MUNICIPAL LIABILITY 2012-2013 UPDATE

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I COURT OF APPEALS CASES THIS YEAR (Also displayed in the relevant areas of this outline)

Applewhite v Accuhealth, Inc., ___ N.Y.3d ___, 2013 WL 3185185 (2013). Twelve-year-old plaintiff suffered from uveitis, an eye condition, which required the intravenous administration of a prescribed medication. After a visiting nurse injected her with the drug at her home, she experienced an episode of anaphylactic shock, including breathing difficulties. Mom dialed 911 seeking assistance while the nurse performed whatever emergency care that she could provide. Girl went into cardiac arrest. Within minutes of the 911 call two Fire Department EMT's arrived in a basic life support (BLS) ambulance. No advanced life support (ALS) ambulance was available at the time. One EMT immediately began performing cardio-pulmonary resuscitation (CPR) on the girl while the other called for an ALS ambulance and then retrieved equipment from the ambulance. At some point, the girl's mother requested that the EMTs transport her daughter to a nearby hospital. The EMT continued to conduct CPR on the girl until paramedics from a private hospital, who arrived in an ALS ambulance, appeared at the scene. The girl survived but suffered serious brain damage and sued, *inter alia*, the City. The City moved for summary judgment on governmental immunity grounds. There were two main issues:

(1) whether the medical services provided by the City's EMT's was a "governmental" or a "proprietary" function. If it was the latter, then no governmental immunity defense could be raised. The City asserted that the provision of 911 referrals and emergency medical service responses were within the traditional responsibilities of municipal government, similar in nature to emergency fire protection services, and thus were a governmental function. Plaintiffs, however, maintained that the governmental function terminated with the arrival of the EMTs at the plaintiff's home, and then a proprietary function arose once emergency medical care was undertaken, since treatment of this nature is generally offered by private parties (e.g., doctors and hospital personnel). The Court here held that the services constituted a governmental function because protecting health and safety is one of municipal government's most important duties, and this responsibility extends to "the duty to provide police protection, fire protection *or ambulance service* " to the general public (same determination the Appellate Division had made). A concurring opinion by two judges (Smith and Pigott) found that the EMTs acted in a proprietary capacity once they began to render medical aid, since their conduct at that point was the same as medical services such as mental health care, obstetrics and surgery, which have been held to constitute "governmental activities that have displaced or supplemented traditionally private enterprises" and thus are of a "proprietary" nature. The majority responded that "EMTs cannot be realistically compared to the proprietary medical professionals whose licensure requires extensive educational and training credentials, and who typically provide services at hospital or medical facilities rather than in the unpredictable community-at-large".

(2) The Court then proceeded to determine the second big issue, i.e., whether the plaintiff had sufficiently established the existence of a special duty — an inquiry that would have been unnecessary if the EMT's services had been deemed a *proprietary* function. Plaintiffs established questions of fact on the applicability of the special duty doctrine, thereby precluded summary judgment for the municipal defendants. The facts at issue were: The girl's mother testified that once she realized the treatment provided by the EMTs would be limited to CPR, she "asked them to please take [her daughter] to Montefiore Hospital right away, because it was only a few minutes away from our house at that time." The EMT apparently continued performing CPR and indicated that he was awaiting the arrival of an ALS ambulance personnel. This presented a question of fact as to whether the EMTs, through their actions or promises, assumed an affirmative duty in deciding to have ALS paramedics undertake more sophisticated medical treatment rather than transporting the child to a hospital. The Court also found there was a fact issue to resolve the "justifiable reliance" element. A fact finder could conclude that it was reasonable for the girl's mother to rely on the EMTs' assurances rather than seek an alternative method for transporting her daughter to the nearby hospital since the child's mother claimed she was not informed it would take about 20 minutes for the ALS ambulance to arrive.

NOTE 1: The Court never addressed whether the emergency responders actions were ministerial or discretionary. If they are later found to be discretionary, suit is barred regardless of whether plaintiffs establish a "special relationship" (*see, McLean v City of NY*, 12 N.Y.3d 194).

