thereafter, he died. Subsequently, the decedent's mother moved for leave to substitute herself as the plaintiff in place of the decedent. She also moved for leave to amend the complaint to add a derivative cause of action to recover

damages for loss of services on her own behalf, in her individual capacity. Defendant moved to dismiss. Court noted that the damages alleged in the notices of claim were limited to "personal injuries, loss of earnings, pain and suffering and medical expenses." His mother was not identified as a claimant in the caption of the notices of claim, she was not mentioned in the text of the notices of claim, and there were no allegations that she, individually, sustained any damages for which compensation was sought from the City or the Port Authority. Thus here individual claims were dismissed.

8. No Notice of Claim Required for Federal Law Claims Brought in State Court

Nicholson v. City of New York, 166 A.D.3d 979, 88 N.Y.S.3d 150 (2nd Dep't 2018). Pretrial detainee petitioned for extension of time to serve late notice of claim on municipality. The branch of the petition which sought leave to serve a late notice of claim to assert, pursuant to 42 USC § 1983, violations of the petitioner's federal civil and constitutional rights, should have been denied as unnecessary since such a claim is not subject to the State statutory notice of claim requirement. As for the for assault and battery claims, the statute of limitations had already expired when the motion to late-serve was brought, and thus the Court had no authority to allow it. With respect to the the remaining state law claims, plaintiff failed to show actual knowledge of the facts of the claim within 90 days or a reasonable time thereafter. Such knowledge could not be readily inferred from two reports documenting an internal investigation conducted by the police department to determine how a firearm was allegedly carried into, and concealed within, the station house. Nothing in those reports implicated defendant's negligence or wrongdoing. As for "reasonable excuse" for the delay, plaintiff's incarceration did not constitute such an excuse, since the relevant state law claims did not accrue, and the plaintiff's time to serve a notice of claim did not begin to run, until he was released from custody. Plaintiff also failed to present "some evidence or plausible argument" supporting a finding that the City was not substantially prejudiced by the more than eight-month delay from the expiration of the applicable 90–day statutory period until the commencement of the proceeding.

B. Amending the Notice of Claim

Matter of Johnson v County of Suffolk, 167 A.D.3d 742, 90 N.Y.S.3d 84 (2nd Dep't 2018). 10-year old injured when a motor vehicle struck him as he crossed Highway with his family. Motion to amend the notice of claim against the Town to assert a new theory of liability based on the Town park ranger's alleged act of waving to the family to cross the highway denied. 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, this addition of a new theory of liability was not technical in nature and was not permitted as an amendment to a notice of claim under General Municipal Law § 50–e(6). Further, the Court was without authority to grant leave to serve a late notice of claim on behalf of the parent made after the applicable statute of limitations expired. The infancy toll (see CPLR 208) is personal to the infant and does not extend to a derivative cause of action. As for the petition on behalf of the infant to late-serve a notice of claim, plaintiff failed to establish that the Town acquired actual knowledge, within 90 days of the collision or a reasonable time thereafter, of the essential facts constituting the claim that the Town park ranger waved to the family to cross the highway. The Town park ranger's Public Safety report did not indicate that the Town park ranger waved to the family to cross the highway and thus did not support a ready inference that the Town committed a potentially actionable wrong. Moreover, petitioner failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim asserting the theory that the Town park ranger waved to the family to cross the highway and for the subsequent delay in filing this

petition. Although the petitioners satisfied their initial burden of showing a lack of substantial prejudice to the Town as a result of the late notice, and the Town failed to make a "particularized showing" of substantial prejudice, 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.

Ryabchenko v. New York City Transit Authority, 101 N.Y.S.3d 646 (2nd Dep't 2019). Plaintiff fell in a stairway labeled "U2A" on the north end of the "N Platform" at the Stillwell Avenue subway station in Coney Island. The notice of claim alleged that the steps and/or stairs were "defective," "uneven, misleveled, smooth" with a "slick surface," and that defendants were negligent "in the ownership, operation, control, and maintenance" of the stairs. The plaintiff subsequently filed a complaint alleging that her injuries were caused by the defendants' negligence in the ownership, operation, management, maintenance, care, custody, and control of the premises. More than two years later, plaintiff moved pursuant to General Municipal Law § 50–e(6) for leave to amend her notice of claim to remove any mention of the stairs being "uneven, misleveled, smooth" with a "slick surface," and to add new allegations that the stairs were "defectively installed ... and/or designed ... with a hole/gap upon which [the plaintiff's] foot was caused to trip and fall." Motion denied. Plaintiff's notice of claim made no allegations of any "hole/gap" in which the plaintiff's foot got caught, or that the stairs were defectively installed or designed. Therefore, the proposed amendments were not technical in nature; rather, they were of a substantive nature beyond the purview of General Municipal Law § 50–e(6).

Holder v. County of Westchester, 169 A.D.3d 1017, 94 N.Y.S.3d 569 (2nd Dep't 2019). Bus patron brought action against county for injuries sustained in fall while disembarking from bus. In her original notice of claim, complaint, and bill of particulars, the plaintiff alleged that the bus driver neglected to "lower the front of the bus (kneeling bus)." As a result, the plaintiff was required to step down from the bus, and she fell. At her deposition, the plaintiff testified that she did not know of "[a]nything else that caused [her] to fall." Notwithstanding the foregoing, after filing the note of issue, the plaintiff served supplemental responses to the defendants' demand for expert disclosure wherein she alleged an additional theory of liability, namely, that the defendants allowed her to disembark from the bus in an area that contained ice and that this caused her to step on ice and fall. The defendants moved to strike the plaintiff's supplemental responses to the defendants' demand for expert disclosure and to preclude the plaintiff's expert from testifying as to the additional theory of liability. Thereafter, the plaintiff cross-moved to amend her notice of claim, the complaint, the bill of particulars, and expert disclosures to allege the aforementioned additional theory of liability. Court granted the defendants' motion and denied plaintiff's cross-motion, The proposed amendment to the notice of claim was of a substantive nature not within the purview of General Municipal Law § 50–e(6).

Palacios v. Town of North Hempstead, 165 A.D.3d 967, 86 N.Y.S.3d 117 (2nd Dep't 2018). Seven-year old was struck by a vehicle while crossing a street in the defendant Town. In her timely n/c, plaintiff claimed nonfunctioning street lights, which caused the street to be so dark that the defendant driver had difficulty seeing the infant crossing the street. *Several years after* the 90-day period for filing a notice of claim transpired, the plaintiff moved for leave to serve a late notice of claim describing the accident as arising from the Town's "negligent ownership, operation, control, design, planning, study, retention, supervision, maintenance, repair, inspection, and management of the street, traffic, sidewalks, street lights, and lighting on Swalm Street." Motion denied. Plaintiffs failed to proffer a reasonable excuse for the delay in serving a notice of claim that described the plaintiff's injuries as arising from any negligence on the part of the Town

other than that related to the nonfunctioning street lights, as described in the original notice of claim. The plaintiffs also failed to demonstrate a causal nexus between the infancy of one of the plaintiffs and the delay and that the Town acquired actual knowledge of the essential facts constituting the claim that it was negligent with respect to anything other than the street lights. The plaintiffs also failed to establish that the Town would not be substantially prejudiced by the delay. Thus, the child's petition to late-serve was denied. As for the portion of the petition asking leave to serve a late notice of claim with respect to the mother's derivative claim, it was time-barred because the statute of limitations expired before the plaintiffs moved to serve a late notice of claim, and the toll for infancy pursuant to CPLR 208 does not apply to a parent's derivative cause of action. As for the motion to amend the notices of claim, 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. The proposed amendments to the notice of claim added new theories of liability and such amendments are not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50–e(6).

Ortega v. New York City Transit Authority, 170 A.D.3d 872, 96 N.Y.S.3d 117 (2nd Dep't 2019). Plaintiff, who fell off a subway platform and was hit by a train, served a timely notice of claim alleging negligence in the ownership, management, operation, maintenance, and control of the train, subway station, and subway platform, as well as failure to "properly design" the subway platform. Plaintiff then filed a complaint alleging that his injuries were caused by the general negligence of the defendants in the maintenance and control of the subway platform and train. The complaint did not allege "negligent design" of the subway platform. After the year and 90 day period had passed, plaintiff moved pursuant to CPLR 3025(b) for leave to amend the complaint, inter alia, to add a cause of action alleging negligent design of the subway platform, specifically, the failure to install and utilize platform edge doors, rails, walls, or barriers to prevent passengers from falling from the platform onto the subway tracks. Defendant opposed the motion, claiming prejudice. Court held that the allegations of the timely served notice of claim included an allegation that the subway platform was improperly designed and, therefore, gave the defendants notice of the need to defend against allegations that they negligently designed the platform. Therefore, the proposed amendment was allowed.

Velez v. City of New York, 2019 WL 3310144 (2nd Dep't 2019). Plaintiff was injured while attempting to board a subway train. Approximately one month later, and prior to serving a notice of claim, the petitioner commenced a proceeding pursuant to CPLR 3102(c) to obtain presuit discovery. Specifically, the petitioner sought an order directing the defendants to "preserve and make available for inspection by a date certain any and all evidence currently in their possession and/or control" related to the subject accident. Motion granted. But in addition, the court sua sponte ordered that the "[p]etitioner shall have the right to amend his Notice of Claim as to the facts and legal theories within 30 days upon the filing of the note of issue in the action involving the accident." On appeal, the defendants argue that the court should not have granted this additional relief as the petitioner never requested it. Appellate Division found that although Supreme Court had authority to grant that branch of the petition which was for an order preserving material related to the accident, it had no authority to sua sponte grant a nearly unlimited prospective right to the petitioner to amend a notice of claim that had not yet been served. This sua sponte relief was dramatically different from the pre-action discovery that was the subject of the petition. Furthermore, the papers before the court did not support the award of such additional relief, since the absence of a notice of claim rendered it impossible to determine whether the future notice of claim or any amendments thereto would be in compliance with General Municipal Law § 50–e(6).

C. Late Service of the Notice of Claim

1. Know When the Claim Acrrued So As to Correctly Calculate the 90 Days to File the Notice of Claim

O'Dell v. County of Livingston, 103 N.Y.S.3d 730 (4th Dep't 2019). Arrestee brought action against village (police) and county's district attorney's office alleging false arrest and malicious prosecution. Plaintiff was arrested on September 7, 2015 and was released from confinement that same date. Thus, the cause of action for false arrest accrued on September 7, 2015, and the 90–day period within which to file a notice of claim expired on December 7, 2015. Plaintiff's notice of claim was served upon the Village in August 2016, and was therefore beyond the expiration of the 90–day period with respect to the claim for false arrest. But the notice of claim was timely with respect to a claim for malicious prosecution, which accrues upon the favorable termination of a criminal proceeding.

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

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

i. Med Mal Cases: Test is Whether Med Mal was Apparent in the Med Records.

J.H. v New York City Health & Hosps. Corp. (Elmhurst Hosp. Ctr.), 169 A.D.3d 880, 94 N.Y.S.3d 345 (2nd Dep't 2019). In support of his motion to late-serve a notice of claim, the plaintiff submitted, inter alia, medical records from the hospital and an affidavit from a physician who reviewed the medical records and concluded, among other things, that there had been a departure from accepted medical practice. Inasmuch as the medical records, upon independent review, showed that the mother was not admitted to the hospital on November 23, 2010, despite a physician's order, and that two days later, the plaintiff infant was delivered one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times, they provided the hospital with actual knowledge of the essential facts constituting the claim. Further, plaintiff made an initial showing that the hospital would not suffer any prejudice by the delay in serving a notice of claim, and the hospital failed to rebut the showing with particularized indicia of prejudice. Further, the absence of prejudice was demonstrated by virtue of the fact that the hospital had possessed timely actual knowledge of the essential facts constituting the claim.

Matter of Rayson v New York City Health & Hosps. Corp., 165 A.D.3d 948, 86 N.Y.S.3d 175 (2nd Dep't 2018). The claimant was admitted to defendant hospital after her family found her suffering a cardiac arrest. Several days later, she suffered another cardiac arrest at the hospital, rendering her mentally incapacitated. Approximately one year later, the claimant's guardian served a notice of claim as well as a petition against the New York City Health and Hospital Corporation (hereinafter NYCHHC), seeking leave to serve a late notice of claim, or to deem the late notice of claim timely served nunc pro tunc. The Court denied the petition and dismissed the proceeding because the medical records submitted failed to establish

that defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. Since the defendant did not acquire actual knowledge of the facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, the petitioner failed to satisfy the initial burden of showing that defendant would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay.

Feduniak v. New York City Health and Hospitals Corporaiton (Queens Hospital Center), 170 A.D.3d 663, 95 N.Y.S.3d 340 (2nd Dep't 2019). Plaintiff gave birth to a daughter at the defendant hospital, who later on was discovered to have had elevated glucose levels, which caused developmental delays. The issue was whether plaintiff could late-serve a notice of claim after they learned of the problem. Court here finds that the medical records indicated that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose. The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90–day period expired. When the child's injuries became apparent, plaintiff served a late notice of claim without leave of court. ***Although the Second Department previously ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court*** (*Katsiouras v City of New York*, 106 AD3d 916, 918 [2nd Dept 2013]) in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50–h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explored. As for the question of prejudice, defendant suffered no substantial prejudice. The plaintiff's motion and the defendant's cross motion focused on whether the defendant's failure to monitor the child's glucose levels constituted malpractice which proximately caused the child's developmental delays, indicating that the parties were fully conversant with the merits of the case, and the defendant conducted a General Municipal Law § 50–h examination where the essential facts constituting the claim were explored. Petition to late-serve notice of claim granted.

Smith v. Westchester County Health Care Corporation, 165 A.D.3d 1150, 86 N.Y.S.3d 548 (2nd Dep't 2018). Plaintiff did not establish that the defendant had actual knowledge of the essential facts constituting the claim within the requisite 90–day period or a reasonable time thereafter. Merely having or creating hospital records, without more, does not establish actual knowledge of a potential claim where the records do not evince that the medical staff, by its acts or omissions, inflicted an injury on the petitioner attributable to malpractice. Plaintiff failed to establish that the alleged malpractice was apparent from an independent review of the medical records. Plaintiff failed to demonstrate through admissible medical evidence that he was incapacitated to such an extent that he could not have complied with the statutory requirement to serve a timely notice of claim.

Ballantine v. Pines Plains Hose Compnay, Inc., 166 A.D.3d 718, 87 N.Y.S.3d 245 (2nd Dep't 2018). Plaintiff tripped and fell down a flight of stairs at a restaurant and then commenced a malpractice action against the municipal EMT provider who attended to him. Plaintiff had retained counsel within a month of the accident, however, a timely notice of claim was not served, so their was no reasonable excuse for the delay. As usual, lack of a reasonable excuse was not fatal to the petition. Court noted that said defendant prepared and was in possession of its own ambulance call report, which was significantly detailed about their observations and their treatment of plaintiff. Plaintiff submitted an affidavit from an EMT expert, who was a medical doctor, who stated that, in his opinion, the EMT "failed to use spinal precautions and/or

follow required EMT protocols as it relates to mobilizing and placing a patient on a stretcher who has a high index of having sustained a spinal cord injury" and that this "deviated from the standard of care applicable in this case" and such deviation was a "direct and contributing cause" of the plaintiff's injuries. Court thus found that the medical records provided the defendant with actual knowledge of the essential facts constituting the claim. Furthermore, defendant was not prejudiced by the delay in serving a notice of claim inasmuch as the it acquired actual knowledge of the essential facts of the claim via its own ambulance report.

Jadusingh v. New York City Health and Hospitals Corporation, 168 A.D.3d 940, 93 N.Y.S.3d 80 (2nd Dep't 2019). More than a year after birth, child was diagnosed with cerebral palsy. Shortly thereafter, the child's mother served a notice of claim on the defendant, alleging that the child sustained injuries as the result of medical malpractice committed by the hospital's medical staff. The evidence submitted in support of the motion failed to establish that HHC 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 the child's delivery and follow-up care. Moreover, the petitioner failed to satisfy her initial burden of showing that HHC would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay. Accordingly, motion to late-serve denied.

ii. Actual Knowledge from Accident Reports

McFarland v. City of New York, 169 A.D.3d 687, 92 N.Y.S.3d 725 (2nd Dep't 2019). Sanitation worker was injured when he slipped and fell in a garage. The petitioner did not demonstrate a reasonable excuse for his failure to serve a timely notice of claim upon the respondents. The unusual occurrence report prepared on the date of the incident did not provide the respondents with actual knowledge of the essential facts underlying the petitioner's claim since it merely indicated that the petitioner had fallen on the floor of a garage and had a seizure, and made no reference to the alleged presence of a greasy substance on the floor or that the petitioner slipped and fell on any substance. The petitioner also failed to present "some evidence or plausible argument" supporting a finding that the failure to serve a timely notice of claim would not substantially prejudice the respondents' ability to defend against the claim.

Nadler v. City of New York, 166 A.D.3d 618, 87 N.Y.S.3d 335 (2nd Dep't 2018). A year after his accident, this worker filed petition for leave to serve late notice of claim against city construction company for injuries allegedly sustained as a result of falling off A-frame ladder while taking field measurements for a "light trough" at construction project, alleging violations of Labor Law §§ 200, 240(1), and 241(6). Plaintiff failed to establish that the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or a reasonable time thereafter, to provide a reasonable excuse for their delay, or to show that the respondents would not be substantially prejudiced in their ability to maintain a defense. While the accident report stated that the defendant took photographs of the accident scene shortly after the accident, there was no indication that an investigation of the plaintiff's specific claim of negligence was undertaken or contemplated.

Smiley v. Metropolitan Transportation Authority, 168 A.D.3d 631, 93 N.Y.S.3d 30 (1st Dep't 2019). Although the failure to proffer a reasonable excuse for the delay in serving a notice of claim was not alone fatal to the petition for leave to file a late notice, plaintiff also failed to demonstrate that defendants acquired actual notice of the essential facts of the incident within 90 days after his claim arose or a reasonable time

thereafter. The record failed to show that defendants actually received an accident report that contained the essential facts of the claims within the statutory deadline or that the condition of the construction site has remained unchanged since the accident. Plaintiffs also failed to show that defendant would not be prejudiced in maintaining a defense on the merits as a result of the delay in filing a notice of claim, given the lack of timely, actual knowledge of the essential facts constituting the claims and the transitory nature of the alleged defective condition.

Rodriguez v. City of New York, 168 A.D.3d 481, 91 N.Y.S.3d 66 (1st Dep't 2019). Employee of city Health and Hospitals Corporation brought negligence action against City when he was assaulted by an inmate-patient. The documentation submitted to the Workers' Compensation Board did not establish that defendant obtained timely actual notice of her claims, because it fails to set forth any facts that suggested her injuries were caused by respondent's negligence and there was no evidence that her workers' compensation claim was received by defendant City. The seven-month delay prejudiced defendant's ability to investigate who was present during the incident and collect testimony from witnesses whose memories were fresh. Motion denied.