NOTE 2: Judges Smith and Pigott, in their concurrence, thought that the services were proprietary, not governmental, and thus that the governmental immunity doctrine did not apply, and that there was thus no need to show a "special relationship" at all. They complained that, under this ruling, private emergency response providers would receive "favored treatment" *vis-à-vis* municipal emergency responders, though

both would be performing the same function. They agreed with the outcome of reinstating the complaint, but only so that a trial could be had on the issue of negligence and proximate cause. Judge Abdus-Salaam offered a similar concurring opinion.

NOTE 3: The most important part of this Decision may be FOOTNOTE NUMBER 1. It states "contrary to the parties' arguments, our precedent does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis". This footnote invalidates Appellate Division case law that had held for decades that there was no need for a plaintiff to establish a "special duty" or "special relationship" where the governmental actor's negligence was *active* (misfeasance) rather than merely *passive* (nonfeasance). The footnote validates the First Department's footnote in *Applewhite* in which it stated, "in *McLean*, 12 N.Y.3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167, the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function. Accordingly, we will not evaluate this case using a distinction between nonfeasance and misfeasance. We merely distinguish proprietary functions from ministerial functions". The Court of Appeals has now "affirmed" the First Department's footnote. Bottom line: "special duty" will always have to be shown, even in cases of *misfeasance*, for example, where a police officer fires a bullet in a crowded street.

Metz v. State, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (N.Y. 2012). The Ethan Allen was a public vessel operating as a tour boat on Lake George. In 2005, 20 passengers were killed and several others were injured when the boat capsized and sank. The injured passengers and representatives of those who died brought action against the State, alleging that the State was negligent in certifying tour boat to carry more than 14 passengers. As a public vessel, the Ethan Allen had been subject to yearly state inspections, which included certificating the vessel's maximum passenger capacity. At the time the vessel sank, it had been carrying 47 passengers and 1 crew member, within the 48–passenger maximum set forth in the certificate of inspection. The Ethan Allan had at first been a Coast Guard vessel. The Coast Guard had certified it for 48 persons and 2 required crew members, for a total capacity of 50 persons. When it became a tourist vessel in 1979, the State began certifying the ship year after year consistently with the old Coast Guard certification. This was so despite the fact that the Ethan Allen was modified in 1989–replacing its canvas canopy with a heavier canopy made of wood. Meanwhile, Americans were getting heavier. Yet the State never independently retested the passenger capacity in light of these developments; it just "rubber stamped" the old certification year after year. The Third Department had granted plaintiffs' motion to dismiss the State's affirmative defense of governmental immunity based on the State's failure to actually exercise "discretion" in rating the passenger capacity of the ship. It relied on prior Court of Appeals case law (*see*, *Haddock v City of New York*) which says that the purpose of the governmental immunity defense is to allow the government to exercise discretion without fear of lawsuits, and thus if the government fails to exercise discretion, the defense is unavailable. Here, the Third Department reasoned, the State had merely "rubber stamped" year after year to old Coast Guard passenger capacity rating, and never exercised the discretion it clearly had to decide whether to make, or not make, an independent study. The Court of Appeals, however, refused to reach the issue of whether discretion was exercised. It pointed out that, in the recent case of *Valdez v. City of New York*, 18 N.Y.3d 69, 80, 936 N.Y.S.2d 587, 960 N.E.2d 356 (2011), it had set the precedent that a plaintiff must "first establish the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity". The Court then found that the State's duty to certify the capacity of the vessel was not a duty owed to the individual plaintiffs, but rather was intended to protect all members of the general public similarly situated, and thus there was no "special duty". As for whether the Navigation Law, which set forth the State's obligations in this regard, was intended to create a private right of action, the Court held this "would be incompatible with the legislative design" since the Navigation Law does not provide for governmental tort liability, but instead for fines and criminal penalties to be imposed upon vessel owners and operators. Case dismissed.

Stephenson v. City of New York, 19 N.Y.3d 1031, 978 N.E.2d 1251, 954 N.Y.S.2d 782 (N.Y. 2012). Student brought action against city, school, and others, alleging school negligently failed to prevent assault by fellow student. The assault occurred two blocks from the boys' school prior to school hours. The two had been involved in a fight at school, between classes, just two days earlier. Both boys received in-school suspensions for that. The assistant principal dismissed plaintiff from school early, making sure the boys' dismissal times were not the same so that no further altercations would occur after they left the school that day. Defendants moved for summary judgment, arguing, among other things, that since the incident occurred before regular school hours and off school

property, defendants owed no duty to plaintiffs and, therefore, could not be held liable for the incident. Supreme Court denied the motion; the Appellate Division, with two Justices dissenting, reversed by granting defendants' motion to dismiss the complaint. Here the Court of Appeals affirms the granting of summary judgment. The Court points out that generally a school cannot be held liable for off-school ground assaults. However, in certain situations, the duty of the school can be extended to off-school premises injuries. But this is so generally only where the assault occurred, either during school hours or ***shortly thereafter upon the student's departure from the school.*** None of these circumstances were present here. Here, the plaintiff was adequately supervised at school, and the school addressed the altercation that occurred on school property between the two boys by punishing them. The second altercation which resulted in plaintiff's injuries was out of the orbit of the school's authority, as the incident occurred away from the school and before school hours where there was no teacher supervision. Further, contrary to plaintiffs' urging, the school could not be held liable for a failure to comply with a separate duty to notify the plaintiff's mother of the impending danger. There was no statutory duty to inform the parents about generalized threats made at school, and the circumstances here did not give rise to a common-law duty to notify parents about threatened harm posed by a third party. This case did not involve threatened conduct that would occur while the child was in custody and control of school officials.

Cividanes v. City of New York, 20 N.Y.3d 925, 981 N.E.2d 281, 957 N.Y.S.2d 685 (N.Y. 2012). Plaintiff testified at her 50-h that she injured her left ankle when she "stepped off the last step into a hole and fell" as she exited the rear of a bus owned and operated by defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority. Court of Appeals here held that the No–Fault Insurance Law was inapplicable because plaintiff's injury did not arise out of the "use or operation" of a motor vehicle and the bus was neither a "proximate cause" nor an "instrumentality" that produced plaintiff's injury. Court found that *Manuel v. New York City Tr. Auth.*, 82 A.D.3d 1059, 918 N.Y.S.2d 787 (2d Dept.2011), *which held on similar facts that the No–Fault Insurance Law's restrictions on tort liability were applicable, should not be followed.* Dissent disagreed, finding that plaintiff properly alleged that her accident was proximately caused by the use or operation of a motor vehicle and that her allegation could not be refuted as a matter of law.

Custodi v. Town of Amherst., 20 N.Y.3d 83, 980 N.E.2d 933, 957 N.Y.S.2d 268 (2012). The doctrine of primary assumption of the risk did not preclude the negligence claim by an experienced rollerblader against the Town and a private homeowner. One of plaintiff's skates struck a two-inch height differential where the edge of the homeowner's driveway met a drainage culvert that ran the length of the street causing plaintiff to fall. Court noted that in general, the application of the doctrine should be limited to cases arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues. No exception to that general principle was warranted under the facts of this case. Plaintiff was not rollerblading at a rink, a skating park, or in a competition. Nor did defendants actively sponsor or promote the activity in question. Moreover, extension of the doctrine of primary assumption of the risk to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners, both public and private, to maintain their premises in a reasonably safe condition. The exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed inherent risks assumed by non-pedestrians who sustain injuries, whether they be joggers, runners, bicyclists or rollerbladers.