Nieto v. City of New York, 170 A.D.3d 1022, 96 N.Y.S.3d 283 (2nd Dep't 2018). Officer brought action against the City for City's failure to provide him with a safe workplace. He was injured when he fell off the back of a police truck after it hit a bump in the road in Brooklyn. He moved for leave to deem the late amended notice of claim timely served nunc pro tunc. In support of his petition, he submitted, inter alia, a police accident report, a collision report, a witness statement, and a line-of-duty injury report. Court found that City acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. The police accident report prepared by the responding sergeant, the NYPD collision report prepared by an investigating supervisor, and the NYPD line-of-duty injury report approved by the commanding officer described the time and date of the accident, the petitioner's injury, and how the accident occurred, identified the truck involved, indicated that the petitioner was referred to the hospital, and provided actual knowledge of the essential facts constituting the petitioner's claim, inter alia, pursuant to General Municipal Law § 205–e predicated upon the City's alleged violation of Labor Law § 27–a(3)(a)(1). Furthermore, the petitioner met his initial threshold burden of demonstrating the absence of substantial prejudice to the City by submitting evidence that the City acquired timely, actual knowledge of the essential facts constituting his claim and his affidavit, in which he stated that the fellow officer who provided the witness statement was still employed by the NYPD and that the truck involved in the accident was presently available for inspection. While the petitioner lacked a reasonable excuse for the failure to serve a timely notice of claim, the absence of a reasonable excuse is not dispositive where there is actual notice and an absence of prejudice.

iii. Actual Knowledge from School Incident Reports

Matter of Zelin v Blind Brook-Rye Union Free Sch. Dist., 164 A.D.3d 1352, 84 N.Y.S.3d 252 (2nd Dep't 2018). Student fell during physical education class and filed a petition seeking leave to serve late notice of negligent supervision claim against school district one year and 90 days after accident. The petitioner failed to demonstrate that her injuries constituted a reasonable excuse for her failure to timely serve a notice of claim. The medical evidence she submitted in support of her petition demonstrated that she was not incapacitated and had substantially healed long before the expiration of the statutory 90–day period for filing her notice of claim. Thus, she failed to medically substantiate that her injury and treatment prevented

her from making timely service, or that she did not learn of the full extent of her injuries until after the statutory period had expired. Additionally, the petitioner did not establish any nexus between her infancy and the failure to timely serve a notice of claim. Also, defendant did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The petitioner's reliance on an incident report and an email sent by the physical education teacher to the petitioner's parents merely established that the petitioner had been injured in a fall during gym class, and did not provide the respondents with actual knowledge of the facts underlying the petitioner's negligent supervision claim.

Messick v. Greenwood Lake Union Free School District, 164 A.D.3d 1448, 84 N.Y.S.3d 215 (2nd Dep't 2018). Grandmother of student brought petition for leave to serve a late notice of claim after she tripped on floor mats on school premises. The plaintiff made an initial showing of "actual knowledge" by defendant and that the defendant was not substantially prejudiced by the delay, since the defendant acquired timely, actual knowledge of the essential facts constituting the claim within the 90–day period, conducted an investigation, and notified its insurance carrier of the accident. In opposition, the respondent failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice was allowed. Defendant was not prejudiced by the mats having been replaced after the accident since the Director of Facilities sent an email on the morning following the plaintiff's accident in which he indicated that he was aware of the fact that the plaintiff tripped over the mats in the vestibule. Any prejudice resulting from the replacement of the mats was due to the defendant's practice of changing the mats on a weekly basis rather than from the plaintiff's delay in serving a notice of claim. Under these circumstances, the failure of the defendant to inspect the mats that were on the ground on the date of the petitioner's accident was not caused by the delay in serving a notice of claim. The absence of a reasonable excuse is not in and of itself fatal to the petition where, as here, there was actual notice and an absence of prejudice.

iv. First-hand Actual Knowledge

Moroz v. City of New York, 165 A.D.3d 799, 85 N.Y.S.3d 566 (2nd Dep't 2018). Construction worker fell off scaffold plank. Approximately seven months later, he moved to serve a late notice of claim against the City. Plaintiff failed to establish that the municipal parties acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual, or within a reasonable time thereafter. Notably, the record was devoid of evidence showing that any of the municipal parties was aware, prior to the commencement of this proceeding, that the petitioner's accident had occurred—let alone that the petitioner was claiming violations of Labor Law §§ 200, 240(1), and 241(6). A delay of four months following the expiration of the 90–day notice period did not constitute a "reasonable time" within the meaning of General Municipal Law § 50–e(5). Further, plaintiff failed to present some evidence or plausible argument supporting a finding that the municipal parties were not substantially prejudiced by the four-month delay from the expiration of the 90–day statutory period, in part because of the transitory nature of the injury-producing condition. Finally, there was no reasonable excuse for the delay.

John P. v. Plainedge Union Free School District, 165 A.D.3d 1263, 87 N.Y.S.3d 593 (2nd Dep't 2018). Petition to late-serve a notice of claim for autistic 7-year-old student's psychological and emotional injuries sustained after she was left unattended in a school bus parked in a school yard. The temperature at the approximate time of the incident was 87 degrees Fahrenheit. Student was found by the bus matron approximately 45 minutes after she was due home, wandering in the surrounding neighborhood. Following

this incident, plaintiff developed signs of psychological and emotional injuries. Court found that defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, since the Superintendent and other officials responded directly to and met with the student and his father at the scene of the incident and the Superintendent viewed multiple videos of the incident within days of the occurrence. This "actual knowledge" also proved no substantial prejudice to defendant. Motion granted.

Powell v. Central New York Regional Transporation Authority, 169 A.D.3d 1412, 92 N.Y.S.3d 791 (4th Dep't 2019). Bus passenger brought motion to serve late notice of claim against City bus company. Plaintiff failed to meet her burden of demonstrating that respondent had actual knowledge of the incident, including knowledge of claimant's injuries, within 90 days of the accident. The claimant did not say anything to the bus driver when the accident occurred and it was not obvious that she was injured. Her only communication with defendant about the incident within the statutory period was an anonymous telephone call that she made to defendant's general phone number, during which she did not indicate that an accident had occurred or describe her injuries. In addition, the untimely notice of claim she served incorrectly identified the date on which the accident allegedly occurred. Application for leave to serve a late notice of claim denied.

Constantino v. City of New York, 165 A.D.3d 1225, 87 N.Y.S.3d 612 (2nd Dep't 2018). Pedestrian slipped and fell upon a patch of ice on the sidewalk abutting golf course owned by city. Six months later she sued someone other than the City (not realizing the City owned the golf course) and then two months after that, plaintiff moved pursuant to General Municipal Law § 50–e for leave to serve a late notice of claim on the City. Motion denied. Plaintiff's failure to ascertain that the defendant owned the Golf Course was attributable to a lack of due diligence in investigating the matter, which was an unacceptable excuse. The plaintiff did not establish that the defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, which is an important factor. Even assuming that the plaintiff met her initial burden to show that the late notice would not substantially prejudice the defendant, and that the defendant, in response, failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice is allowed, the court held that the balancing of the factors weighed against allowing late-service of the notice of claim.

Holbrook v. Village of Hoosick Falls, 168 A.D.3d 1263, 90 N.Y.S.3d 717 (3rd Dep't 2019). Defendant village became aware of the presence of perfluorooctanoic acid ("PFOA") in its municipal water system. In January 2016, the DEC issued an emergency regulation that determined – for the first time – that PFOA was a hazardous substance. That same month, the Department of Health commenced a program to obtain blood testing for residents for the presence of PFOA in their blood. The blood tests indicated they had elevated levels of PFOA. Petitioners then moved for leave to file a late notice of claim. Although plaintiffs failed to present a reasonable excuse for the lengthy delay between when they obtained their blood test results and when they sought leave to file late notices of claim, defendant had actual knowledge of the essential facts underlying the claim, i.e., both of the existence of PFOA in its municipal water supply system and the negative potential health risks associated with PFOA exposure. Defendant had actual notice of all the essential facts underlying plaintiffs' claims. Further, there was no demonstration of substantial prejudice to defendant as a result of plaintiffs' delay in seeking to file late notices of claim. Motion granted.

Rodriguez v. City of New York, 172 A.D.3d 556, 101 N.Y.S.3d 303 (1st Dep't 2019). Plaintiff, a medical technician at a hospital, was assaulted by an inmate in the custody of Department of Correction (DOC) while that inmate was being treated at the hospital where he worked. The inmate punched her in the chest and slapped her twice in the face after she approached him to advise him that he should get dressed for a family visit. The DOC officers who had accompanied the assailant were not present in the room at that time. She moved to late-serve a notice of claim for the DOC's negligence seven months after the 90–day statutory period elapsed. In her affidavit, she swore that on the very same day of the alleged assault, she had two conversations a DOC employee, a "captain", once before seeking medical attention and again after she returned from the Bellevue Hospital emergency room. She claimed the officer took pictures of her face and asked her to describe the assault (she did) and asked her if she intended to sue the City of New York Department of Correction. The DOC did not submit any affidavit to counter these assertions. But it argued that it did not have all the essential knowledge of the "claim" because the plaintiff had not described the theory of liability, i.e., that the DOC officer should have been present when plaintiff was examining the inmate, nor had she specifically mentioned that no DOC employee was present in the room when the assault took place. She only described how she was assaulted. Supreme Court agreed with defendant, but Appellate Court found that plaintiff had offered enough to show the defendant had actual knowledge of the essential facts of the claim within the 90-day period, and thus granted the petition to late-serve the notice of claim. To the extent that plaintiff did not specify that her description of the assault included a recitation of who was in the room, "municipal authorities have an obligation to obtain the missing information if that can be done with a modicum of effort ". Negligence was the only theory of liability that could have been implied by plaintiff's conversations with the DOC officer and, in any event, he could have determined who was in the room during the course of his investigation with "a modicum of effort." Appellate Court also found that Supreme Court erred in applying the incorrect legal standard when evaluating the issue of substantial prejudice (*Newcomb*). Under *Newcomb*, plaintiff easily met her initial burden of providing "some evidence or plausible argument" regarding the lack of substantial prejudice by pointing to the conversations she had with the DOC captain. Thus, the burden shifted to defendant, who offered no proof of prejudice from the delay. While petitioner did not demonstrate a reasonable excuse for service of her late notice of claim, the lack of excuse is not fatal here.

Motta v. Eldred Central School District, 172 A.D.3d 1575, 101 N.Y.S.3d 472 (3rd Dep't 2019). High school student, who alleged harassment and bullying by several classmates, brought action against school district, alleging that he sustained physical, mental, and emotional injuries as a result of district's negligent supervision of its students and its violation of the Dignity for All Students Act (DASA). Appellate Court found that Supreme Court did not err in denying defendant's motion seeking to dismiss the complaint based upon plaintiffs' alleged failure to timely file a notice of claim. Plaintiffs' notice of claim alleged that the bullying and assaults began five years earlier, and continued up to the present. The record demonstrated plaintiff continued to report these incidents to school administrators and the school was continuing to take action with regard to his complaints. Accordingly, given the continuing nature of the alleged bullying and negligent supervision at issue, and the fact that defendant had actual notice of the claim in time to properly investigate and obtain evidence, Court found no error in Supreme Court's determination that the notice of claim was timely.

v. Actual Knowledge by One Defendant not Imputed to Another

Harding v. Yonkers Central School District, 170 A.D.3d 725, 95 N.Y.S.3d 279 (2nd Dep't 2019). Plaintiff's vehicle was struck by a vehicle owned by the School District. Plaintiff served a timely notice of claim upon the School District's driver, but not upon the School District. Later, he brought a motion to serve a late notice of claim on the school district, but the Court held that said defendant did not acquire timely, actual knowledge of the essential facts constituting the petitioner's claim by virtue of the police accident report prepared by the police officer who responded to the scene of the accident or through the defendant's insurer. The police report did not indicate any personal injury, and thus provided no actual notice of the facts constituting the plaintiff's claim that he sustained serious injuries as a result of the respondent's negligence. The fact that a timely notice of claim was served upon the driver of the defendant's vehicle did not establish that the driver reported the incident to a school official with a duty to investigate the claim. In addition, plaintiff failed to present "some evidence or plausible argument" supporting a finding that the respondent would not be substantially prejudiced by the five-month delay in seeking leave to serve a late notice of claim. Notably, the delay prevented the respondent from promptly conducting a thorough investigation and obtaining a medical examination of the petitioner.

vi. Actual Knowledge from a previously, but improperly or untimely served or late Notice of Claim

M.L. v. City of New York, 173 A.D.3d 848, 103 N.Y.S.3d 499 (2nd Dep't 2019). School bus in which plaintiff was a passenger collided with another vehicle. The notice of claim identified the date and specific location of the collision, as well as the specific vehicles and drivers involved, and alleged that the plaintiff was injured in the collision as a result of the negligence, carelessness, and recklessness of the defendants in their ownership, operation, management, maintenance, and control of the school bus. While not expressly alleged in the notice of claim, the attached police accident report included a notation that the intersection where the accident occurred was "missing a stop sign," causing the other vehicle to hit the school bus. Later, the plaintiff moved for leave to serve a late notice of claim or, in the alternative, for leave to amend the notice of claim. The proposed late notice of claim described the plaintiff's injuries as arising not only from the alleged negligence in the ownership, operation, management, maintenance, and control of the school bus, but also from the alleged negligence of the City and the New York City Department of Transportation regarding the maintenance and management of the alleged missing stop sign. The Court granted that branch of the plaintiff's motion which was for leave to serve a late notice of claim. Although the plaintiff's motion was made more than one year and 90 days after the claim accrued, it was not barred as the statute of limitations because that was tolled by reason of the plaintiff's infancy. As for the merits of the motion to late-serve the notice of motion, although plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim containing the allegation regarding the missing stop sign, the City defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose and were not substantially prejudiced by the late notice. Specifically, the original timely notice of claim, to which was annexed a copy of the police accident report, gave the City defendants actual knowledge of the essential facts constituting the plaintiff's claim based upon the alleged missing stop sign within 90 days of accrual. Regarding prejudice, inasmuch as the City defendants acquired actual knowledge of the essential facts constituting the claim, the plaintiff made an initial showing that they will not be substantially prejudiced by the late notice of claim. The City defendants failed to come forward with particularized evidence showing that the late notice substantially prejudiced their ability to defend the claim on the merit.

Feduniak v. New York City Health and Hospitals Corporaiton (Queens Hospital Center), 170 A.D.3d 663, 95 N.Y.S.3d 340 (2nd Dep't 2019). Plaintiff gave birth to a daughter at the defendant hospital, who later on was discovered to have had elevated glucose levels, which caused developmental delays. The issue was whether plaintiff could late-serve a notice of claim after they learned of the problem. Court here finds that the medical records indicated that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose. The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90–day period expired. When the child's injuries became apparent, plaintiff served a late notice of claim without leave of court. ***Although the Second Department previously ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court*** (*Katsiouras v City of New York*, 106 AD3d 916, 918 [2nd Dept 2013]) in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50–h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explored. As for the question of prejudice, defendant suffered no substantial prejudice. The plaintiff's motion and the defendant's cross motion focused on whether the defendant's failure to monitor the child's glucose levels constituted malpractice which proximately caused the child's developmental delays, indicating that the parties were fully conversant with the merits of the case, and the defendant conducted a General Municipal Law § 50–h examination where the essential facts constituting the claim were explored. Petition to late-serve notice of claim granted.

Matter of Ashkenazie v City of New York, 165 A.D.3d 785, 85 N.Y.S.3d 508 (2nd Dep't 2018). Plaintiff fell on a sidewalk defect in Brooklyn. She subsequently served a notice of claim beyond the 90–day statutory period. More than nine months after defendants specifically rejection the late notice of claim, the petitioner sought leave to serve a late notice of claim. But she failed to demonstrate that her injuries and medical care constituted a reasonable excuse for her failure to timely serve a notice of claim. Rather, the medical evidence she submitted in support of her petition demonstrated that she had substantially healed and no longer required any pain medication long before the expiration of the statutory 90–day period for timely filing her notice of claim. Furthermore, the petitioner failed to establish any reasonable excuse for her nine-month delay in seeking leave to serve a late notice of claim after her original notice of claim was rejected as untimely. **Further, defendants did not acquire actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter by reason of the late notice of claim which the respondents rejected as untimely.**

b. The Newcomb Standard: Substantial Prejudice to Defense

Mercedes v. City of New York, 169 A.D.3d 606, 94 N.Y.S.3d 69 (1st Dep't 2019). In support of his application to late-serve a notice of claim filed about three months after the 90–day statutory period elapsed, plaintiff submitted an affidavit averring that he was injured by the sudden malfunction of weight lifting equipment in a recreation center owned by the City, and that an employee of the center assisted him and prepared an accident report, which petitioner signed, and the weight lifting equipment was repaired a few months later. All this demonstrated defendant's actual notice of the pertinent facts underlying his claim, if not the negligence claim itself, which supported a "plausible argument" that the City would not be substantially prejudiced in investigating and defending the claim. The burden thus shifted to the City to

make "a particularized evidentiary showing" that it would be substantially prejudiced if the late notice were allowed. Here, the City did not deny the existence of the incident report or submit any evidence, but simply asserted that the delay would prejudice its investigation due to fading memories and the possible changed condition of the equipment, which was insufficient to demonstrate prejudice. Accordingly, in light of the relatively short delay in giving notice of claim and the absence of any record evidence showing that the City would be substantially prejudiced in defending and investigating the claim, application to late-serve granted

Matter of Charles v County of Orange, N.Y., 164 A.D.3d 1232, 83 N.Y.S.3d 660 (2nd Dep't 2018). Plaintiff failed to establish that the County had acquired actual knowledge of the essential facts constituting his false arrest claim within 90 days of his release from jail or a reasonable time thereafter. The County had no reason to conduct a prompt investigation into any purported negligence or other alleged violation. The petitioner also failed to provide a reasonable excuse for his failure to serve a timely notice of claim. Although the petitioner argued that he was so severely incapacitated that there was no feasible way for him to have filed a notice of claim during his hospitalization or shortly thereafter, he failed to explain in the petition, or through competent evidence, the extent of his illness, treatment, and incapacity. Although petitioner satisfied his initial burden of showing that the late notice would not substantially prejudice the County in its defense, the balancing of the actual knowledge and reasonable excuse factors weighed against permitting service of a late notice of claim.

Matter of Bermudez v City of New York, 167 A.D.3d 733, 89 N.Y.S.3d 289 (2nd Dep't 2018). On March 27, 2016, the petitioner tripped and fell on a defect in a crosswalk. Approximately eight months later, she served a notice of claim and asked the Court to deem it timely served *nunc pro nunc.* Annexed to her papers were two photographs of the defect taken shortly after the accident, and some older photos from the internet. Petitioner failed to demonstrate a reasonable excuse for her failure to timely serve the notice of claim. The petitioner submitted no medical evidence in support of her petition, nor did she otherwise medically substantiate that her injuries prevented her from making timely service. The City did not have actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. While the photographs submitted in support of the petition may have demonstrated that the City had prior knowledge of the crosswalk defect, actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability. Further, plaintiff did not sustain her burden of demonstrating that the City would not be substantially prejudiced by the late notice. The petitioner contended that the photographic evidence showed that the defective condition was substantially the same in appearance at the time of her accident as it was some eight months later when her petition was served. However, the photographs purportedly taken "shortly after" the accident were never authenticated, nor did the petitioner identify the actual date the photographs were taken or the person who took them. Moreover, the more recent photographs were taken at different angles than the earlier photos, and neither set of images contained any measurements or dimensions to support the conclusion that a comparison of the two sets of photographs established that the defect did not change in the interim. Thus, the petitioner did not sustain her initial burden of presenting "some evidence or plausible argument of lack of substantial prejudice".