II STATUTORY CHANGES THIS YEAR

THE UNIFORM NOTICE OF CLAIM ACT, which took effect June 15, 2013, simplifies and harmonizes the manner of service and the time limitations for serving a notice of claim and suing the various public corporations. The new Act is imbedded in several Statutes (See GML §§51-e[f], 53, CPLR § 217-a, Unconsolidated Laws § 6412-a). Here are the highlights:

- Service on secretary of state – The NY General Municipal Law is amended to add new sections stating that plaintiffs are allowed to serve a notice of claim on a public entity by serving the secretary of state. The secretary of state then has to send a copy of the notice of claim to the public entity within 10 days. Public entities need to file a certificate with the secretary of state designating the secretary as agent for service, and the certificate has to provide the name and contact information for the transmittal of notices. Public entities should be aware that service on the secretary of state could lead to delays in the

public entity actually receiving the notice. So once public entities receive the notices, they may have to move more quickly in demanding a 50-h examination within the requisite 90 day period.

- Uniform 90 day period for serving notice of claim – The CPLR and other statutes are amended to state that no action against a public entity for damages, injuries to property, or personal injuries or wrongful death, can be commenced unless the plaintiff served a notice of claim in compliance with General Municipal Law § 50-e, including the 90 day time limit.
- Uniform one year and 90 day statute of limitations – The CPLR and other statutes are amended to state that except for wrongful death actions, all actions against public entities for damages, injuries to property, or personal injuries, are subject to a one year and 90 day statute of limitations or another applicable statute of limitations prescribed by law, whichever is longer.

III THE NOTICE OF CLAIM

A. DEFECTS, INSUFFICIENCIES AND PROBLEMS IN THE NOTICE OF CLAIM

1. Notice of Claim Requirements When Suing Individual Defendant-Employees of Municipal Defendant.

Goodwin v. Pretorius, 105 A.D.3d 207, 962 N.Y.S.2d 539 (4th Dep't 2013). Employees of a municipal hospital moved to dismiss this medical malpractice action brought against them on the grounds that they were neither served with the notice of claim nor named in the notice of claim (only the hospital was). General Municipal Law § 50–e bars an action against an individual who has not been named in a notice of claim only where such notice is required by law. The Court reviewed the case law on the subject, and concluded that courts in the past have misapplied or misunderstood the law in creating, by judicial fiat, a requirement for notices of claim that goes beyond those requirements set forth in the statute. If the legislature had intended that there be a requirement that individual employees be named in the notices of claim, it could easily have created such a requirement. It has not. Therefore, to the extent that this Court's prior decisions held that General Municipal Law § 50–e bars an action against individual municipal employees who have not been named in a notice of claim, those cases are no longer to be followed. Defendants' motion to dismiss the complaint against the employee defendants was thus denied.

Thygesen v. North Bailey Volunteer Fire Co., Inc., 106 A.D.3d 1458, 964 N.Y.S.2d 816 (4th Dep't 2013). Former member of Town's volunteer fire company alleged in complaint against individual firefighters and volunteer fire company that the fire company, its president, its fire chief, and state police investigator discriminated against him and violated his privacy and civil rights, and defamed him, when they expelled him from membership. Plaintiff never served a notice of claim nor did he name the Town as a defendant. Trial court held that no notice of claim was required because the Town was not a named defendant, and the Fire Company sued was a not-for-profit corporation, not a municipality or a fire district. The Appellate Division reversed, holding that a notice of claim against the Town, and suit against the Town, was necessary. It noted that, pursuant to Town Law § 170, a town is authorized to establish a *fire district, fire alarm district or fire protection district* for the benefit of the town residents, and that *a fire district* is a separate legal entity whose members are employees of the *fire district*, not of any political subdivision. In contrast, a *fire protection district* is simply a geographic area, with no independent corporate status, for which the town board is responsible for the furnishing of fire protection. Members of the fire departments or companies established within a *fire protection district* are deemed officers, employees, or appointees of the town, and the town is liable for any negligence on the part of such members. Here the Town, had long ago established a *Fire Protection District*, and contracted with the Fire Company for fire protection services within the Fire Protection District. Thus, a notice of claim against the Town was required. As such, the tort causes of action, including defamation, were dismissed, but not the non-tort, discrimination causes of action, since the notice of claim requirements of GML 50-e do not apply to actions not "founded upon tort".