Waliszewski v. County of Ulster, 169 A.D.3d 1212, 93 N.Y.S.3d 740 (3rd Dep't 2019). **NOTE**: **This is one of the rare cases where leave to late-serve is granted even though defendant did not have actual knowledge of the essential facts of the claim claim within 90 days of its accrual. Such cases are becoming more common, however, in the wake of *Newcomb*, wherein the Court of Appeals elevated**

the importance of the "substantial prejudice" factor. Special guardian of motorcyclist who lost control of his motorcycle and struck tree causing serious brain injury sought to serve late notice of claim on county, alleging that it negligently designed and maintained and failed to provide appropriate markings and signage for roadway. Although defendant received two 911 emergency calls immediately following the accident, there was no indication that any of its employees were present at the accident scene. The incident report maintained by respondent regarding the 911 emergency calls, without more, did not satisfy the statutory requirement of actual notice. As for the reasonable-excuse factor, the fact that plaintiff was incapacitated by the accident was sufficient. In fact, plaintiff's family had to wait for a guardian to be appointed for the plaintiff before a retainer agreement could even be signed. As for the substantial-prejudice factor, the only prejudice defendant alleged was that the roadway "no longer exists in [its] 'negligently maintained' state" because it was resurfaced following the accident. But the State Police took photographs of the scene shortly after the accident and prepared a schematic depicting the accident site, including the location of the crashed motorcycle. Further, this was a negligent design case, and defendant failed to provide sufficient evidence that the alleged design defects or the signage were affected by resurfacing or that its ability to investigate plaintiff's claim was otherwise substantially prejudiced by the passage of time. Motion to late serve granted. *SEE COMPANION CASE BELOW.*

Wala v. County of Ulster, 169 A.D.3d 1211, 94 N.Y.S.3d 678 (3rd Dep't 2019). SEE COMPANION CASE ABOVE. This plaintiff-motorcyclist was riding just in front of the *Waliszewski* claimant (see case immediately above) and was involved in the same accident and was represented by the same lawyer. This plaintiff (unlike *Waliszewski* plaintiff above) was not rendered incapacitated as a result of the crash, but he nonetheless sustained serious injuries that required surgery and extended hospitalization, which contributed to the delay from the time of the accident to when he first spoke with counsel several months later. There was, however, an additional delay of six-months from the time he retained counsel. The excuse there was that, since this plaintiff had retained same lawyers as the *Waliszewski* plaintiff, who was incapitated and needed to wait for a guardian to be appointed, this plaintiff's lawyers were justified in waiting to serve a notice of claim on both the claims at the same time, i.e., bringing a motion to serve both of them late rather than serving the one on time and waiting on the other. Counsel's decision to wait and move for leave to serve a late notice of claim for both plaintiffs at the same time after a guardian was appointed for the incapacitated plaintiff was not unreasonable, according to the Court. (NOTE: Maybe not unreasonable, but certainly not advisable!).

II. 50-H ISSUES

Colon v. Martin, Jr., 170 A.D.3d 1109, 97 N.Y.S.3d 311 (2nd Dep't 2019). The plaintiffs appeared for the 50-h hearing but plaintiffs' counsel would not proceed unless each plaintiff was permitted to be present while the other testified. The defendants' counsel indicated that it was the defendants' policy to conduct individual hearings for each claimant. The defendants' counsel added that 50-h hearings were conditions precedent to a lawsuit and the defendants were "not waiving any right to any hearing." The plaintiffs' counsel countered that each plaintiff had "the absolute right" to sit in on the other's testimony. The plaintiffs' counsel asserted that the plaintiffs were "ready, willing and able" to proceed and that they were not "refusing to proceed." Thereafter the 50-h hearings did not go forward because the parties' lawyers could not reach an agreement. Nevertheless, plaintiffs commenced the action alleging that defendant "constructively waived" the 50-h hearings. Defendant moved for summary judgment dismissing the complaint on the ground that the plaintiffs failed to comply with the 50-hearing requirement. The Statute

does not expressly permit nor give the absolute right to a claimant involved in the same alleged incident to be present at or to observe another claimant's oral examination. Case dismissed for plaintiff's failure to comply with condition precedent. Dissent disagreed, concluding that defendant constructively waived the 50-h hearing.

Riabaia v. New York City Health and Hospitals Corporation, 170 A.D.3d 1062, 96 N.Y.S.3d 157 (2nd Dep't 2019). Octogenarian fell when she was a patient at defendant hospital. The defendant served the plaintiff's attorney with a 50–h demand. After multiple adjournments of that examination, the plaintiff commenced the action. The defendant then moved to dismiss the complaint for failure to comply with General Municipal Law § 50–h. The plaintiff opposed the motion, relying on several letters written by her doctors, all of which she alleged had been sent to the defendant excusing her from attending a 50-h because of her health. Therein, the plaintiff's doctors stated, among other things, that the plaintiff was homebound, weak, and had multiple medical and mental problems. The plaintiff's failure to appear for the § 50–h hearing should have been excused. Accordingly, the defendant's motion to dismiss the complaint for failure to comply with General Municipal Law § 50–h should have been denied.

C.B. v. Park Avenue Public School, 172 A.D.3d 980, 100 N.Y.S.3d 343 (2nd Dep't 2019). Kindergartener and her parents filed action against school district to recover damages for sexual assault upon her by fellow student in bathroom during lunch period. The infant plaintiff's parents each appeared for the 50-h examination, but refused to produce the infant plaintiff because they felt it would be traumatic for her. Plaintiffs then commenced the action. After issue was joined, the plaintiffs moved, inter alia, for a protective order preventing the infant plaintiff from having to submit to a General Municipal Law § 50–h examination and from being deposed. Appellate Court found that motion court had providently exercised its discretion in denying the request for a protective order. Although the plaintiffs' submissions established that the infant plaintiff suffered trauma as a result of the incident, the record did not support a finding of extreme incapacity or psychological injury so as to excuse the infant plaintiff from submitting to a General Municipal Law § 50–h examination or, at this juncture, from testifying at an examination before trial. The Court noted that, after the infant plaintiff's section 50–h examination was completed, the Supreme Court would have broad discretion to preclude or limit any future deposition of the infant plaintiff based on what transpires at the examination.

III. GOVERNMENTAL IMMUNITY

A. Affirmative Defense Must be Pleaded

Pitts v. State of New York, 166 A.D.3d 1505, 88 N.Y.S.3d 323 (4th Dep't 2018). Inmate assaulted by fellow prisoner during afternoon recreation session sued State for negligent supervision claims. Court rejected defendant's contention that the claim was barred by governmental function immunity because defendant had waived that affirmative defense inasmuch as defendant did not plead it in its amended answer. NOTE: The defense would have failed anyway.

B. Governmental v. Proprietary functions

Ortiz v. City of New York, 171 A.D.3d 1198, 98 N.Y.S.3d 614 (2nd Dep't 2019). Elevator suddenly dropped without warning and came to an abrupt stop and plaintiff was then injured during rescue operations. Plaintiff

brought negligence action against property owner and elevator maintenence company, but also against the City defendants (firefighters) negligent rescue operations. City defendants moved to dismiss under CPLR 3211 or, in alternative, for summary judgment. Court found that the City defendants were acting in a governmental capacity, and thus were protected by governmental immunity unless plaintiff could show a special duty. Plaintiff conceded there was no special duty, arguing instead that no special duty was required. Plaintiff was wrong about that. Case against City defendants dismissed.

Santana v. City of New York, 169 A.D.3d 578, 92 N.Y.S.3d 877 (1st Dep't 2019). The governmental function immunity doctrine did not apply in this case where plaintiff pedestrian was injured when she was struck by a police vehicle pursuing a vehicle that had committed a traffic infraction. (NOTE: That's because driving a vehicle is considered a proprietary, and not a governmental function). Instead, where a plaintiff alleges that a municipality and/or its employees were negligent in the ownership or operation of an authorized emergency vehicle while engaged in one of the activities protected by Vehicle and Traffic Law § 1104(b), the "reckless disregard" standard set forth in Vehicle and Traffic Law § 1104(e) applies. Here, a factual issue existed as to whether defendants were engaged in a protected activity under Vehicle and Traffic Law § 1104(b), namely, proceeding past a steady red signal while pursuing a vehicle for a traffic violation so as to apply the reckless standard of care as opposed to ordinary negligence principles.

Scozzafava v. State of New York, 2019 WL 3021627 (3rd Dep't 2019). Truck driver brought action against State Thruway Authority alleging that its negligence in delaying the dispatch of maintenance personnel to remove a couch from a road and failing to dispatch state police to the scene after initial report about couch resulted in driver's injuries. His truck had hit the couch and rolled onto its side. Authority moved for summary judgment, arguing that it was immune from liability as it was performing a ***governmental*** function at the time of the claimed negligence. Claimants asserted that the failure to dispatch State Police to the initial call was integral solely to the ***proprietary*** function of removing maintaining the State's property, i.e., removing debris and maintaining the roadway in a reasonably safe condition. Since property maintenance is a ***proprietary*** function, no governmental immunity should attach. However, Court found that the gravamen of the claim was that plaintiff's injuries were caused by the improper allocation of police resources pursuant to the exercise of defendants' general police powers, i.e.,a ***governmental function.*** Notably, it was the conduct of defendants' radio dispatchers, not the actions of the State Police, that claimant was challenging. The primary capacity in which the dispatchers were engaged involved the assignment of resources to deal with a reported foreign object on the Thruway that posed an immediate risk to the health and safety of the public. It was irrelevant, therefore, whether the State Police ever actually engaged in traffic control on the afternoon in question, as the conduct of dispatching – or failing to dispatch – the State Police was an inseparable component of providing the very police resources that claimants' assert should have been dispatched in the first instance. Accordingly, the Court found that the provision of dispatching services constituted a quintessential governmental function that entitled defendants to immunity from liability for any negligence. Given this ruling, and in light of claimants' failure to allege the existence of any special duty or relationship owed to plaintiff, the Court declined to address whether the failure to initially dispatch the State Police was a ministerial versus a discretionary function. Claim dismissed.

Vassenelli v. City of Syracuse, 2019 WL 3437895 (4th Dep't 2019). Plaintiff, a disabled and retired police officer, claimed he sustained injuries in connection with defendants' management of plaintiff's health care benefits pursuant to General Municipal Law § 207–c. Court dismissed the negligence and gross negligence causes of action inasmuch as defendants were entitled to governmental function immunity based on the

discretion afforded in administering payments of General Municipal Law § 207–c benefits. Although plaintiff's negligence and gross negligence causes of action involved the health care services that he was receiving, the City defendants were engaged in a governmental function because they were merely administering the payment of General Municipal Law § 207–c benefits, i.e., they did not actually provide plaintiff with health care services. Moreover, the City defendants were entitled to immunity inasmuch as the administration of section 207–c benefits involved the exercise of their discretion and the record established that the City defendants denied payment of the disputed claims for benefits after actually exercising this discretion.

C. Discretionary v. Ministerial Acts

Jagatpal v. Chamble, 172 A.D.3d 573, 98 N.Y.S.3d 741 (1st Dep't 2019). The municipal defendants could not be held liable for plaintiff's injuries, even if their traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control and in any event plaintiff failed to plead or show that there was a special relationship owed to him.

Price v. City of New York, 172 A.D.3d 625, 103 N.Y.S.3d 31 (1st Dep't 2019). Plaintiff alleged he was the victim of a negligent police pursuit. He claimed that when the undercover officers came to his apartment, he believed they were in fact drug dealers trying to break into the building where he lived. He escaped to the roof, where he claimed he held on to the gutter and could see the officers (who he believed were drug dealers) 9 to 10 feet away on the roof. Plaintiff fell to the backyard below and a resident of the building notified the police. The Court did not buy his story. Hanging from the gutter, his eyes would have been at least a foot below the level of the roof, and it would have been impossible for plaintiff to see someone standing on the roof 9 to 10 feet away on the roof above. This untenable testimony was compounded by plaintiff's assertion that he held on to the rain gutter for a full 20 minutes. Court found plaintiff's testimony incredible as a matter of law. Further, the claim that the officers negligently pursued plaintiff to the roof was dismissed because the officers' decision to pursue plaintiff was a discretionary one, and defendants were thus protected by governmental immunity. The complaint failed to show any special duty owed by the officers to plaintiff that would require them to rescue plaintiff after he evaded them but before he fell from the rooftop.

D. Special Duty (a/k/a the Public Duty Rule)

Nair v. City of New York, 167 A.D.3d 761, 89 N.Y.S.3d 283 (2nd Dep't 2018). Motor vehicle operator brought action against city for personal injuries plaintiff suffered as result of police's failure to place flares on roadway near collision site. The City won summary judgment because there was no special relationship between it and the plaintiff. The responding police officers' purported instructions to the tow truck driver did not constitute an assumption by the City of an affirmative duty to act on the plaintiff's behalf. Moreover, the officers' purported instructions to the plaintiff did not establish a special relationship, as the City's evidence established, prima facie, that the plaintiff did not rely on such instructions.

Ade v. City of New York, 164 A.D.3d 1198, 83 N.Y.S.3d 653 (2nd Dep't 2018). A second-grade student, and his father suing derivatively, brought action against vehicle owners and against city and its board of education, alleging that they were negligent in failing to place a substitute crossing guard at a certain intersection and negligent supervision. Court held the municipal defendants established absence of any

special relationship with the infant plaintiff. Further, the municipal defendants' duty was limited to providing a crossing guard at the main intersection and did not extend to a neighboring intersection where no crossing guard was ever posted. Further, the municipal defendants established, prima facie, that the failure of having a crossing guard at the intersection the neighboring intersection was not a proximate cause of the injuries. Finallly, their submissions demonstrated that the accident occurred after the infant plaintiff was dismissed from school and they did not release the infant plaintiff into a foreseeably hazardous setting that they had a hand in creating.

Wilson v. New York City Board of Education, 167 A.D.3d 820, 89 N.Y.S.3d 701 (2nd Dep't 2018). Elementary school principal brought action against city board of education and city seeking to recover damages for personal injuries arising from incident wherein 12-year-old student grabbed a cell phone from principal's hand, alleging that a school safety officer failed to adequately protect principal. Court held defendants established, prima facie, that they did not owe the plaintiff a special duty.

K.A. v. City of New York, 169 A.D.3d 655, 92 N.Y.S.3d 718 (2nd Dep't 2018). Injured student sued City after she was struck by an automobile as she left school and crossed a street. The deposition testimony by plaintiff indicated there was no crosswalk, but a crossing guard told her, "you can't cross here, you have to cross over there," and pointed in the direction of a crosswalk a block away. The child then proceeded to the middle of the block where there was no intersection, crosswalk, or crossing guard, and then began to quickly cross. Before entering the street, the infant plaintiff looked to her left and observed a line of stopped cars in that direction. She walked past those cars when she crossed to the yellow line at the center of the road. After stopping in the middle of the street, the infant plaintiff, still looking left but never looking to her right, resumed crossing the street and was struck by a vehicle approaching from the right. Court held a special duty existed between the City defendants' crossing guard and the infant plaintiff. Nevertheless, given that the crossing guard told the infant plaintiff to not cross at an unsafe location and pointed the infant plaintiff to the crosswalk, the City defendants established, prima facie, that its employees did not breach their duty to the infant plaintiff.

Pozarski v. Brooklyn Bridge Park Corporation, 64 Misc.3d 1217 (Kings Co. Sup. Ct. 2019). Defendants moved to dismiss the complaint for failure to adequately plead special duty and alternatively because the EMT's actions were discretionary and thus governmental immunity applied. Under the Court of Appeal's *Applewhite* case, when a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a governmental function and cannot be held liable unless it owed a 'special duty' to the injured party". Nevertheless, plaintiff here contended that his claims were not barred by *Applewhite* because the EMT's negligence was *misfeasance* rather than *nonfeasance.* Court noted that the *Applewhite* case specifically declined to adopt the misfeasance v. nonfeasance distinction that previous courts had applied. Case dismissed.

IV. DISCOVERY ISSUES INVOLVING MUNICIPALITIES

A. 3126 Motion for Discovery Sanctions post Note of Issue

J.H. v. City of New York, 170 A.D.3d 816, 93 N.Y.S.3d 896 (2d Dept. 2019) Infant student placed his right hand out an open window and another student closed the window on his hand, severing the tip of his right index finger. The City defendants moved for summary judgment on the basis that inadequate supervision

was not a proximate cause of the injuries. The Court noted that where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not a proximate cause of the injury. Summary judgment granted. The Court also affirmed Court's denial of plaintiff's 3126 motion to strike the City's answer. The Court held that by filing the note of issue and certificate of readiness prior to moving pursuant to CPLR 3126 for the imposition of a discovery sanction, the plaintiffs waived any objection to the City defendants' failure to meet their disclosure obligations

B. Pleading the Fifth

Spencer v. City of Buffalo, 172 A.D.3d 1916, 99 N.Y.S.3d 843 (4th Dept. 2019). Plaintiff brought suit against police officers for violations of his constitutional rights. One of the defendant police officers, however, had a pending criminal prosecution against him. Plaintiff moved to compel this deposition pursuant to CPLR 3124. Defendant moved for a protective order, staying the police officer's deposition until the completion of the criminal prosecution against him. Court held that while a witness in a civil action is "not required 'to give an answer which will tend to accuse himself of a crime,'" a blanket refusal to answer questions based on the privilege cannot be sustained absent unique circumstances. The privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer and in civil actions, "invoking the privilege against self-incrimination is generally an insufficient basis for precluding discovery in a civil matter." The Court properly granted plaintiff's motion compelling the deposition.