2. New Allegations in Complaint Not Contained in Notice of Claim

Vargas v. City of New York, 105 A.D.3d 834, 963 N.Y.S.2d 278 (2nd Dep't 2013). Prior to trial, the City moved to dismiss so much of the complaint as alleged negligence in failing to provide medical care on the grounds that the plaintiff's allegation that he was deprived of necessary medical treatment was not set forth in the notice of claim or bill of particulars. The plaintiff was not allowed to plead so much of the complaint as alleged negligence, since the allegations of negligence were not set forth in the notice of claim. As for the violation of civil rights claim, a

notice of claim is not a condition precedent to maintaining a cause of action pursuant to 42 USC § 1983. But plaintiff failed to state a cause of action in this regard as the complaint failed to allege any facts from which it could be reasonably inferred that the defendants had a policy or custom of depriving medical treatment to persons in police custody. Case dismissed.

Carrasquillo v. New York City Dept. of Educ., 104 A.D.3d 516, 960 N.Y.S.2d 313 (1st Dep't 2013). Plaintiffs' original notice of claim did not allege that the infant plaintiff slipped on water on the gym floor. It alleged merely that defendants were "negligent in the premises." This allegation failed to provide defendants with enough information to enable them to investigate the premises liability claim. Plaintiffs could not rely on the complaint (served 13 months after the accident), the bill of particulars (served almost two years after the accident), or the General Municipal Law § 50-h hearing testimony (given almost one year after the accident) to alert defendants to their theory of a failure to discover and remedy a wet floor.

Tully v. City of Glen Cove, 102 A.D.3d 670, 957 N.Y.S.2d 719 (2nd Dep't 2013). Prior to commencing this property damage action, the plaintiff served a notice of claim upon the City. However, the notice of claim contained no reference to any acts or omissions attributable to the City, made no mention of the culvert system or of any type of drainage system at issue, and did not mention any decision to subdivide the nearby property. In support of its motion, the City established, prima facie, that the theories of liability alleged in the complaint were not included in the plaintiff's notice of claim. Case dismissed.

Clare–Hollo v. Finger Lakes Ambulance EMS, Inc., 99 A.D.3d 1199, 952 N.Y.S.2d 350 (4th Dep't 2012). Court found that plaintiff was *bound by the theories of negligence raised in the notice of claim* and was not free to add new theories in her bills of particulars. Plaintiff's notice of claim alleged only that the City's employees may have been negligent, either through their actions or their use of address-identifying equipment and materials, in causing the initial response of the ambulance to the wrong address. The subject paragraphs in plaintiff's supplemental bill of particulars, by contrast, collectively alleged that the City's employees acted negligently in, inter alia, (1) "participating in a cover-up"; (2) failing to properly assess and report via dispatch decedent's medical condition; (3) failing to solicit help from other emergency responders; and (4) "sending [plaintiff] away from the phone to look for the ambulance." Because none of those theories of liability was contained in the notice of claim and a late notice of claim asserting such theories would in any event be time-barred, plaintiff was not entitled to raise them in her supplemental bill of particulars.

Hammond v. City of New York, 100 A.D.3d 563, 954 N.Y.S.2d 529 (1st Dep't 2012). Plaintiff was injured by height differential between dirt in tree well and surrounding sidewalk. The complaint was dismissed because plaintiff's notice of claim failed to give notice of the theory that the City was affirmatively negligent in failing to install tree gratings or cobblestones.

In re New York City Asbestos Litigation, 106 A.D.3d 617, 966 N.Y.S.2d 393 (1st Dep't 2013). Construction worker brought action against Port Authority, alleging he was injured by being exposed to asbestos while working on Port Authority building. He was diagnosed with malignant mesothelioma in or about April 2010. On October 4, 2010, he and his wife filed a notice of claim against defendant for the injuries he sustained, and on November 12, 2010, they served the complaint. On November 27, 2010, decedent died. Plaintiffs' counsel should have been aware of the time requirements in the applicable statute, and the service of the complaint was premature, resulting in a lack of subject matter jurisdiction over the Port Authority(*see* McKinney's Unconsolidated Laws of N.Y. § 7107 [requiring service of a notice of claim at least 60 days before commencement of the action]). Plaintiffs argued that despite their initial failure to obtain subject matter jurisdiction over defendant, they nonetheless obtained subject matter jurisdiction through service of the amended complaint after the decedent's death. This argument was unavailing because the initial notice of claim specifically stated that it was for *personal injury* arising from the asbestos exposure and *not for the decedent's death*, which had yet to occur. Although courts have held, in considering notices of claim under GML § 50–e, that notice of an *injury* placed a municipality on notice of a plaintiff's subsequent *death* from that same injury, these cases have no application to the Port Authority's suability statute. While GML 50-e contains a "substantial compliance" provision permitting courts to consider whether a plaintiff has substantially complied with the statute's terms, the Port Authority's suability statute contains no substantial compliance provision (Uncons. Laws §§ 7107, 7108). Under these circumstances, plaintiffs should have served on the Port Authority a new notice of claim concerning the wrongful death and survivorship actions. Case dismissed.

B. NOTICE OF CLAIM REQUIREMENT WAIVED OR EQUITABLY ESTOPPED

Robinson v. Board of Educ. of City School Dist. of City of New York, 104 A.D.3d 666, 962 N.Y.S.2d 279 (2nd Dep't 2013). The Board did not waive the notice of claim requirement, a statutory condition precedent, by failing to plead it as an affirmative defense in its answer.
Martinez v. City of New York, 104 A.D.3d 407, 961 N.Y.S.2d 54 (1st Dep't 2013). The fact that NYCTA failed to serve a bill of particulars with respect to the affirmative defense that the notice of claim was served on the wrong entity does not invoke the doctrine of equitable estoppel. Unlike the unusual factual scenarios presented in *Bender v. New York City Health & Hosps. Corp.*, 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561 [1976] and *Matter of Hartsdale Fire Dist.*, 65 A.D.3d 1345, 886 N.Y.S.2d 454 [2d Dept. 2009], *lv. denied* 14 N.Y.3d 701, 2010 WL 456908 [2010], relied on by plaintiffs, here the NYCTA neither engaged in misleading conduct nor induced plaintiffs' inaction, and thus that there was no equitable estoppel.

IV LATE SERVICE OF NOTICE OF CLAIM

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

Haunss v. City of New York, 100 A.D.3d 428, 953 N.Y.S.2d 211 (1st Dep't 2012). Plaintiff's notice of claim was filed three days after the 90-day deadline. Plaintiff clearly believed he was filing the notice of claim within 90 days of the incident as indicated by the date he claimed the accident happened. But he was wrong about the date of the accident, and his N/C was actually filed 93 days after the actual accident date. When plaintiff moved to change the date in the Notice of Claim, defendant cross-moved to dismiss case for failure to comply with the condition precedent of timely notice of claim. Plaintiff sought an order deeming the notice of claim timely served nunc pro tunc. However, the late service, without leave of court, was a nullity and the court lacked the authority to deem the notice timely served nunc pro tunc, as the one-year and 90–day statute of limitations period had expired at the time plaintiff brought the motion. Case dismissed.

Robinson v. Board of Educ. of City School Dist. of City of New York, 104 A.D.3d 666, 962 N.Y.S.2d 279 (2nd Dep't 2013). The plaintiff's service of a late notice of claim upon the Board was a nullity, as it was made without leave of the court. The plaintiff was required to petition or move for leave to late-serve within one year and 90 days after the accrual of the claim. The plaintiff's cross motion to deem the late notice of claim timely served nunc pro tunc was made after the one–year–and–90–day statute of limitations had expired and, thus, the Supreme Court was without authority to grant such relief. Contrary to the plaintiff's contention, the Board did not waive the notice of claim requirement, a statutory condition precedent, by failing to plead it as an affirmative defense in its answer.