C. Quality Assurance Disclosure in Medical Malpractice Cases

Nowelle v. Hamilton Medical, Inc., 2019 WL 2896807 (4th Dep't 2019). Mother brought malpractice action against medical center, alleging that her infant son suffered severe brain injury after he was transported from defendant hospital to State hospital and placed on ventilator. During discovery, plaintiff requested that defendants and SUNY Upstate produce all documents related to the evaluation of what occurred to the infant. Defendants and SUNY Upstate objected to that request, contending that any responsive documents would have been made as part of SUNY Upstate's quality assurance program and would therefore be privileged and exempt from disclosure pursuant to Education Law § 6527(3) and Public Health Law § 2805–m(2). After defendants refused to produce said documents, mother moved to compel production. Supreme Court granted motion in part, and required defendants to produce statements made within quality assurance process concerning facts and circumstances giving rise to malpractice. Defendants and SUNY Upstate, appealed from the order to the extent that it granted that part of plaintiff's motion seeking to compel production of those statements. The Appellate Division, Fourth Department agreed with SUNY Upstate and defendants that the court erred in granting plaintiff's motion with respect to certain statements made by defendants during the quality assurance process. "The New York State Education Law shields from disclosure 'the proceedings [and] the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program." Although there is an exception to that privilege, "the exception is narrow" and is limited to "statements made by any person in attendance at such a [quality assurance] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" The "statements" at issue were provided shortly after the incident and were obtained as part of SUNY Upstate's quality assurance investigation. The statements, however, were not made at a quality assurance committee meeting; nor were they made in response to any inquiries initiated by the committee**. None of the defendants appeared at any committee meeting**. Thus, the Court agreed with SUNY Upstate and defendants that plaintiff's proposed construction of the statutory exception would not give any practical effect to the phrase "in attendance," but rather would render that phrase

meaningless. **To the extent that the Second Department had expanded the statutory exception to the statements at issue here (***Santero v. Kotwal*, 4 A.D.3d 464, 465, 772 N.Y.S.2d 342 [2d Dept. 2004]; *vanBergen v. Long Beach Med. Ctr.*, 277 A.D.2d 374, 374–375, 717 N.Y.S.2d 191 [2d Dept. 2000]) **the Fourth Department declined to follow those cases.**

V. DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Design – Qualified Immunity

Carlebach v. City of New York, 168 A.D.3d 472, 91 N.Y.S.3d 84 (1st Dept. 2019) Pedestrian was injured when she placed her cane into a small opening within a manhole cover causing her to trip and fall. Plaintiff alleged both negligent traffic planning and a roadway defect. The City may be held liable for a discretionary traffic planning decision only where either (1) its study of a known hazard was plainly inadequate or (2) where there was no reasonable basis for its plan. Here, city demonstrated that it was unaware that the design or placement of the manhole would give rise to any hazard requiring a study. In any event, the City demonstrated that it had a reasonable basis both for the design of the manhole cover (which had trapezoid-shaped openings to capture water buildup) and for its placement of the manhole to facilitate drainage at the intersection. In opposition, plaintiff failed to present evidence (such as of prior similar accidents or of a violation of any mandatory safety standard) that would raise an issue of fact as to whether the City lacked a reasonable basis for its design or placement of the manhole. Moreover, to the extent plaintiff claimed a dangerous condition within the purview of Administrative Code of the City of N.Y. § 7–201(c)(2), city demonstrated that it did not receive prior written notice. Summary Judgment granted.

Iovine v. State of New York, 165 A.D.3d 766, 85 N.Y.S.3d 520 (2nd Dep't 2018). Claimant's decedent was driving his motorcycle at a speed of at least 62 miles per hour. The speed limit was 45 miles per hour. The decedent also had cocaine in his system. Another motorist was in her vehicle at a stop sign, preparing to turn right into a "merge" area of the two roadways. Said motorist attempted to merge directly into the left-turn lane, which required her to cross three lanes of traffic, and then required her to cross a solid white line. The decedent made contact with said vehicle, lost control of his motorcycle, and skidded approximately 95 feet until he made contact with a guardrail. The decedent died from his injuries. At trial, the claimant presented the testimony of a civil engineer who testified that the subject merge was unsafe, and that the merge should have included either channelizing devices—vertical orange sticks—along the solid white line of the left-turn lane, or warnings to discourage drivers from crossing three lanes of traffic and a solid white line. The claimant's expert further testified that such measures "may" have prevented the vehicle's driver from attempting to cross three lanes of traffic in front of the oncoming decedent. The State presented the testimony of a civil engineer who had reviewed a report in 2003, concerning the safety of the subject intersection. The engineer testified that the Report found no safety concerns regarding the intersection. The claimant's expert conceded that this was so. The State's engineer testified that a traffic light was subsequently placed at the intersection of Old Sunrise Highway and Sunrise Highway in order to "increase the capacity of the intersection, to improve the operations of the intersection by allowing the dual turns." He testified that the traffic light was not designed to prevent the type of accident that occurred in this case. The Court of Claims found that the State was not entitled to qualified immunity, that the State had constructive notice of a dangerous condition at the intersection, and that the State's failure to remedy that dangerous condition was a proximate cause of the accident. It found the State to be 33.3% at fault in the happening of the accident. Here, the Appellate Division finds that the Court of Claims' finding that the State was not entitled to qualified immunity for decisions pertaining to the merge was not warranted by the facts. The

State had submitted the Report as evidence that it had studied the intersection at issue, as part of a larger study of a 1.2–mile stretch. The Report considered safety conditions and accident history, traffic volumes, "speeds and delay studies," and traffic control devices. The State concluded that no additional safety measures were necessary at the merge. The claimant's expert conceded that the Report found no safety problems with the merge, and further conceded that she found no deficiencies with the Report. The subsequent placement of a traffic light at the intersection for reasons other than preventing the type of accident here did not affect the State's entitlement to qualified immunity for decisions.

Tyberg v. City of New York, 173 A.D.3d 1239 (2nd Dep't 2019). Student was struck by motorist and seriously injured while attempting to cross an uncontrolled intersection in order to reach an area where school buses stopped to pick up children. The City established that, in response to citizen complaints, it had conducted studies of the subject intersection in 2005 and 2007 and concluded that no traffic control device on the street was warranted. However, the City did not establish that those studies, which took place in the summertime, were conducted at times when the subject schools were in session. The City also failed to establish that the studies addressed the specific concern of schoolchildren crossing this street to reach awaiting buses and, thus, did not establish that it had entertained and passed on the very same question of risk that was at issue in this case. City failed to sustain its prima facie burden on the issue of qualified immunity in its summary judgment motion. Motion for summary judgment denied.

Giannelis v. Borgwarner Tec Inc., 167 A.D.3d 1185, 89 N.Y.S.3d 475 (3rd Dep't 2018). An employee of defendant, leaving his shift, entered the merge lane of an abutting public road and struck and killed a bicyclist. Plaintiff submitted proof that established a material question of fact as to both the special use exception and the creation of the dangerous condition exception. A finding of a special use arises where there is a modification to the public sidewalk, such as the installation of a driveway, or a variance of the sidewalk to allow for ingress and egress that was constructed in a special manner for the benefit of the abutting owner or occupier. The owner must derive a unique benefit unrelated to the public use. Courts will also consider whether there is an exclusive use. In this case, plaintiff submitted evidence that the public roadway in question had been altered for the exclusive benefit of defendant to facilitate its relocation. The wide merge lane, which was clearly designed for employees turning right onto the public road when exiting the premises, would be used differently by those motorists than by motorists already in the public road. Plaintiff also submitted evidence that defendant had a duty to the public to control the flow of traffic from its employees leaving the private parking lot. As an employer, defendant had the opportunity to conduct training or communicate in some way to its employees to use due caution and follow traffic laws when using the exit. Although the employee who caused this accident had finished his shift and was no longer acting in the scope of employment, activity arguably outside the scope of her employment, i.e., exiting the facility, was also "necessary or incidental to such employment," and her actions were still controlled in part by the gate and signage (a yield sign) installed by defendant, and defendant retained some degree of control and, under these circumstances, assuming defendant created a dangerous condition, it would not be unreasonable or unduly burdensome to impose a duty.

B. Negligent Roadway Maintenance

Schleede v. State of New York, 170 A.D.3d 1400, 96 N.Y.S.3d 383 (3d Dept. 2019). Claimant bicyclist was leading a group of bicyclists on a recreational bike ride on a State road. Claimant claimed that the traffic on the road forced his group to use the right lane which was bumpy, eroded, uneven and choppy and caused

claimant to fall from his bicycle. He claimed that the State's failure to properly maintain and repair the road caused the accident. He moved for summary judgment to establish liability, claiming the State owed the public a nondelegable duty to maintain its roadways in a reasonably safe condition, and that defendant had actual or constructive notice of a hazardous condition and failed to take reasonable measures to remedy it. In opposition, defendant's expert conceded that the area had been "a problem for awhile" because water would drip from the bridge, freeze and thaw and "rough[ ] up" the pavement. However, there were no complaints made about this area nor any specific request for repairs. Nevertheless, because the prior winter had been "bad" and the roads were in "poor shape," there was a standard order that employees fill potholes every day. Another DOT employee inspected this road at least once a week as part of his job and did not recall whether he observed it prior to claimant's accident. He explained that generally, because the road was heavily trafficked, repairs were a priority. Plaintiff's expert identified the hazardous condition as a "discontinuity" that extended across the entire width of the lane for approximately 15 to 20 feet, together with the accumulation of winter sand and debris on the right shoulder. Another of plaintiff's experts asserted that the size of the delaminated section, the preceding 'bumps' and the condition of the shoulder were dangerous for cyclists, who are proper users of the roadway. The Court determined that based upon the evidence plaintiff presented, there was no evidence that defendant had actual notice of this hazard and only conflicting evidence regarding constructive notice. DOT witnesses stated that there had been no prior complaints or accidents and that the road was regularly inspected. As to constructive notice, although most of the witnesses attributed the bumps to the effects of cars driving over cold patch and the delamination to the effects of the freeze/thaw cycle, evidence regarding the length of time that the bumps and delaminated section were present was equivocal, and there was no evidence regarding how long the debris had been on the shoulder. Even if defendant had actual or constructive notice of the hazardous condition, claimant's submissions evinced that temporary repair work had been done in the months leading up to the accident, and the submissions failed to demonstrate what reasonable corrective measures should have been taken given the circumstances. Thus, the Court held that given the myriad factual questions presented, including whether defendant had notice of the hazardous condition in the highway but failed to respond with appropriate maintenance measures, the Court of Claims properly denied claimant's motion for summary judgment.

Markwardt v. Town of Hartford, 60 Misc.3d 1231 (Washington Co. Sup. Ct. 2018). Plaintiff motorcyclist was travelling on a town road as he approached a slight curve in the road with a grading. As he reached that curve the motorcycle slid sideways. Plaintiff described "two different colors of pavement" as he "came into the corner" of the roadway and believed this was a cause of his accident. Three months prior to the accident, the Town had placed a shim course (a coat of blacktop designed to level out the road) on Burch Road at the area of this accident resulting in an elevation difference of 1/8″ to 3/16. Defendants produced an expert who opined that the shim course conformed to the NYSDOT Guidelines and Standards. Plaintiff had alleged that the Town negligently designed, constructed, maintained, signed and repaired this portion of the road, specifically that the Town, (a) negligently permitted the application of a shim course or a true and leveling course of asphalt to the existing surface of the roadway, (b) permitted loose stones to exist on the surface of the roadway and, (c) permitted a significant drop off with regard to the right shoulder of the roadway. The Court noted that there was no prior written notice, but examined the affirmative creation exception.. The plaintiff claimed that the defect in the shim course would have existed immediately upon completion of the work. There was a question of fact on all issues. Defendant's motion for summary judgment denied.

Gutkaiss v. Delaware Avenue Merchants Group, Inc., 173 A.D.3d 1327, 102 N.Y.S.3d 316 (3d Dep't 2019). With the consent of defendant City of Albany, a not-for-profit corporation, wrapped strands of decorative LED lights around the City's light poles for the purpose of creating a brighter appearance. Later, plaintiff was hired as a subcontractor to replace light strands because many of the light bulbs had become inoperable. Plaintiff was injured when he fell from a 16–foot aluminum-rung extension ladder when the pole that it was leaning on suddenly fell over. Plaintiff served a timely notice of claim against the City for Labor Law § 240(1) violations and for negligence. Plaintiff's claimed the City negligently maintained the light pole. The City argued that it was entitled to *qualified immunity* from this claim or, alternatively, that the claim should be dismissed because it had *no prior written notice* of the allegedly dangerous condition. Court noted that, although a municipality may enjoy qualified immunity from liability arising from highway planning and design decisions, that doctrine does not shield a municipality from liability arising from *negligent maintenance*. This was not a *negligent design* case, but rather a *negligent maintenance* one. Thus, the City failed to establish qualified immunity from plaintiff's negligence claim. As for the City's argument that plaintiff's negligence claim should be dismissed for lack of prior written notice, it was unpreserved for review.

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

A. Prior Written Notice Required

1. What is a "Sidewalk", "Culvert", etc?

Hinton v. Village of Pulaski, 33 N.Y.3d 931, 122 N.E.3d 51, 98 N.Y.S.3d 534 (2019). Pedestrian fractured ankle after tripping over a poorly maintained stairway which connected a public road to a municipal parking lot. The Court of Appeals relied on its decision in Woodson v. City of New York 93 N.Y.2d 936 (1999) where the Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve." The Court held that the stairway at issue "functionally fulfills the same purpose" as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition. Therefore, without prior written notice, the matter was dismissed. In a scathing dissent, Judge Wilson argued that "By holding that the stairway in this case was a "sidewalk," the majority was rewriting the Village Law to provide that the prior written notice rule applies to actions seeking damages for personal injuries allegedly sustained as a consequence of a defective village stairway – even though the legislature specifically declined to include stairways in the list of municipal passageways to which prior written notice protection applies." Judge Wilson distinguished the Woodson case from the present matter emphasizing that "when stairs are integrated with, or serve as part of, a connected standard sidewalk, they plainly fall within the meaning of that already existing category…. The stairway in this case functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal".

Coventry v. Town of Huntington, 165 A.D.3d 750, 85 N.Y.S.3d 573 (2nd Dep't 2018) Infant plaintiff cut his foot on a rusty drainage pipe as he walked in the water at the Defendant's beach. Defendant Town of Huntington had a prior written notice statute and the "drainage pipe" was found by the Court to be a "culvert" falling within the ambit of the statute. The Town established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the alleged defect.

Plaintiffs failed to raise a triable issue of fact. Actual or constructive notice of the alleged hazardous condition does not override the statutory requirement of prior written notice. Case was properly dismissed.

2. What Constitutes prior *Written* Notice?

Hernandez v. City of Syracuse, 164 A.D.3d 1609, 85 N.Y.S.3d 293 (4th Dept. 2018). Plaintiff broke her ankle when she tripped on a deformed sidewalk in defendant City of Syracuse. Plaintiff argued that a verbal communication to a municipality subsequently reduced to writing satisfied prior written notice requirement. Court reversed and granted summary judgment holding that a verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy a prior written notice requirement.

Harvey v. Henry 85, LLC, 171 A.D.3d 1025, 98 N.Y.S.3d 262 (1st Dep't 2019). The City established prima facie that it lacked prior written notice of the condition of the sidewalk pedestrian handicap ramp on which plaintiff tripped and fell, by submitting affidavits by two record searchers employed by the Department of Transportation (DOT) showing that the City received no written complaints about the ramp in the two years preceding and including the day of the accident (see Administrative Code of the City of New York § 7–201[c][2]). In opposition, plaintiff submitted a service report that was the result of a verbal or telephonic communication received through the City's 311 system, which was insufficient to raise an issue of fact as to prior written notice. Plaintiff also failed to raise an issue of fact whether the City issued a written acknowledgment of the alleged defect.

Bochner v. Town of Monroe, 169 A.D.3d 631, 93 N.Y.S.3d 136 (2d. Dept. 2019). Pedestrian was injured stepping off the curb into a pothole in the roadway. Village had prior written notice statute and evidence established that officer designated by code as recipient of written notice "drafted two worksheets detailing defects" in the roadway, and those worksheets were emailed to the Village Clerk. Court held, "[a]lthough it was not clear whether the worksheets identified the precise defect that allegedly caused the plaintiff's injuries, the worksheets presented a triable issue of fact." The Court noted that "[a] recent prior written notice that does not provide an exact location, but which nevertheless reasonably identifies the area of the purported defect, may give rise to a question of fact for the jury as to the sufficiency of the notice." Summary Judgment denied.

Van Wageningen v. City of Ithaca, 168 A.D.3d 1266, 90 N.Y.S.3d 715 (3d Dep't 2019) Decedent died when he fell from defendant City's trail into a gorge. Court held that since the trail was a paved walkway connecting two public thoroughfares, it was the functional equivalent of a sidewalk and therefore prior notice was required. Plaintiff demonstrated that the Department of Public Works had received numerous prior written complaints about the general condition of the trail, and one of the written complaints was an email forwarded to an Assistant Superintendent of Public Works that was, according to his testimony, "probably" shared with the Superintendent of Public Works, and attached to the email was a map with photographs that appeared to reference the defects in the area where decedent fell. Summary Judgment was denied.

Hued v. City of New York, 170 A.D.3d 571, 97 N.Y.S.3d 50 (1st Dept. 2019). Plaintiff injured in trip and fall over sunken catch basin, and contended defendant had prior notice through Customer Service Reports made telephonically through City's 311 system. But this did not satisfy prior written notice requirements. Additionally, the area that was inspected and/or repaired as a result of the work order was on the southwest corner of the intersection and the accident happened on the east side of the intersection. The City's

awareness of one defect in the area was insufficient to constitute notice of another defect that caused the accident. Either way, actual or constructive knowledge cannot substitute for required prior written notice of a defect.

Cook v. City of Amsterdam, 173 A.D.3d 1420, 103 N.Y.S.3d 185 (3d Dept. 2019). Plaintiff was injured when he stepped into a hole and fell while walking upon a roadway in Defendant City. Defendant City moved for summary judgment establishing that it had not received prior written notice. Plaintiff's contention that defendant had received two verbal complaints about the condition of the relevant area prior to the date of plaintiff's accident that led to an inspection by City personnel and the preparation of a written work order for repairs did not satisfy the prior written notice requirement in Local Law as actual notice of an alleged defect "does not override the statutory requirement of prior written notice." Summary judgment was properly granted.

Robinson v. City of New York, 173 A.D.3d 485 (1st Dept. 2019). Plaintiff slipped and fell on a puddle on a staircase landing at a subway station. Plaintiff submitted no evidence showing that defendant had actual notice of the puddle prior to the accident, nor had plaintiff established that the drain at the bottom of the staircase became clogged so frequently as to constitute a recurring condition. Summary judgment was properly granted.

3. Creative but Unsuccessful Arguments to Get Around the Prior Written Notice Requirement.

Gori v. City of New York, 171 A.D.3d 1025, 98 N.Y.S.3d 262 (3d Dep't 2019). Plaintiff was thrown from her bicycle when the front wheel of her bicycle was caught a depressed manhole cover owned by the City of New York. On SJ motion, City proved it had no prior written notice of the manhole cover. Court also found the City's duty to maintain city-owned street manhole covers in accordance with 34 RCNY § 2–07(b) did not obviate the requirement of prior written notice under section 7–201(c)(2) or the application of a recognized exception. Case dismissed.

Gebhardt v. County of Suffolk, 171 A.D.3d 531, 98 N.Y.S.3d 75 (2d Dep't 2019). Plaintiff tripped and fell on an uneven sidewalk condition outside a courthouse in Suffolk County. Upon summary judgment motion, the County proved it did not have prior written notice of the sidewalk defect. The plaintiff responded that the prior written notice law did not apply since the County had a "proprietary duty" to maintain its sidewalk. Court held that, contrary to the plaintiff's contention, even if the County had a proprietary duty to maintain the sidewalk abutting the courthouse, the prior written notice law still applied.

B. "Big Apple Map" in New York City

Allen v. City of New York, 164 A.D.3d 725, 83 N.Y.S.3d 556 (2nd Dep't 2018). Bicyclist fell from his bicycle when he rode into a pothole on road in Defendant City. Defendants established the City's prima facie entitlement to judgment as a matter of law by demonstrating through, inter alia, DOT records, that the City did not have prior written notice of the condition alleged as required by the Administrative Code and that the City did not affirmatively create the condition. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the City received prior written notice of the alleged condition. Although the plaintiff relied upon a map submitted by the Big Apple Pothole and Sidewalk Protection Corporation which had a straight line, indicating "[r]aised or uneven portion of sidewalk," in the area where the plaintiff's

accident occurred, the map did not give the City prior written notice of the pothole condition alleged by the plaintiff. Summary judgment should have been granted, prior Court's determination reversed.