Katsiouras v. City of New York, 106 A.D.3d 916, 965 N.Y.S.2d 533 (2nd Dep't 2013). The service of the notice of claim 20 days beyond the 90–day statutory period was a nullity, as it was made without leave of court. Further, the disallowed notice of claim did not provide defendants with actual knowledge of the essential facts constituting the claim within the 90–day statutory period or within a reasonable time thereafter. Also, plaintiff failed to proffer any other evidence that was sufficient to provide the defendants with actual knowledge of the essential facts constituting the claim within 90 days after the accrual of the claim, or within a reasonable time thereafter. As for "reasonable excuse" for the delay, while the plaintiffs may have set forth a reasonable excuse for their initial delay in serving the notice of claim, they failed to proffer any excuse as to why 10 months elapsed between the time the defendants disallowed the claim and the filing of an application for leave to late-serve the notice of claim.

B. Court Permission to Serve Notice of Claim Beyond SOL is a nullity

Ahnor v. City of New York, 101 A.D.3d 581, 956 N.Y.S.2d 53 (1st Dep't 2013). Five days before the one–year–and–90–day statute of limitations expired, plaintiff moved for leave to file a late notice of claim. That tolled the SOL so that plaintiff would, upon entry of the Order granting the motion, have five days left on the SOL. The order, however, purported to give plaintiff more time than this. It purported to allow plaintiff until a specific date *beyond* the SOL. A Court, however, has no authority to extend an SOL. Plaintiff was required to file her complaint within the SOL (five days after entry of the Order granting permission to late-serve) and the Court had no authority to extend the statute of limitations beyond this deadline. Plaintiff relied on the Court-ordered

deadline, all to plaintiff's detriment, and filed the summons and complaint more than five days after entry of the Order. He thus missed the SOL. In dismissing the complaint, the Appellate Division notes that plaintiff should have had no trouble complying with the statutory requirements. GML 50-e provides that "an application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action" and thus nothing prevented plaintiff from filing the complaint and then bringing the motion to late-serve nunc pro tunc.

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

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

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

Mercado v. City of New York, 100 A.D.3d 445, 953 N.Y.S.2d 206 (1st Dep't 2012). Defendant was served with the notice of claim 6 weeks after expiration of the 90–day filing requirement. Plaintiff showed that the late notice, though a nullity, was sufficient to serve as actual knowledge of the claim and it was served within a reasonable time after the 90 days expired. Since the motion for leave to late-serve was filed within the statute of limitations, the Court had jurisdiction to grant it, and did. The alleged defective condition was highly transitory and defendant would have been in the same position regarding any investigation even if the notice of claim had been timely served, and thus, no prejudice to defendant.

b. "Actual Knowledge" through Police Reports

Camet v. County of Suffolk, 100 A.D.3d 882, 954 N.Y.S.2d 575 (2nd Dep't 2012). Neither the domestic incident report completed by the plaintiff two days before her stolen vehicle was damaged in an accident nor the police accident report completed on the date of the accident provided the defendant County with actual knowledge of the essential facts constituting the plaintiff's present claim that her vehicle was damaged due to its negligence in releasing her vehicle to a third party without her permission five days before the accident.

Farfan v. City of New York, 101 A.D.3d 714, 955 N.Y.S.2d 365 (2nd Dep't 2012). No proposed notice of claim was submitted with the application to late serve, which was sufficient justification by itself to deny the application. In any event, the plaintiff proffered no excuse for his failure to serve a timely notice of claim and, although a police accident report was filed regarding the subject accident, the police accident report did not provide actual knowledge to the City of the essential facts constituting the claim. Case dismissed.

Brown v. City of Buffalo, 100 A.D.3d 1439, 954 N.Y.S.2d 303 (4th Dep't 2012). Plaintiffs excuse for failing to serve a timely notice of claim -- that they were unaware of the notice of claim requirement -- was not acceptable, and in any event, there was no actual knowledge by defendant. The police report plaintiff relied on to establish knowledge stated only that plaintiff was injured after she failed to "realize" that the street came to a dead end.