De Zapata v. City of New York, 172 A.D.3d 1306, 101 N.Y.S.3d 151 (2d. Dept. 2019). Plaintiff pedestrian fell while walking on the sidewalk upon snow and ice "that accumulated inside the broken and depressed surfaces of the sidewalk" in front of city premises. Defendant City moved for summary judgment contending, among other things, that it did not have prior written notice of the alleged defect that caused the plaintiff to fall and that it lacked constructive notice of any icy condition at the location of the accident. The plaintiff contended that the Big Apple map constituted prior written notice of the defect and that the City had constructive notice of the ice, since the accident occurred three days after a snow storm and the temperature remained below freezing up until the date of the accident. The Court held that "Transitory conditions present on a roadway or walkway 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" and noted that "Neither actual nor constructive notice may substitute or override a prior written notice requirement". Plaintiff's contention that the Big Apple map indicated that the sidewalk abutting the subject property had an "[e]xtended section of raised or uneven sidewalk," did not provide the City with notice of the alleged defect, which the plaintiff consistently described as a "hole" or "ditch." Summary judgment was properly granted.

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

1. Generally Must "Immediately Result in the Existence of a Dangerous Condition"

Kales v. City of New York, 169 A.D.3d 585, 95 N.Y.S.3d 58 (1st Dept. 2019) Motorist injured due to defect in roadway. Pursuant to Administrative Code § 7–201[c][2], no action may be maintained against the City of New York as a result of injury arising from a dangerous, defective, unsafe, or obstructed condition on its, inter alia, streets or sidewalks unless the City received prior written notice of such condition and failed to repair it within 15 days of such notice. Failure to "plead and prove" such prior written notice requires dismissal of the complaint. Plaintiff here did not assert in the Notice of Claim or the complaint that defendant had prior written notice of the roadway defect that allegedly caused her accident. Additionally plaintiff did not include language that the City caused or created the defect. The Court held that even if the plaintiff did include the language in the complaint or notice of claim, the contention that the roadway "was foreseeably caused to deteriorate over time from weather conditions and vehicular traffic" is not the type of affirmative act of negligence "that immediately results in the existence of a dangerous condition" which is necessary to sustain a "cause or create" claim. Summary Judgment granted.

Harvish v. City of Saratoga Springs, 172 A.D.3d 1503, 99 N.Y.S.3d 472 (3d Dept. 2019). Pedestrian brought trip-and-fall action against municipality for injuries she suffered when she tripped on metal traffic sign post anchor protruding from sidewalk. Plaintiff alleged that her fall was the result of defendant's failure to, among other things, properly maintain its sidewalk. Defendant moved for summary judgment dismissing the complaint on the ground that it had not received prior written notice of the alleged defect. Defendant submitted the affidavits of its Commissioner of Public Works and the head of the traffic maintenance department within its Department of Public Safety, establishing that defendant had not performed any repairs or work on either the sign or the surrounding sidewalk. As such, proof demonstrated the absence of prior written notice regarding the defective condition that allegedly caused plaintiff's injuries,

defendant established its prima facie entitlement to summary judgment dismissing the complaint The burden thus shifted to plaintiff to raise a question of fact as to defendant's receipt of prior written notice of the defect or that one of the two exceptions to the rule applied. Plaintiff claimed that defendant affirmatively created the defect by improperly installing the sign in 2006 and failing to routinely monitor its condition thereafter. The affirmative negligence exception to prior written notice, however, applies only where the action of the municipality immediately results in the existence of a dangerous condition. Plaintiff failed to present any proof that this was so. Summary judgment granted.

Thompson v. City of New York, 172 A.D.3d 485, 99 N.Y.S.3d 312 (1st Dept. 2019). Pedestrian sued municipality after he tripped and fell on broken and uneven pavement. Defendant established prima facie entitlement to judgment as a matter of law by showing that it did not have prior written notice. In opposition, plaintiff failed to raise an issue of fact. There was no evidence that defendant actually applied a cold patch instead of, as it claimed, a hot patch when it cured the condition approximately six months prior to plaintiff's accident. Even if defendant had applied a cold patch, and only temporarily cured the condition, plaintiff offered no evidence that doing so was inadequate, or that such allegedly inadequate repairs immediately resulted in the dangerous condition that caused his accident. Summary judgment was properly granted.

2. No Need to Show "Immediately Resulted in the Existence of a Dangerous Condition" in Negligent Snow Removal Cases

Eisenberg v. Town of Clarkstown, 172 A.D.3d 683, 99 N.Y.S.3d 394 (2d. Dep't. 2019). Pedestrian who slipped and fell on ice at entrance to municipal-owned parking lot sued municipality. Plaintiff alleged defendant affirmatively created the dangerous ice condition through its snow removal operations. Specifically, plaintiff alleged that the 6 to 12 inches of snow that the plaintiff observed on the sidewalk, making it impassable, was the product of defendant's snow removal operations. Defendant, on summary judgment motion, established it did not receive prior written notice, but failed to establish it did not create the condition complained of. The defendant's evidence provided information about its general snow removal operations, but failed to show what the sidewalk abutting the accident site looked like immediately after it completed its snow removal operations. The defendant failed to establish, prima facie, that the snow on the sidewalk was not the product of its snow removal operations. The defendant also failed to submit any evidence as to what the temperature was from the time that it last performed its snow removal operations and the time of the accident. Given that the defendant's submissions failed to eliminate all triable issues of fact as to whether its snow removal efforts created the ice condition, the defendant's motion for summary judgment dismissing the complaint should have been denied. Lower Court's granting of summary judgment was reversed. Note: No need to show negligent snow removal "immediately" resulted in hazard. For example, the snow pile can be harmless and later melt and then freeze. *See*, Ct of Appeals case *san Marco v. Village of Mount Kisco.*

Gilbert v. City of Rye, 2019 WL 3679663 (2d. Dep't 2019). Plaintiff pedestrian slipped and fell on a patch of ice located on a public sidewalk that was adjacent to property owned by a church in Defendant Town. The plaintiffs alleged that a snowstorm a few days prior led to an accumulation of snow. The plaintiffs argued that the City plowed snow and ice from the road in front of the sidewalk, and that it negligently pushed the snow and ice from the road into a large pile along the sidewalk, making it "highly likely that the snow would melt and then re-freeze as Black Ice on the sidewalk," thereby creating the dangerous

condition. The City demonstrated that it had no duty to maintain the sidewalk that abutted the Church's property (based on local statute shifting the duty to the abutting landowner) and further demonstrated that it did not create or exacerbate the allegedly dangerous condition on the sidewalk. In opposition, the plaintiffs failed to raise a triable issue of fact as the affidavit of their expert which was speculative and conclusory and could not raise a triable issue of fact as to whether the City created or exacerbated the dangerous condition. Summary judgment to defendant granted.

9. "Special Use" Exception to the Prior Written Notice Rule

Garcia v. Thomas and The Incorporated Village of Freeport, 173 A.D.3d 842, 102 N.Y.S.3d 707 (2d Dept. 2019). Plaintiff tripped and fell over a raised manhole cover on a sidewalk in Defendant Village. Defendant moved for summary judgment on the grounds that it received no prior written notice, did not cause or create the hazard and did not receive a special benefit to the locality. Plaintiff argued, as to the special benefit exception to the prior written notice statute, that the locality derived a special benefit as it was a manhole, which provided access to underground sewer drains. The Court found, however that the defendant's ownership of the subject manhole, which provided access to the sewer system, benefitted the public at large, and the defendant did not derive a special benefit therefrom. Summary Judgment was properly granted.

Budoff v. City of New York, 164 A.D.3d 737, 83 N.Y.S.3d 163 (2nd Dep't 2018) Cyclist injured while riding a bicycle in a bicycle lane. The accident allegedly was caused by a defect in the bicycle lane. The City demonstrated, prima facie, that it lacked prior written notice of the alleged defect and that the record contained no evidence that the City created the condition that allegedly caused the plaintiff's accident. Cyclist contended that this case fell within the special use exception because bicycle lanes provide a special benefit to the City by "enhancing its status" and "attracting residents and tourists." However, the plaintiff failed to demonstrate that the implementation of bicycle lanes on City roadways bestowed a special benefit upon the City unrelated to the public use or that it constituted a special use of the roadways. City's motion for summary judgment was granted.

McAllister v. City of New York, 171 A.D.3d 608, 99 N.Y.S.3d 3 (1st Dep't. 2019). Pedestrian brought action against city and city housing authority after he tripped and fell into hole. Defendant City established that it did not own or control the walkway by submitting a deed showing that the property belonged to defendant Housing Authority. Defendant City also established that it did not cause or create the condition by submitting records showing that it did not perform any work in the area during the relevant period. One service request in the vicinity of the accident site identified by plaintiff and Housing Authority concerned a hole created by an undersized steel plate or manhole cover in a playground. However, the plaintiff's deposition testimony made no mention of a steel plate, and the plaintiff testified that the hole he fell on was on the walkway, not in a playground. Contrary to Housing Authority's contention, the City's sewer easement running under the walkway did not impose a duty on the City to maintain or repair the sidewalk, which, according to the unrefuted testimony of a witness, was at least 10 or 20 feet above the easement, unless the easement causes the dangerous condition. The City established that there was no evidence that the hole that caused the accident was related in any way to the easement. In opposition, Housing Authority failed to present evidence sufficient to raise an issue of fact as to the cause or creation of the hole. Contrary to Housing Authority's further contention, responsibility for maintaining the walkway could not be imposed

upon the City on the ground that the City derived a special benefit from the public property, because the public benefited from the easement. Summary judgment as to the city was properly granted.

10. New York City Sidewalk Law

Madonia v. City of New York, 164 A.D.3d 1320, 83 N.Y.S.3d 685 (2nd Dep't 2018) Plaintiff pedestrian tripped and fell on a sidewalk defect (a raised block of concrete with bolts coming out of it) in Brooklyn. She sued the defendant City and DOT, defendant Con-Ed and the private owner of adjoining commercial property. Plaintiff claimed that the private owner was responsible pursuant to A.C § 7–210. The private defendant claimed that the defect was the site of a functioning lamppost which was knocked down by a snowplow during snowstorm and then removed. A few days later, defendant Con-Ed put in the foundation for a new lamppost, but never installed a lamppost. The private defendants were thus able to prove that the defect was not a "sidewalk" within the meaning of A.C. §7-210, which meant they could not be held liable unless they created the defect, which they did not. The Defendant City moved for summary judgment. It was uncontested that they did not prior written notice. The only evidence that the City had created the defect was the testimony of the private landowner, who claimed he had heard that the lamppost had been knocked down by a city snow plow. This was speculative, so the Court found there were no issues of fact that the City created the defect. The only defendant held in was Con-Ed. Although they had no records regarding the repair, the private landowner described how Con Ed employees installed the subject lamppost foundation. Con-Ed was therefore unable to establish, prima facie, that it did not create the alleged defect which caused the plaintiff's fall. Summary judgment as to defendant Con-Ed only was properly denied.
Barrios v. City of New York, 172 A.D.3d 668, 97 N.Y.S.3d 516 (2d Dept. 2019). Pedestrian injured when she tripped and fell on a sidewalk abutting premises owned by private defendant. Private defendant moved for summary judgment contending, inter alia, that the plaintiff tripped and fell on a metal grating that covered a tree well and that it had no duty to maintain the tree well. Administrative Code of the City of New York § 7–210, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner. **However, a tree well does not fall within the applicable Administrative Code definition of "sidewalk" and, thus, "section 7–210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells."** Private landowner thus established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff fell due to a condition related to the tree well, not due to any condition concerning the sidewalk, and that it had no duty to maintain the tree well. In opposition, the plaintiff and the City failed to raise a triable issue of fact. Summary judgment granted to private defendant.

Bruck v. 51st Homes Realty, Inc., 2019 WL 3419181 (Sup. Ct. Kings Cty. 2019). Pedestrian injured when she slipped and fell on snow and ice on the sidewalk abutting a private premises, a two-family home, owned by the defendant 51st Homes Realty Inc. The building's resident was the only officer and shareholder of the corporation. He had lived in the premises at the time of plaintiff's incident. It was undisputed that no person shoveled the sidewalk to clear the snow on behalf of defendant and therefore, defendant did not cause and create the icy condition. Defendant contended that the premises was a two-family, owner occupied, residential only dwelling and thus was entitled to the exemption from liability under the New York City Administrative Code § 7-210 unless it created the hazard, which it did not. Plaintiff contended that the corporate *officer and sole shareholder's* occupancy was not equivalent to the *corporate entity* occupying the premises. The issue was thus whether a two-family property, which was owned by the defendant corporation and occupied by the owner of that corporation, coould be considered "owner-occupied" and thereby was entitled to the exemption to tort liability under § 7-210. The Court found that the corporate

officer and the defendant corporation were not interchangeable for the purpose of § 7-210. The officer/shareholder, by choosing to hold title in a corporate name, was shielded from personal liability and afforded all the benefits derived from incorporation. To afford his real estate holding corporation the added protection of the § 7-210 exemption would be contrary to the legislative intent to protect small property owners with limited resources. The premises, which was owned by defendant corporation, could not be considered "owner-occupied" pursuant to § 7-210. Therefore, defendant failed to meet its burden. Summary judgment is denied.

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

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

1. What Constitutes an "Emergency Operation?"

Portalatin v. City of New York, 165 A.D.3d 1302, 87 N.Y.S.3d 73 (2nd Dep't 2018). Plaintiff driver injured when his vehicle was backed into by police vehicle. Defendants' contention that their police officer had noticed an individual at a nearby address with what he believed to be an open alcoholic container was insufficient to raise a triable issue of fact as to whether the police vehicle was engaged in an emergency operation. Thus the Court did not apply the reckless disregard standard of care. Under the ordinary negligence standard of care, the police officer's failure to take proper precautions before backing up the police vehicle into the plaintiff's stopped vehicle established plaintiff's entitlement to judgment as a matter of law on the issue of liability (VTL § 1211[a]). The Court affirmed the lower Court's granting summary judgment pursuant to Rodriguez v. City of New York, 31 N.Y.3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366 (2018).

State Farm Mutual Automobile Ins. Co. v. County of Nassau, 62 Misc.3d 475, 89 N.Y.S.3d 869 (Sup. Ct. Nassau Cty. 2018). Motorist was turning left and was struck by a vehicle driven by a police officer proceeding straight while in a funeral procession. The Court determined that escorting a funeral procession was not qualified as an "emergency" under VTL § 1104 and therefore the qualified privilege did not apply to the officer. Finding ordinary negligence, the Court Apportioned fault at 60% to the plaintiff and 40% to the Defendant County.

McGough v. City of Long Beach, 102 N.Y.S.3d 456 (2d. Dep't. 2019). Plaintiff motorist was truck by defendant's police officer as the police officer reversed his vehicle. Just prior to the accident, a man and a woman were arguing in the vicinity. When the defendant police officer observed this, he stopped his vehicle for a few seconds and then began to reverse his vehicle, colliding with the front of the plaintiff's vehicle. Defendant police officer testified at his deposition that, as he passed by the man and woman, he saw the man raise his right arm and thought that the man might strike the woman, but his view became obstructed. The officer testified that he then stopped his vehicle for a few seconds, checked his mirrors, did not see any vehicles in the mirrors, activated the emergency lights, and began to reverse, and his vehicle struck the plaintiff's vehicle. Defendants moved for summary judgment asserting that the police officer's conduct must be viewed through the prism of VTL § 1104 and did not amount to reckless disregard. In opposition, the plaintiff failed to raise a triable issue of fact. Court found officer was engaged in an emergency operation and was not reckless. Summary judgment was properly granted.

2. Whether the driving conduct set forth is triggered by VTL § 1104(b) so as to Qualify for "Reckless Disregard" Standard.

Cable v. State of New York, 63 Misc.3d 549, 96 N.Y.S.3d 816 (2018). Motorcyclist fell and was injured after he abruptly applied his brakes to avoid hitting police officer who had pulled his vehicle in front of his motorcycle. Officer was responding to radio call to assist another officer, In response to the call, the trooper intended to exit the shoulder and execute a U-turn. Claimants moved for summary judgment on the issue of liability, claiming that the negligence rather than the reckless disregard standard applied. The critical issue was whether the trooper was engaged in one of the four specified types of driving conduct set forth in Vehicle and Traffic Law § 1104(b). The Court found that the trooper's conduct fell within Vehicle and Traffic Law § 1104(b)(4) in that the trooper was attempting to execute a U-turn "in disregard of the regulations governing directions of movement or turning in specified directions". Thus, the reckless disregard standard applied, and plaintiff's motion was denied. Defendant had cross-moved for summary judgment arguing that recklessness was the applicable standard of care and that the trooper's conduct, as a matter of law, was not reckless. This cross-motion was granted. The trooper testified at his deposition that, before entering the northbound lanes of the parkway, he looked in his side view and rearview mirrors and looked behind him for oncoming traffic. The trooper observed northbound headlights behind him; however he believed that they were at a sufficient distance to enable him to safely enter the parkway. Since the trooper testified he looked in all directions before he attempted his U-turn, and he simply misjudged the distance of the lights coming at him, this constituted a "momentary lapse in judgment," and did not, as a matter of law, rise to the level of a reckless disregard for the safety of others.

Chesney v. City of Yonkers, 167 A.D.3d 567, 88 N.Y.S.3d 507 (2nd Dep't 2018). Pedestrian struck by police vehicle attempting to cross a street within a crosswalk against a traffic light. Defendant City argued that the police officer's conduct in the operation of the vehicle was governed by the reckless disregard standard of care pursuant to VTL § 1104[e]. Plaintiff, in opposition, argued that his allegation that the officer failed to see what there was to be seen should be governed by the ordinary negligence standard of care. Defendant submitted evidence, including a surveillance video of the accident and deposition transcripts, sufficient to show that, at the time of the accident, the police officer was operating an authorized emergency vehicle and involved in an emergency operation, and that he was operating the vehicle in excess of the maximum speed limit (one of the four qualified driving behaviors in VTL § 1104[b]). Court held that since the "injury-causing conduct" was operation of the vehicle in excess of the speed limit, the Supreme Court properly applied the reckless disregard standard of care. Plaintiff failed to raise issues of fact that the officer operated the police vehicle with reckless disregard for the safety of others. Summary judgment affirmed.

Jimenez-Cruz v. City of New York, 170 A.D.3d 975, 95 N.Y.S.3d 573 (2nd Dep't 2019). Driver brought action against defendant city for her injuries when her vehicle collided with a left-turning marked police car. According to the deposition testimony of the plaintiff and police officer, the parties both approached the intersection from opposite directions, and each had a green light. When defendant police officer made the left, the vehicles collided. Defendants asserted VTL § 1104 claiming the police officer was engaged in an emergency operation at the time of the accident and did not act in a reckless manner. The plaintiff moved for summary judgment on the issue of liability and the defendants cross-moved for summary judgment dismissing the complaint. Plaintiff's motion for summary judgment was denied as she failed to demonstrate, prima facie, that the defendants' affirmative defense was without merit (*Rodriguez v. City of New York*, 31 N.Y.3d 312, 317, 76 N.Y.S.3d 898, 101 N.E.3d 366). Court granted summary judgment to the defendants

since officer established was responding to an emergency (robbery in progress in vicinity) and that he engaged in specific qualified conduct listed in VTL 104(b) in that he "failed to yield the right-of-way to oncoming traffic while attempting to turn left." Defendant therefore qualified for the reckless standard of care and Plaintiff was unable to raise an issue of fact as to its application. Summary judgment denied for the plaintiff and granted for the defendant.

3. What Constitutes "Reckless Disregard"?

Melendez v. City of New York, 171 A.D.3d 566, 98 N.Y.S.3d 178 (1st Dept. 2019) Plaintiffs' vehicle was stopped in traffic when it was rammed multiple times by an SUV that had been pursued by police officers. The SUV eventually pushed plaintiffs' vehicle onto the concrete barrier in the middle of the expressway. The driver of the SUV, going both forward and in reverse, also struck several other cars, while ignoring directions from officers to stop the car. Officers subsequently shot and killed the driver of the SUV, who was purportedly attempting to run them over. Plaintiff brought negligence claims against the City based on the officers' vehicular pursuit of the SUV. The Court held that the actions of the driver of the SUV were the sole proximate cause of plaintiffs' injuries. In any event, the record demonstrated that the officers' conduct was not reckless, as would be required to give rise to liability (see Vehicle and Traffic Law § 1104[e]) Additionally, Plaintiffs' claims for intentional infliction of emotional distress against the City was "barred as a matter of public policy" but even so, the Court held that the evidence failed to raise a triable issue of fact as to whether the discharge of police weapons to prevent the SUV from harming officers on foot or members of the public who were stuck in traffic was "extreme and outrageous conduct" sufficient to support the claim for negligent infliction of emotional distress. Summary Judgment properly granted.

Flood v. City of Syracuse, 166 A.D.3d 1573, 88 N.Y.S.3d 740 (4th Dep't 2018). Plaintiff driver was driving behind a patrol vehicle operated by defendant police officer. Defendant police officer attempted to execute a U-turn in order to pursue a suspect in a domestic incident. Before he attempted the U-turn, he checked his driver's side and rearview mirrors, turned his head, and saw no vehicles behind him. The police officer made an abrupt left and his vehicle collided with plaintiff's vehicle. Defendant's motion for summary judgment was denied in the lower Court. The Fourth Department held that when the accident occurred, the police officer was operating an "authorized emergency vehicle" and "was engaged in an emergency operation by virtue of the fact that he was attempting a U-turn in order to 'pursu[e] an actual or suspected violator of the law'" Thus, the police officer's conduct was exempted from the rules of the road by section 1104(b)(4) and was governed by the reckless disregard standard of care in section 1104(e). The Court further held that "momentary judgment lapse' did not alone rise to the level of recklessness. Defendant officer articulated the precautions he took before he attempted the U-turn and established as a matter of law that the officer's conduct did not rise to the level of reckless disregard for the safety of others, i.e., "he did not act with 'conscious indifference' to the consequences of his actions" The Court reversed the judgment of the lower Court and held that Summary judgment should have been granted.

Deno v. Belliard, 165 A.D.3d 602, 86 N.Y.S.3d 63 (1st Dep't 2018) The accident occurred when the police car, while responding to an emergency call, drove through a red light. The police officer testified that he came to a complete stop before entering the intersection and looked in the direction of the taxi, but did not

see it. The Court held that the Officers actions were not reckless as a matter of law and dismissed the third party action against the city.

Baker v. City of White Plains, 169 A.D.3d 980, 92 N.Y.S.3d 904 (2nd Dep't 2019). At trial, defendant police officer testified that, at the time of the accident, he was driving his vehicle in excess of the speed limit, with the lights and siren engaged, while in pursuit of a suspect in another vehicle. Defendant testified that when the suspect's vehicle changed lanes, the officer attempted to follow, but was prevented by the sudden appearance, on his right side, of the vehicle in which the plaintiff was riding. The officer was unable to avoid colliding with that vehicle. The trial court denied the plaintiff's motion for a directed verdict and the jury found in favor of the defendant on the issue of liability. The Court upheld the jury's findings that the officer was engaged in an emergency operation at the time of the collision and that the officer's conduct did not rise to the level of reckless disregard for the safety of others. The jury's verdict was not disturbed.

Levere v. City of Syracuse, 173 A.D.3d 1702, 103 N.Y.S.3d 212 (4th Dept. 2019). Plaintiff driver and passenger were in a vehicle struck in an intersection by defendant's police vehicle that ran a red light. Defendants moved for summary judgment on the grounds that the officer was not engaging in reckless conduct as a matter of law. It was not disputed that the defendant officer was operating an "authorized emergency vehicle" and was "involved in an emergency operation" at the time of the accident. The defendant officer was performing exempted conduct when he "proceed[ed] past a steady red signal ..., but only after slowing down as may be necessary for safe operation" and plaintiffs failed to raise a triable issue of fact on that issue. The Fourth Department made an interesting observation: "**We note that the court's and plaintiffs' reliance on our decision in LoGrasso v. City of Tonawanda, 87 A.D.3d 1390, 930 N.Y.S.2d 129 (4th Dept. 2011) is misplaced. Unlike the officer in LoGrasso, who complied with the rules of the road and thus was not subject to the reckless disregard standard of care (id. at 1391, 930 N.Y.S.2d 129), the defendant officer here engaged in conduct that ordinarily constitutes a violation of Vehicle and Traffic Law § 1111(d)(1) but is specifically exempted from the rules of the road under section 1104(b)(2), i.e., he proceeded against a steady red light."** Thus, unlike in *LoGrasso*, here the reckless discregard standard was triggered. Summary judgment was granted.

Thomas v. City of New York, 172 A.D.3d 1132, 100 N.Y.S.3d 318 (2d. Dept. 2019). At the time of the accident, the firefighter was responding to a reported fire with the lights and sirens of the fire truck activated. As the firefighter made a right turn from the left lane of a four lane road, the rear of the fire truck struck the front of the plaintiff's vehicle, which had pulled over to the right-hand side of the road. Defendant moved for summary judgment. Defendant successfully argued that its driver's conduct was exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), because, in cutting across the lanes, he was "disregarding regulations governing the direction of movement or turning in specified directions". Further, the conduct did not rise to the level of reckless disregard. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment was properly granted.

Martinez v. City of Rochester, 164 A.D.3d 1655, 84 N.Y.S.3d 652 (4th Dep't 2018). Passenger in motor vehicle that collided with a police vehicle after police vehicle had entered intersection on a red light with emergency lights and sirens activated brought action against defendants. In support of their motion, defendants established that defendant police officer was responding to a police call with his emergency lights and sirens activated when he slowed his patrol vehicle and then entered the intersection against a red light, as plaintiff's vehicle entered the intersection with a green light and struck the side of the patrol vehicle.

Despite the fact that plaintiffs contended that the officer acted in violation of internal guidelines, plaintiff failed to establish that his conduct was reckless. Summary judgment was properly granted.

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

Howell v. State of New York, 169 A.D.3d 1208, 93 N.Y.S.3d 736 (3rd Dep't 2019). Passenger in disabled minivan on side of road which was struck by a snowplow clearing a state highway sued state for injuries. Court of Claims erroneously analyzed the actions of the snowplow pursuant to Vehicle and Traffic Law § 1104 (Vehicle and Traffic Law § 1103(b) was the applicable code) and concluded that an ordinary negligence standard of care applied. The Court of Claims found that defendant was negligent and bore sole responsibility for the accident. Here the Defendant established the snowplow was working during an active storm and, as such, liability would only attach if defendant and its employees behaved in a reckless manner, meaning a "conscious disregard of 'a known or obvious risk that was so great as to make it highly probable that harm would follow'" Despite the fact that the snowplow had a plow which extended two feet beyond normal range here, the Court did not find that the operator of the snowplow acted recklessly. Court of Claims trial order was reversed and the claim was dismissed.

VIII. SCHOOL LIABILITY

A. Student on Student Assaults

Eskenazi-McGibney v Connetquot Cent. Sch. Dist., 169 A.D.3d 8, 89 N.Y.S.3d 295 (2nd Dep't 2018). Bullied student brought action against school district, asserting causes of action for Dignity for All Students Act (DASA) violation, negligent supervision, negligent retention of certain employees, and negligent performance of governmental function. As a learning-disabled high school student, he was repeatedly bullied and harassed by a fellow student, including multiple physical assaults and death threats. Plaintiff and his parents repeatedly made complaints to the school district and BOCES teachers and officials, and they received assurances that the matter would be dealt with, but the other student was not disciplined and the bullying and harassment continued. Court held there was no private right of action under DASA. As for the negligence causes of action, the complaint alleged sufficient facts to support the causes of action to recover damages for negligent supervision, negligent retention, and negligent performance of a governmental function. Summary judgment denied.

Gaston v. East Ramapo Central School District, 165 A.D.3d 761, 85 N.Y.S.3d 525 (2d dept. 2018). Plaintiff's infant was stabbed during an altercation with a classmate in a hallway at defendants' school. Plaintiff sued, alleging negligent supervision and inadequate security. Court held that schools are under a duty to adequately supervise the students in their charge (locus parentis) and they will be held liable for foreseeable injuries proximately related to the absence of adequate, hence, actual or constructive notice to the school of prior similar conduct generally is required, and "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence". (NOTE: ***No special duty*** is needed for ***lack of supervision*** claims at school because the duty flows from the locus parentis duty of the school). Here, the defendant failed to demonstrate, prima facie, that the assault on the plaintiff was not foreseeable or that the District's alleged negligent supervision was not a proximate cause of the plaintiff's injuries and failed to eliminate triable issues of fact as to whether it had knowledge of the

offending student's dangerous propensities based on his involvement in other assaultive altercations with fellow students in the recent past. Additionally, as to proximate cause, the District failed to 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 was denied as to negligent supervision. However, the District established, prima facie, its entitlement to judgment as a matter of law dismissing the cause of action alleging ***inadequate security*** by demonstrating that there was ***no special relationship*** giving rise to a special duty to protect the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact in this regard. Thus summary judgment should have been denied as to negligent supervision, but summary judgment was proper as to inadequate security.

Palopoli v. Sewanhaka Central High School District, 166 A.D.3d 639, 87 N.Y.S.3d 207 (2d. Dept. 2018). Infant plaintiff boarded a school bus parked outside of Defendant High School and attempted to sit in the only available seat. The student next to him, who became a defendant, began a 6 minute fight in which infant plaintiff and another student claimed injuries. When the fight initially began, the bus driver exited the bus and a security aide entered the bus during the fight, but, according to one of the injured infant plaintiffs, the security aide did not intervene to stop the fight. According to the bus driver, the security aide told the students to stop fighting and then radioed for assistance, and three additional security aides entered the bus thereafter, but the bus driver did not see whether any of the security aides intervened to stop the fight. The Court held that the school defendants failed to establish, prima facie, that they had no specific knowledge or notice of student defendant's propensity to engage in the misconduct alleged. The assistant principal testified that the defendant student had a disciplinary record, but when asked whether student defendant's prior disciplinary history involved violence, the assistant principal replied only, "Not that I remember." Thus, the school defendants failed to sustain their prima facie burden of establishing that they had no actual or constructive notice of the student defendant's propensity to engage in the misconduct alleged. Additionally, the testimony that a security aide entered the bus three minutes into the six-minute fight, but did not intervene, and the testimony of the bus driver, who testified that four security aides entered the bus, but he did not see whether they intervened to stop the fight or whether the fight stopped on its own, raised triable issues of fact as to whether the student defendant's dangerous conduct occurred in such a short span of time that no amount of supervision by the school defendants could have prevented the infant plaintiffs' injuries. Summary Judgment should have been denied.

M.P. v. Central Islip Union Free School District, 101 N.Y.S.3d 898 (2d. Dep't. 2019). Kindergarten student was injured when she was pushed into a wall by a fellow kindergarten student while they were lining up outside their classroom before the afternoon session. Infant plaintiff sued the Defendant District and Defendant District moved for summary judgment. Defendant District established, prima facie, that the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's alleged injuries. In opposition, the plaintiffs failed to raise a triable issue of fact. Defendant District was entitled to summary judgment.

B. Sports and Gym Accidents at School

Krzenski v. Southampton Union Free School District, 173 A.D.3d 725, 102 N.Y.S.3d 693 (2nd Dep't 2019). Plaintiff student volunteered to play floor hockey at the "class night" event during which she was injured. She had previously played floor hockey in the school's gymnasium during physical education classes. Two sets of fully extended bleachers were being used as the sideline boundaries for the floor hockey playing area. On the night of the accident, an opposing team member hit plaintiff in the back, causing her to hit her

head and shoulder on the unpadded metal railing of the bleacher stairs. A physical education teacher at the school, who witnessed the accident, testified at his deposition that the bleachers were not fully extended during floor hockey games in physical education classes, he also testified that the bleachers were used as boundaries in physical education classes which plaintiff had played in, consequently, the proximity of the bleachers to the playing area was open and obvious, and the risk of collision with the bleachers was an inherent risk in playing indoor floor hockey in the subject gymnasium. Defendant moved for summary judgment and established its entitlement to summary judgment based upon the doctrine of primary assumption of risk. Plaintiff failed to raise a triable issue of fact in opposition as to whether the failure to pad the metal railings on the bleacher stairs or to use a buffer zone between the bleachers and the playing area created a risk beyond the risks inherent in the sport of indoor floor hockey. The affidavit of the plaintiff's expert failed to accurately identify a violation of any specific safety standard which was applicable to floor hockey. The defendant also established that it was not negligent in supervising the plaintiff. The plaintiff failed to raise a triable issue of fact in support of her allegation that the defendant failed to properly supervise her to prevent her from suffering a concussion. The affidavit of the plaintiff's expert relied upon the University of the State of New York Guidelines for Concussion Management in the School Setting, which were promulgated *after* the alleged accident occurred. In any event, the plaintiff failed to submit any evidence that the defendant did not follow any guideline related to concussion prevention or management. Summary judgment was properly granted.

Powers v. Grennville Central School District, 169 A.D.3d 1324, 93 N.Y.S.3d 743 (3d Dept. 2019) Infant student brought negligence action against school district for injuries she sustained after she was allegedly struck in the eye by a ball while playing a "modified lacrosse" game in her physical education class. Defendant's physical education teacher testified that, at the time of the accident, the students were playing a modified version of lacrosse known as "soft lacrosse," wherein they used different equipment as compared to what was used in interscholastic sports – specifically, lighter, softer and shorter sticks with softer webbing and deep pockets, that the ball was air filled and compressible and that, since it was modified as such, protective eyewear was unnecessary. Defendant's expert opined that this version of "modified lacrosse" was "extremely different" than the type of lacrosse played in interscholastic sports (which requires protective eyewear). Plaintiff's expert opined that, based upon the equipment used by the students, they were not playing "soft lacrosse" and, therefore, protective eyewear was necessary for the infant. Plaintiff's expert stated that the stick used by the students was a regular hard stick with netting and not a stick with a plastic head. Furthermore, the infant student stated in her deposition that a "plastic" orange safety ball was being utilized at the time of the accident. The Court held that there existed a triable issue of fact regarding defendants' negligence. The appellate division found a triable issue of fact as to the nature of the lacrosse game played by the students and whether protective goggles should have been used by the students based upon the game they were playing. Summary judgment was denied.

C. Negligent Supervision

Boland v. North Bellmore Union Free School District, 169 A.D.3d 632, 96 N.Y.S.3d 244 (2d Dept. 2019). Infant plaintiff fell from an "apparatus" in defendant's school playground at recess and claimed negligent training and supervision and negligent maintenance of the playground. Court affirmed dismissal of negligent training and supervision claims as defendant submitted evidence demonstrating that the defendant provided adequate training of its staff and playground supervision, and that the level of training or

supervision was not a proximate cause of the accident. However, the plaintiff raised a triable issue of fact as to negligent maintenance of the playground by the submission of an expert affidavit demonstrating that the ground cover beneath the subject apparatus was inherently dangerous as installed and/or maintained, because it did not meet standards established by the Consumer Product Safety Commission (see General Business Law § 399–dd). Summary judgment on negligent maintenance was denied.

Hinz v. Wantagh Union Free School District, 165 A.D.3d 1074, 86 N.Y.S.3d 140 (2d Dept. 2018). Infant-student had her finger caught in hinge-side of bathroom door resulting in crush amputation. The student, who was a Type I diabetic, had a one-on-one aide, but went unaccompanied to the girls' bathroom, with the permission of her classroom teacher. Plaintiff alleged negligent maintenance of door and negligent supervision of student. Appellate Division affirmed granting of summary judgment as to the negligent supervision claim since the accident occurred in so short a span of time that even the most intense supervision could no have prevented it. Summary judgment granted as to negligent supervision theory and was denied as to the premises liability cause of action.

Matter of P.S. v Pleasantville Union Free Sch. Dist., 168 A.D.3d 853, 91 N.Y.S.3d 242 (2d Dept. 2019) Parents commenced this action against the defendant school district asserting causes of action alleging negligence and negligent supervision, hiring, training, and retention where defendant school was aware that infant plaintiff had been diagnosed with anxiety and depression and was hospitalized multiple times as a result. Plaintiffs asserted that the defendants had represented that the infant plaintiff would receive appropriate therapeutic support while at school. On the date of the incident, the infant plaintiff left school during the day without the knowledge of the defendants, went home, and attempted to commit suicide. The defendants moved, pursuant to CPLR 3211(a)(2), to dismiss the complaint for lack of subject matter jurisdiction. The defendants argued that the plaintiffs were actually alleging that, defendants had provided inadequate educational services to the infant plaintiff under the Individuals with Disabilities Education Act (hereinafter IDEA) (20 USC § 1400 et seq.) As such, plaintiffs failed to exhaust the IDEA's administrative remedies prior to commencing the instant action, the court lacked subject matter jurisdiction. Pursuant to the IDEA, if a parent is dissatisfied with the outcome of built in administrative IDEA remedies, after having exhausted the IDEA's administrative remedies, the parent may then seek judicial review by filing a civil action in state or federal court (see 20 USC § 1415[i][2][A]). Plaintiff argued that they did not pursue an action under IDEA, and that the complaint alleged only common-law causes of action to recover damages for, inter alia, negligence, negligent supervision, hiring, training, and retention. The Appellate Division agreed with the plaintiffs in that they were not required to exhaust the IDEA's administrative remedies before commencing the instant action. Summary judgment was denied.

Deb B. v. Longwood Central School District, 165 A.D.3d 1212, 87 N.Y.S.3d 625 (2d. Dept. 2018). Special education student entered school with another special education student (JG) who had been on the same school bus. After entering the school, before the first-period class, JG asked the infant student to accompany him outside the school building to a set of bleachers where infant plaintiff alleges that JG then sexually assaulted her. Plaintiff alleged, inter alia, negligent supervision. The defendants submitted evidence that the infant's individualized education plan (IEP) did not provide for a school aide to escort her from the school bus to the school building or to escort her throughout the building as she moved between classes. The infant plaintiff's mother testified that she was aware that the infant was not so escorted, and that she had no expectation that this would be done. Additionally, there was no history of the infant plaintiff leaving the school building improperly. Finally, there was no allegation that JG had a propensity to engage in dangerous

conduct, or that the defendants knew or should have known of any such propensity In opposition, the plaintiff failed to raise a triable issue of fact.

A.C. v. Brentwood Union Free School District, 63 Misc.3d 1204 (Sup. Ct. Suffolk Cty. 2019)(St. George, J.) Infant plaintiff (2nd Grader) injured when he fell off a zip line playground apparatus while at defendant Elementary School. Plaintiffs' Bill of Particulars alleged that defendants permitted the infant plaintiff to use the apparatus "without prior instruction and without supervision," resulting in injury, alleging the existence of dangerous and defective conditions, namely failing to have proper padding underneath the apparatus and failing to have "proper non-slip material" on the handle of the zip line apparatus. Defendants submitted the pleadings, photographs of the apparatus, sworn testimony of the infant plaintiff, his mother, and the physical education teacher on the playground at the time of the incident, and affidavits from a field investigator, the school principal, the District's Assistant Superintendent, and a certified playground safety inspector. While the Court determined that there was no dangerous or defective conditionon the subject and that defendants did not receive any complaints about the subject apparatus, including from the infant plaintiff or his mother, at any time prior to the incident giving rise to this action, the Court did determine that defendants' own submissions raised an issue of fact as to whether the infant plaintiff was properly instructed on the use of the zip line apparatus prior to his fall. The infant plaintiff testified that no one showed him how to use the zip line apparatus. The occasion of his accident was the very first time that the infant plaintiff ever used the subject apparatus. The Court held that since the infant plaintiff's testimony raised a question of fact as to whether he was properly instructed in the use of the zip line apparatus and as to the proper way to break a fall, summary judgment on this claim was to be denied.

B.J. v. Board of Education of the City of New York, 172 A.D.3d 693, 100 N.Y.S.3d 51 (2d. Dep't., 2019). Student brought personal injury action against defendant after nonstudent dog owner's dog broke loose at student's high school lacrosse practice, chased another student, and caused other student to run into student, causing injury. The Court held that the defendants established, prima facie, that they had no specific knowledge of any prior instances of dogs being brought into the field area during sports practices. Furthermore, the act of a student running into the infant plaintiff was a spontaneous, impulsive, and intervening act that could not have been anticipated. Therefore, the defendants established, prima facie, that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries. In opposition, the plaintiffs failed to raise a triable issue of fact. Summary judgment was properly granted.

A.R. v. City of New York, 171 A.D.3d 589, 98 N.Y.S.3d 182 (1st Dep't. 2019). Plaintiff student, then 11 years old, claimed that she was injured when she was accidently pushed by another student while playing on the bleachers in an area next to her school. Infant plaintiff testified that students regularly went to the bleacher area when the school bus arrived early, and that no effort was made to prevent them from accessing the bleachers despite a school social worker's testimony that students were not permitted to play in that area. On the day of the accident, infant plaintiff was playing on the bleachers for about 10 to 20 minutes before she was injured. The Court held that triable issues of fact exist as to whether defendants adequately supervised infant plaintiff in allowing her and her classmates to play on the bleachers and whether adequate supervision would have prevented the accident. Summary judgment properly denied.

Francis v. Mount Vernon Board of Education, 164 A.D.3d 873, 83 N.Y.S.3d 637 (2nd Dep't 2018). High school student alleged failure to provide adequate supervision of fellow high school student, who dropped student on his head. Defendant's motion for summary judgment dismissing the complaint was granted because plaintiff and the other student had no previous interaction and the other student's prior disciplinary

record did not include any violent act. But dissent found there were nevertheless questions of fact as to whether the defendant could have intervened in this particular incident earlier because it had sufficient specific notice of the dangerous conduct which was about to cause plaintiff's injuries.

Meyer v. Magalios, 170 A.D.3d 1163, 97 N.Y.S.3d 265 (2nd Dep't 2019). Eleventh grade high school student brought action against high school, school district, and parents of 12th grade student, when he was assaulted by 12th grade student in classroom during school hours. The assault lasted approximately 20 to 30 seconds. The incident occurred while the two boys were in a classroom and plaintiff called the assailant "fat." When the incident began, the classroom teacher was standing in the hallway ushering other students into the classroom and/or conversing with another teacher. School District established, prima facie, that the alleged assault by the fellow student was an unforeseeable act and that the School District had no actual or constructive notice of prior conduct of the students involved here which was similar to the subject incident. Further, the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries

K.B. v. City of New York, 166 A.D.3d 744, 88 N.Y.S.3d 549 (2nd Dep't 2018). Door in school's gymnasium closed on kindergartener's finger. Plaintiffs asserted causes of action alleging negligent supervision and loss of services. Thereafter, in a bill of particulars, the plaintiffs asserted an additional theory of liability alleging negligent maintenance of the subject door. Summary judgment to City granted. City cannot be held liable for torts committed by the DOE. Summary judgment on negligent supervision cause of action granted as to DOE. Any alleged inadequacy in the level of supervision was not a proximate cause of the accident as it happened so quickly. The plaintiffs' allegation that the subject door was negligently maintained was not set forth in the notice of claim, or the complaint, and only in the bill of particulars, which was too late. The plaintiffs did not seek leave to amend the notice of claim pursuant to General Municipal Law § 50–e. Case dismissed.

Chiauzzi v. Sewanhaka Central High School District, 170 A.D.3d 1106, 94 N.Y.S.3d 880 (2nd Dep't 2018). Plaintiff eighth grader sustained injuries on the exterior grounds of the defendant's school during her lunch recess. A short fence, approximately the same height as the plaintiff's knees, separated a grass area from a concrete walkway. The plaintiff and two of her friends took turns running and jumping over this fence. The incident occurred approximately 10 to 15 minutes into this activity, after the plaintiff and her friends had each taken five or six turns jumping over the fence. As the plaintiff attempted to jump over the fence, the middle of her right shin struck the fence, causing her to fall on the concrete walkway. The plaintiff testified at a General Municipal Law § 50–h hearing and her deposition that she did not see any school personnel outside the school building either before or at the time of the incident. Defendant established, prima facie, that the plaintiff was engaged in an age-appropriate activity that did not constitute dangerous play, and that the alleged lack of supervision was not a proximate cause of the accident.

M.P. v. Mineola Union Free School District, 166 A.D.3d 953, 88 N.Y.S.3d 479 (2nd Dep't 2018). Nine-year-old student, and his mother suing derivatively, commenced action against school district and to recover damages for personal injuries student sustained when he ran into playground equipment while playing football, alleging that the accident was caused by the defendants' negligent supervision. The infant plaintiff testified at his General Municipal Law § 50–h hearing and at his deposition that, on the date of the accident, he and his friends were playing outside the designated boundaries prior to his accident. He ran toward the playground to catch the football, while looking back towards the airborne ball, then dove for the ball and hit

his face on a piece of playground equipment. Although the risks inherent in a sport include those "associated with the construction of the playing surface and any open and obvious condition on it", the defendants failed to establish, prima facie, that their alleged negligent supervision in permitting the students to play football near the playground did not "create[ ] a dangerous condition over and above the usual dangers that are inherent in the sport". Further, the defendants failed to establish, prima facie, that the infant plaintiff's accident occurred in so short a span of time that even the most intense supervision could not have prevented it, thereby negating any alleged lack of supervision as the proximate cause of the infant plaintiff's injuries.

D. Premises Liability on School Grounds

Gonzalez v. Board of Education of City of New York, 165 A.D.3d 1065, 87 N.Y.S.3d 63 (2d. Dept. 2018) Plaintiff injured when she slipped and fell in vestibule area of school during period of snowy and rainy weather. Case went to trial and jury returned verdict in plaintiff's favor. Defense moved to set aside the verdict. Court denied defendant's motion: Plaintiff testified that the floor looked "glossy" and was slippery and wet, and there were no floor mats at the location of her accident. Defendant's custodial staff established that they were aware that water regularly accumulated during inclement weather in the specific area where the plaintiff fell, a condition they routinely addressed by placing floor mats at that particular location. This gave rise to constructive notice of the condition in the area in which the plaintiff fell. Furthermore, although the defendant was not required "to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain" the defendant had a duty to maintain the school premises in a reasonably safe condition. An issue regarding the adequacy of the defendant's remedial measures was presented for the jury's resolution.

IX. CLAIMS BROUGHT BY ON-DUTY POLICE OFFICERS AND FIREFIGHTERS (GOL 205-a and 205-e)

A. Need to Predicate 205-a and 205-e on a Statute or Rule

Cerrato v. Jacobs, 173 A.D.3d 1134, 103 N.Y.S.3d 557 (2d Dept. 2019). Plaintiff, a Police officer, was injured when he stepped in a dirt area of landowner's front yard while executing a felony arrest warrant of another person. Plaintiff asserted two causes of action against the defendant, to recover damages for personal injuries under common-law negligence as codified by GOL § 11–106, and under GML § 205–e. Defendant moved for summary judgment dismissing the complaint and the plaintiff cross-moved for summary judgment on the issue of liability. As to GOL § 11-106, the defendant established his prima facie entitlement to judgment as a matter of law by demonstrating that the dirt area was an open and obvious condition which was inherent or incidental to the nature of the property and which was recognizable simply as a matter of common sense. In opposition, the plaintiff failed to raise a triable issue of fact. The defendant also demonstrated his prima facie entitlement to judgment as a matter of law dismissing the GML § 205–e cause of action. The defendant demonstrated, prima facie, that he was not in violation of any of the regulations alleged by the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. Plaintiff's motion for summary judgment was properly denied and defendant's motion for summary judgment was properly granted.

Stancarone v. Sullivan, 167 A.D.3d 676, 89 N.Y.S.3d 325 (2nd Dep't 2018). Police officer brought action against homeowners to recover damages alleging common-law negligence and violations of property maintenance code after he slipped and fell on homeowners' residential property while performing his

assigned duties. The GML § 205–e claim was predicated upon violations of Property Maintenance Code of New York State (2010) §§ 302.3 and 306.1. The injured plaintiff testified that he fell while descending a flight of steps in the defendants' backyard. According to the plaintiff, the steps were illuminated only by the flashlight that he was carrying. He further testified that after his fall, he observed a "slimy almost like dead moss or ice-like substance" covering the step upon which he had slipped. He also testified that he "went to [his] right side as to reach for a railing," but he did not remember a railing being there. The injured plaintiff's mere inability to identify the precise nature of the slippery substance upon which he alleges he fell "cannot be equated with" a failure to identify the cause of his fall. The defendants also failed to establish, prima facie, that they lacked constructive notice of the alleged hazardous substance on the step, that the lighting for the area was adequate, and that the lack of a handrail on the steps was not a hazardous condition that may have been a proximate cause of the injuries. Plaintiffs, however, were not entitled to summary judgment on the issue of liability on so much of their cause of action to recover damages pursuant to General Municipal Law § 205–e as was predicated upon violations of Property Maintenance Code of New York State (2010) §§ 302.3 and 306.1. The plaintiffs failed to demonstrate, prima facie, the defendants' "neglect, omission, willful or culpable negligence" in violating Property Maintenance Code of New York State (2010) § 302.3. Moreover, the plaintiffs failed to eliminate all material issues of fact regarding whether the alleged hazardous condition actually existed. Furthermore, to the extent that the cause of action was predicated upon a violation of Property Maintenance Code of New York State (2010) § 306.1, the plaintiffs' evidence failed to establish, prima facie, that the injured plaintiff's accident resulted directly or indirectly from the absence of a handrail. Summary judgment was denied.

Metzger v. Lazala, 171 A.D.3d 1287, 97 N.Y.S.3d 350 (3rd Dep't 2019). Firefighter brought a personal injury action against homeowner for line-of-duty injuries he sustained when flames blocked his exit via the stairway and he had to exit from the second floor window onto the roof's snowy surface upon which he slipped and fell to the ground. Defendant's motion for summary judgment dismissing GML 205-a claim granted. Defendant submitted his deposition testimony and the affidavit of an expert opining that defendant's house contained no building code violations that contributed to plaintiff's injuries. Plaintiff asserted that defendant violated statutory and building code provisions requiring all multifamily dwellings to contain fire-resistant enclosures at the base or top of stairways or both (see Multiple Dwelling Law § 52[5][a]; Building Code of New York State § 1009.5.3 [2010]), and that the lack of such enclosures contributed to plaintiff's injuries. However, under the Multiple Dwelling Law, a building occupied for residential purposes by not more than two families is defined as a private dwelling, not a multiple dwelling (see Multiple Dwelling Law § 4[6], [7], [8]). Similarly, the Building Code of New York State does not apply to one- or two-family dwellings, which are instead governed by the Residential Code of New York State (see Building Code of New York State § 102.2 [2010]). Thus, even if defendant's house was a two-family dwelling,1 the Multiple Dwelling Law and Building Code would not apply (see Multiple Dwelling Law §§ 4, 8; Building Code of New York State § 102.2 [2010]). Summary judgment was granted to defendant.

B. **"Direct or Indirect" Causation**

Fernandez v. City of New York, 165 A.D.3d 403, 84 N.Y.S.3d 147 (1st Dep't 2018). On-duty police officer, plaintiff, sued City after his foot was run over by a fellow police officer operating a patrol car plaintiff was attempting to enter so they could pursue a drunk motorist. In order to prevail on his General Municipal Law § 205–e claim, plaintiff had to show that plaintiff's injuries were caused "directly or indirectly" by the

driver's statutory violation (General Municipal Law § 205–e[1]). Plaintiff's testimony that his injury occurred while he was acting as a police officer and chasing the motorist, who had violated a traffic law, raised an issue of fact as to whether defendant driver "indirectly" caused plaintiff's injuries, which precluded summary judgment dismissing plaintiff's claims against him.

Annunziata v. City of New York, 2019 WL 3679865 (2nd Dep't 2019). Plaintiff sued City of New York and another defendant when he tripped and fell on a piece of torn carpeting in the offices of the New York City Fire Department, while he was performing his assigned duties as a firefighter. The plaintiff asserted causes of action under General Municipal Law § 205–a, predicated upon violations of (1) sections 27–127 and 27–128 of the Administrative Code of the City of New York (now, respectively, section 301.1 of the New York City Building Code [Administrative Code of City of NY, tit 28, ch 7] and section 107.5 of the New York City Fire Code [Administrative Code of City of NY, tit 29, ch 1]), and (2) section 27–a of the Labor Law. Plaintiff testified at trial that he was in his cubicle when one of his superiors summoned him to his office. The plaintiff testified that he "got up from [his] cubicle" and "took a couple of steps forward and [he] tripped on a piece of torn carpet." Photographs of the tear in the carpet were admitted into evidence, and the plaintiff identified the "piece of torn carpet where [he] tripped on." Although there were no other individuals present when the plaintiff fell, his supervisor immediately responded to "the loud bang" that resulted from the accident. The plaintiff's supervisor prepared a report that morning, which stated that the plaintiff had tripped on a piece of loose rug. Another one of the plaintiff's supervisors testified that he responded to the location of the accident and observed "a ripped carpet there." The director of support services for the building where the accident occurred testified that he was aware of the presence of tears in the carpeting, and that he was aware that these conditions had previously caused people to fall down. The jury determined that the City violated sections 27–127 and 27–128 of the Administrative Code, but that such violations did not ***directly or indirectly*** cause the plaintiff's accident. The jury further determined that the City did not violate Labor Law § 27–a. Plaintiff moved to set aside the verdict. Appellate Division found that Supreme Court should have granted those branches of the plaintiff's motion which were pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability on the causes of action alleging violations of Administrative Code §§ 27–127 and 27–128, and for a new trial on the issue of liability with respect to those causes of action.

C. What Is a "Firefighter" under GML 205-a?

Fedrich v. Granite Building 2, LLC, 165 A.D.3d 759, 85 N.Y.S.3d 170 (2nd Dep't 2018). Fire marshal brought action against building owner and managing agent under GML 205-a. Since the injured plaintiff was not an officer, member, or employee of any fire department, he did not qualify under the GML § 205-a statute. He was a fire marshal employed by the Nassau County Fire Marshal's Office who was conducting an inspection of the building when the accident allegedly occurred. Case dismissed.

X. FALSE ARREST, MALICIOUS PROSECUTION AND EXCESSIVE FORCE

A. Malicious Prosecution

Roberts v. City of New York, 171 A.D.3d 139, 97 N.Y.S.3d 3 (1st Dept. 2019). Plaintiff was arrested and prosecuted for the murder of a man who was shot and killed at a social gathering. Plaintiff had been indicted by a grand jury on two counts of murder in the second degree and other charges, and a criminal jury

trial followed. Ultimately, plaintiff was acquitted. The investigation included witnesses who recanted stories, invoked their fifth amendment rights and testified inconsistently with their grand jury testimony. Plaintiff commenced this civil action against the City of New York, New York City Police Department, and various John Doe police officers, for false arrest and imprisonment and malicious prosecution. The propriety of these civil claims revolve around two key issues: Whether the arrest was unlawful, and whether the prosecution was improperly motivated. It was undisputed that two witnesses, who had known plaintiff for years, identified plaintiff to the police as the person who shot the victim. These accounts were corroborated by plaintiff's own admission that he had been present at the party and involved in a fight. While not inculpatory with respect to the shooting, plaintiff thus enhanced the reliability of the identification evidence presented to police in connection with the resulting arrest. Plaintiff tried to locate factual uncertainty in what he describes as materially impeaching circumstances arising from the identifications by the witnesses, but the record provided sufficient evidence of probable cause. Even assuming that additional police investigation could somehow have uncovered evidence that conflicted with the witnesses' statements, that evidence might have been relevant to the issue of reasonable doubt at the criminal trial at the back end of the prosecution. However, it would have provided no sound basis to controvert probable cause to arrest plaintiff at the front end of the criminal investigation predicated on the information and accusations provided to police by witnesses who had been present during the shooting and who were personally familiar with plaintiff. As to the malicious prosecution claim, plaintiff's indictment created a presumption of probable cause for the criminal proceeding. While the presumption of probable cause may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith, the record did not support this. Moreover, even if a plaintiff rebutted the presumption of probable cause, he or she still had to establish as a jury issue that the defendant acted with malice, i.e., that the defendant commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served. This was simply not present here. Summary judgment granted.

B. **False Arrest**

Ball v. Miller and City of New York, 164 A.D.3d 728, 83 N.Y.S.3d 169 (2d Dept. 2018). Plaintiff engaged in a sexual act with a defendant who accused him of forcing her to engage in a non-consensual sexual act with her. Plaintiff was arrested and charged for criminal sexual act in the third degree and other related charges. After investigation, the charges were dismissed and the criminal case sealed. Plaintiff brought a claim against the sexual-assailant defendant as well as against the arresting officer and the City for false arrest, false imprisonment, malicious prosecution, intentional and negligent infliction of emotional distress, negligence, and violations of the plaintiff's constitutionally protected civil rights. The lower court granted the City summary judgment. This was affirmed: As to the causes of action for false arrest, false imprisonment, and malicious prosecution, the Court noted that the existence of probable cause constituted a complete defense. Additionally, probable cause constituted a complete defense to causes of action asserted pursuant to 42 USC § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law that are the federal-law equivalents of state common-law false arrest and malicious prosecution causes of action. The Court noted that the information from the assailant defendant furnished the police with probable cause to arrest the plaintiff and plaintiff therefore could not raise a triable issue of fact. The causes of action for negligence were dismissed as New York State does not recognize a cause of action to recover for negligent arrest and investigation. The causes of action for intentional infliction of emotional distress were barred as “public policy bars claims sounding in intentional infliction of emotional distress

against a governmental entity" and held that as to the arresting officer, he did not engage in extreme or outrageous conduct. As to negligent infliction of emotional distress, the defendants established, prima facie, that they did not breach a duty of care owed to the plaintiff. Summary judgment was affirmed.

C. Excessive Force

Elias v. City of New York, 173 A.D.3d 538, 102 N.Y.S.3d 192 (1st Dep't. 2019), Plaintiff went to a City park to ice skate with her family and became intoxicated. Park security refused to allow her on the ice because she was intoxicated and asked her to leave the park. Plaintiff became belligerent, arguing with security staff and the NYPD. Plaintiff alleged that she was physically assaulted by the police and that during the course of handcuffing and arresting plaintiff, plaintiff's wrist was fractured. Defendants move for summary judgment. The Court held that the defendants met their initial burden on summary judgment with respect to the excessive force-related claims by providing the deposition testimony the police officers who testified that plaintiff was intoxicated, belligerent, refused to cooperate with police instructions, drew the attention of a crowd, and actively resisted arrest. The plaintiff sufficiently raised a triable issue of fact as to the reasonableness of the use of force by the police. The plaintiff presented competent proof, in a deposition by plaintiff, her husband, and a security supervisor who witnessed the event, that immediately prior to her arrest she was sitting on a chair and did not assault any police officer. Plaintiff also presented competent evidence that she suffered from a potentially compensable injury, a fractured wrist, as a result of police action. Summary judgment was properly denied.

N.M. v. City of New York, 171 A.D.3d 586, 96 N.Y.S.3d 856 (1st Dept. 2019). Infant plaintiff was approached by Defendant police officers for a "stop and inquiry" regarding a suspected drug transaction at a known drug location. Infant plaintiff began to curse and scream at officers and refused to cooperate with instruction, drawing a crowd. Court ruled police had probable cause to arrest infant plaintiff (ultimately pleaded guilty). Plaintiff acknowledged that he resisted police officers attempts to handcuff him and were only able to handcuff him when they punched him in the face. Plaintiff, offering no competent proof in the form of expert testimony, could not raise issue of fact about excessive force. Summary judgment was affirmed.

XI. CLAIMS BY INMATES

A. Inmate on Inmate Assaults

Dickson v. County of Putnam, 171 A.D.3d 1131, 99 N.Y.S.3d 82 (2d. Dep't. 2019). Defendant County inmate who was injured after co-inmate struck him on the head with a pool cue sued county alleging negligent supervision and negligent entrustment, alleging that the County defendants were liable for his injuries because the co-inmate assaulted him while they were in the County defendants' custody. The County defendants submitted evidence that prior to the incident, the plaintiff and the attacking inmate had a friendly relationship and joked around with each other. They had no prior physical altercations with one another, and the attacking inmate had not been involved in any prior violent incidents with other inmates. Importantly, the County defendants also demonstrated there had been no incident at the facility where an inmate had used a pool cue as a weapon to attack another inmate. This was significant because the pool cue was allowed to remain on the table rather than being signed out. The County demonstrated that the act was not foreseeable. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment was affirmed.

Pitts v. State of New York, 166 A.D.3d 1505, 88 N.Y.S.3d 323 (4th Dep't. 2018)**.** Claimant inmate at state correctional facility sued facility for injuries after he was assaulted by fellow prisoner during afternoon recreation session. Appellate Division held that the Court properly determined that defendant's failure to continuously post officers in the subject recreation yard was a proximate cause of claimant's injuries, "[i]n light of that testimony and the other evidence adduced at trial, we conclude that a fair interpretation of the evidence supports the court's determination that defendant's decision to remove the officers from the yard during the shift change was a proximate cause of claimant's injuries" Order was affirmed.

B. Excessive Force

Bazil v. State, 63 Misc.3d 1216 (Ct. Claims N.Y. 2019) Claimant inmate injured during his incarceration when correction officers allegedly assaulted claimant and used excessive force upon him. Additionally, Claimant sought damages for wrongful confinement of 30 days that he spent confined in the special housing unit (SHU) after the assault. Claimant alleged that his ankle was twisted, head shoved against the wall, was struck multiple times by a corrections officer, handcuffed with excessive pressure, had head shoved against wall and was repeatedly struck while handcuffed and was consequentially confined to a special housing unit. The Court found claimant's testimony credible and forthright and that the Corrections Officer lacked any recollection of details of the encounter and was vague as to others, leading the Court to conclude that the use of physical force upon claimant was excessive and the State was 100 percent liable on the cause of action alleging excessive force. However, as to the wrongful confinement, it is well established that the State is accorded absolute immunity for the actions of its employees involved in the investigation and prosecution of disciplinary charges brought against inmates in a correctional facility and for the actions of the Hearing Officer charged with presiding over and reviewing such matters. This immunity covers discretionary conduct due to its quasi-judicial nature, even if that discretion was erroneously exercised or the findings were subsequently overturned. Absolute immunity may be lost, however, if the State acted in contravention of a governing rule or regulation which caused claimant to suffer actual prejudice or a deprivation of his due process rights which was not present here.

C. Premises liability in Prison

Leggio v. State of New York, 171 A.D.3d 1564, 99 N.Y.S.3d 187 (4th Dept. 2019). Claimant Inmate sustained injury when she tripped over a tree stump while participating in a prison work program at defendant correctional facility. Since claimant and her fellow workers were tasked with cleaning up the branches of a felled tree, the existence of the tree stump was an open and obvious hazard inherent in the nature of the work and thus, contrary to claimant's contention, could not "serve as a basis for liability." Moreover, claimant admitted that she was aware of the stump before she started working, thus contrary to claimant's further contentions, defendant did not have any duty to warn her of the existence of the stump or to instruct the inmates to exercise caution around it In light of the foregoing, the Court also concluded that defendant was not vicariously liable for a fellow inmate's purported failure to warn of the tree stump. Summary judgment was properly granted.

XII. SUBWAY AND MUNICIPAL BUS PASSENGER CASES

A. The Bus Stop

Defay v. City of New York, 101 N.Y.S.3d 603 (1st Dept. 2019). Plaintiff injured when he fell on a pothole as he was attempting to get onto a Transit Authority's bus. The bus stopped seven or eight feet from the curb adjacent to the bus stop. Summary judgment denied because there were triable issues of fact as to whether defendant breached its duty as a common carrier to provide plaintiff with a safe place to board the bus. The fact that approximately 10 other passengers safely boarded the bus at the same time that plaintiff fell in the hole while attempting to board did not entitle NYCTA to summary judgment.

B. Unusual or violent stops

Brown v. New York City Transit Authority, 2019 WL 3310256 (2d. Dep't., 2019). Bus passenger fell after the bus driver applied the brakes shortly after boarding a bus owned by Defendants. The Defendant Transit Authority failed to establish, prima facie, that the stop was not unusual and violent. Plaintiff testified that shortly after she paid her fare, the bus "took off" and then came to a quick stop, causing her to fall. According to the testimony of the bus driver, he was operating the bus at about 15 miles per hour when a vehicle cut in front of him, causing him to apply the brakes and stop the bus. Under the circumstances, a triable issue of fact existed as to whether the stop of the bus was unusual and violent. The Defendant Transit Authority's contention under the emergency doctrine was not properly before the Court. Summary judgment denied.

Mastrantonakis v. Metropolitan Transporation Authority, 170 A.D.3d 823, 96 N.Y.S.3d 250 (2nd Dep't 2019). Passenger fell out of her seat on City bus. She testified at her 50–h hearing that the bus allegedly made a sharp right turn which caused her to fall out of her seat "right" onto the floor. This was not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was "unusual and violent", and of a different class than the jerks and jolts commonly experienced in city bus travel. In fact, defendant pointed out that she further testified 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". The plaintiff's affidavit, which alleged for the first time that the sharp right turn of the bus caused her to travel all the way across the empty aisle seat and then onto the floor, raised what appears to be a feigned issue of fact which was designed to avoid the consequences of her earlier testimony given at the General Municipal Law § 50–h hearing and deposition as to how the subject accident occurred. Summary judgment granted to defendant.

C. Claims against Subway for Dangerous Conditions

Njewadda v. Showtime Networks, Inc., et. al, 63 Misc.3d 256, 93 N.Y.S.3d 813 (Sup. Ct. New York Cty., 2019). Pedestrian fell down stairs at subway station after seeing provocative advertisement for television show about a serial killer, with a "dramatically oversized photograph, poster" of the serial killer from the TV series. The photo extended the full length of the steps from the top of the platform to the bottom, depicted a "shocking, and menacing face expressing of fear or shock". Plaintiff claimed the photo caused her to panic and become fearful, which fright, fear and anxiety caused her to panic and lose her balance on the steps resulting in her falling down the steps to the bottom thereof. Plaintiff alleged that both MTA and NYCTA were responsible for creating the dangerous condition by allowing Showtime to place the

dangerous ad there. Plaintiff also sued Showtime and other private entities. Court held that private entities owed no duty to plaintiff nor had any constructive or actual knowledge of any defect. Court held that MTA's function is limited to financing and planning and does not include operation, maintenance and control of any facility, so was not responsible. As to NYCTA, the Court held that while some courts have found a cause of action for negligently caused "fright", in those cases there were *affirmative acts of negligence or at the very least some physical act by a defendant*. Here, that was not so, and thus no such cause of action existed. There was further no cause of action for negligent or intention infliction of emotional distress. Summary judgment granted.

XIII. CLAIMS FOR NEGLIGENT FOSTER CARE PLACEMENT

K.M. v. Mobley, City of New York, et. al., 64 Misc.3d 1214 (Sup. Ct. Kings. Cty. 2019). Infant plaintiff, then four years old, was allegedly sexually assaulted by defendant, C.B., then a fifteen year old foster child, while at the residence of defendant foster parent (K.M.'s grandmother). Plaintiffs alleged that Defendant foster care agency negligently placed C.B. in the foster parent's care knowing that he had deviant propensities. The defendants, City and Foster program, moved for summary judgment on the grounds that the plaintiffs could not establish that the defendants owed them a duty of care. In the alternative, they sought dismissal on the basis that they had insufficient specific knowledge that criminal third party acts could have been reasonably anticipated. The Court held that despite defemdants' failure to demonstrate a lack of a duty of care to the plaintiffs, they could not be held vicariously liable for the negligent acts of a foster parent, who were essentially contract service providers. Moreover, the Court had already determined that the foster parent did not breach any duty of care to the plaintiffs. As to the negligence for selection of foster parents, defendants failed to eliminate all material issues of fact regarding their alleged negligence in the handling of C.B.'s placement and care. There were triable issues of fact as to whether the foster parent had adequate training to deal with C.B.'s emotional needs, whether the defendants were negligent in failing to assess C.B.'s psychiatric and psychological needs before placing him in the foster parent's home, and whether the defendants properly supervised C.B. after his placement. Furthermore, C.B.'s documented reckless and aggressive behavior, among other things, also raised triable issues of fact as to whether his assault of K.M. was reasonably foreseeable.

XIV. COURT OF CLAIMS ACT ISSUES

A. Late Claim / Late Notice of Intention to File Claim

Decker v. State of New York, 164 A.D.3d 650, 83 N.Y.S.3d 533 (2d. Dep't 2018). Claimant's decedent brought medical malpractice claim against the State for negligence of State hospital where he died of cardiopulmonary arrest. Claimants moved for leave to file a late claim. Court of Claims granted the motion. 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. The Court examined the factors set forth in the Court of Claims act (which are somewhat different from those in GML 205-e): Whether the delay in filing was excusable, whether the State of New York had notice of the essential facts constituting the claim, whether the State had an opportunity to investigate the circumstances underlying the claim, whether the claim appears to be meritorious, whether the State is prejudiced, and whether the claimant has any other available remedy. The Appellate division held that the claimants failed to demonstrate a reasonable excuse for the delay of more than one year and eight months in seeking leave to file a late claim. Although the claimants

retained counsel 74 days after the claim accrued, their counsel's further delay in obtaining the medical records and an expert affidavit amounted to law office failure, which is not a reasonable excuse. Additionally, the claimants failed to demonstrate that the defendant had timely notice of the essential facts constituting their claim. The Court noted that "merely having or creating hospital records, without more, does not establish 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 claimants' decedent attributable to malpractice or negligence. The claimants also failed to demonstrate that the defendant had an opportunity to timely investigate the facts underlying the claim, as well as locate and examine witnesses while their memories of the facts were still fresh. Claimants also failed to sustain their initial burden of demonstrating that the defendant would not be substantially prejudiced and failed to demonstrate a potentially meritorious claim. In examining the "other remedy available" factor, Court found that claimant had already filed related action against one of the Defendant Hospitals in the Supreme Court, Nassau County. Since all the factors weighed against claimant, case dismissed.

Demairo v. State of New York, 172 A.D.3d 856, 100 N.Y.S.3d 362 (2d Dep't, 2019). Decedent's administrator sued state for misdiagnosis of a lacerated spleen. The administrator filed and served a timely notice of intention to file a claim two months after he was appointed. The notice of intention, however, contained the incorrect year of the decedent's death. (It was off by a year). The admininstrator later filed a timely Claim (within the two-year period) but the date of death was again wrong. Defendant moved for summary judgment for lack of jurisdiction because the Notice of Intention and Claim both did not comply with Court of Claims Act § 11(b), which provides that the notice "shall state the time and place where such claim arose and the nature of the same". Claimant cross-moved for leave to amend the Claim. The Court held that the statutory requirements must be strictly construed. "[T]he State is not required to go beyond a claim or notice of intention in order to investigate an occurrence or ascertain information which should be provided pursuant to Court of Claims Act § 11." The Court had no jurisdiction to grant the cross-motion to amend the claim because it lacked jurisdiction since the motion was brought beyond the two-year window. Moreover, the Court held that lack of prejudice to the State was immaterial since a jurisdictionally defective notice of intention to file a claim may not be cured by amendment. Summary judgment to defendant granted.

Dominguez v. City University of New York, 166 A.D.3d 540, 88 N.Y.S.3d 19 (1st Dep't 2018). Petitioner brought action against State University for Labor Law accident claims. Court found defendant acquired actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90–day statute of limitations period due to the fact that plaintiff filed his notice of claim only one day late, on the 91st day after the accident occurred. Moreover, the notice of claim provided the essential facts constituting the claim and further described defendant's alleged negligence and alleged violations of Labor Law §§ 240(1), 241(6) and 200, and certain Industrial Code provisions. The one-day delay in serving the notice of claim did not substantially prejudice the defense. The absence of a reasonable excuse for the delay is not, standing alone, fatal to the application, especially where respondent had actual notice of the essential facts constituting petitioner's claim and where respondent was not prejudiced by the delay.

Sharief v. State of New York, 164 A.D.3d 851, 83 N.Y.S.3d 139 (2d. Dep't 2018). Plaintiff student brought claim against City University after she tripped and fell on campus. The claimant served a timely notice of intention to file a claim naming CUNY, as well as the State of New York and as defendants. The claimant later ***filed*** a timely verified claim against the defendants. However, the claim was not timely ***served***. Realizing this error after the two-year time period had expired, the claimant moved pursuant

to Court of Claims Act § 10(6) for leave to serve and file a late claim, or pursuant to Court of Claims Act § 10(8) to treat the notice of intention to file a claim as a claim. Court of Claims Act § 10(8)(a), states "[a] claimant who timely serves a notice of intention but who fails to timely serve or file a claim may, nevertheless, apply to the court for permission to treat the notice of intention as a claim." The notice of intention to file a claim must set forth "the time when and place where [the] claim arose, [and] the nature of same" The Court held that here, the claimant's notice of intention to file a claim failed to describe the location of the alleged accident with sufficient specificity to satisfy the requirements of Court of Claims Act § 11(b). Additionally, the Court held that the claimant failed to establish a reasonable excuse for her delay in filing the claim and failed to demonstrate that her claim was potentially meritorious. The claimant also failed to establish that the defendants had notice of the essential facts constituting the claim and an opportunity to investigate. The claim was dismissed.

B. Defects, Insufficiencies and Problems in the Claim or Notice of Intention

Donahue v. State, 2019 WL 3448524 (4th Dep't. 2019). Claimant inmate sued for injuries sustained due to negligent supervision while he was an inmate at State Facility. According to the claim, claimant sustained injuries "to his shoulder, bicep, and elbow." State claimed Court of Claims lacked subject matter jurisdiction to award claimant money damages for ***past and future lost wages*** because the claim failed to set this forth in the Claim. Court noted that, pursuant to Court of Claims Act § 11(b), "[t]he claim shall state the time when and place where such claim arose, the ***nature of same, [and] the items of damage*** or injuries claimed to have been sustained." The Court further noted that absolute exactness is not required, but simply a statement with sufficient definiteness to enable the defendant to investigate the claim promptly and ascertain its liability under the circumstances. Court held the facts alleged in the Claim "were sufficient to apprise [defendant] of the general nature of the claim and to enable it to investigate the matter." Additionally, as this was an action for damages for personal injury, claimant was not required to specify, in total or itemized by category, his claimed items of damage. The dissent, however, argued that simply claiming "shoulder, bicep, and elbow" was insufficient to put the defendant on notice of the larger and future damages of the claim.

Constable v. State of New York, 172 A.D.3d 681, 99 N.Y.S.3d 438 (2d. Dep't. 2019). In the notice of intention to file a claim and the claim itself, plaintiff alleged she had fallen "on the ground level of the Stony Brook University Hospital's North Visitor's Parking Lot, which is adjacent to the Emergency Room Entrance. Specifically, Claimant fell because of the hazardous conditions located adjacent to the column designated as D1 on the ground level." Defendant moved for summary judgment asserting that the claim failed to adequately set forth the place where such claim arose as required by Court of Claims Act § 11(b). In support of its motion, the State submitted the affidavit of the manager of the subject parking garage, who attested that there are 28 columns labeled "D1" in the parking garage located on the ground level. The Court held that the notice of intention to file a claim and the claim failed to provide the State with a sufficient description of the place of the accident. The Court noted that the State waited until six months after the last deposition was conducted to seek dismissal on the ground that the claim insufficiently described the location of the alleged accident. The Court noted that, "while it may seem wasteful, and potentially prejudicial to claimants, for the State not to move in the early stages of the litigation for dismissal on the ground of an insufficient location description, whether such a time limitation should be imposed is a matter for legislative, not judicial, consideration."

C. Failed Service of the Claim

Costello v. State of New York, 164 A.D.3d 1420, 85 N.Y.S.3d 83 (2d. Dep't 2018). Claimant sued State for injuries sustained when he lost control of his vehicle on highway. The claimant had served the claim on the State of New York by regular mail. The Appellate Division held that the lower court properly granted summary judgment as the claim was improperly served upon the State by regular mail rather than by personal service or certified mail as required by Court of Claims Act § 11.