Walker v. Riverhead Cent. School Dist., 107 A.D.3d 727, 967 N.Y.S.2d 92 (2nd Dep't 2013). Plaintiff contended that the District acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim accrued by reason of a police accident report, as well as from motor vehicle accident reports that were prepared by the plaintiff, the driver of the District's vehicle, and a witness at the scene of the accident, which were all filed with the Suffolk County Sheriff's Office. But the fact that the Suffolk County Sheriff's Office had knowledge of this accident, without more, cannot be considered actual knowledge of the School District regarding the essential facts constituting the claim against it. In any event, the accident reports were inadequate to provide knowledge since they did not indicate that plaintiff sustained any injuries.

c. "Actual Knowledge" through School Records

Joseph v. City of New York, 101 A.D.3d 721, 955 N.Y.S.2d 622 (2nd Dep't 2012). Infant plaintiff failed to demonstrate defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or a reasonable time thereafter. While an occurrence report was prepared by the New York City Department of Education about two weeks after the school cafeteria accident, that report, which merely indicated that the plaintiff had been injured in the cafeteria when she fell as she was getting up from a lunch table, did not

establish that the defendants had timely, actual knowledge of the essential facts underlying her claim of negligent supervision. Further, the delay of more than two years in commencing this proceeding substantially prejudiced defendant's ability to investigate the facts, and to locate and examine witnesses while their memories were still fresh. Case dismissed.

Anderson v. New York City Dept. of Educ., 102 A.D.3d 958, 958 N.Y.S.2d 746 (2nd Dep't 2013). The comprehensive injury report prepared by the New York City Department of Education on an unspecified date, which merely indicated that the infant plaintiff sprained his ankle during basketball class in a gymnasium, did not establish that the appellants had actual knowledge of the essential facts underlying the plaintiffs' claim that the defendants were negligent, inter alia, in their ownership, operation, maintenance, supervision, and control of the school and its students. Application to late-serve denied.

Funkhouser v. Middle Country Cent. School Dist., 102 A.D.3d 689, 956 N.Y.S.2d 896 (2nd Dep't 2013). Plaintiff showed defendant had actual knowledge of the facts constituting the claim within the 90–day statutory period or a reasonable time thereafter through, among other things, a medical claim form completed by the principal of the school. Moreover, they demonstrated a reasonable excuse for the delay in seeking leave to serve a late notice of claim in that the mother of the infant plaintiff was unaware of the severity of the infant's left elbow injury at the time of the incident, and had relied upon the School District's prior willingness to assume responsibility for the infant's medical expenses. Leave to late-serve granted.

d. "Actual Knowledge" from Other Sources

Anderson v. Town of Oyster Bay, 101 A.D.3d 708, 955 N.Y.S.2d 183 (2nd Dep't 2012). Plaintiff failed to establish that the Town acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. His oral report of the injury to his supervisor about one month after the accident and the filing of a workers' compensation claim with his employer two months after the accident did not provide the Town with actual knowledge of the accident. Similarly, even though two Town representatives were present on a regular basis at the construction site where the accident occurred, there was no evidence that they were aware of the essential facts constituting the claim. Even if the Town had been aware of the workers' compensation claim form filed with the plaintiff's employer two months after the accident, that form merely indicated that the plaintiff slipped and fell while carrying a wooden form. That claim form was insufficient to provide actual knowledge of the plaintiff's claim that he tripped and fell into a four-foot-deep trench due to the Town's negligence in the ownership, operation, repair, inspection, maintenance, and control of the worksite location. The delay in more than eight months prejudiced the Town's ability to investigate the alleged dangerous condition and to interview potential witnesses while their recollections were fresh. Thus, permission to late-serve denied.

Rodriguez v. Woodhull School, 105 A.D.3d 1050, 963 N.Y.S.2d 724 (2nd Dep't 2013). The school district here acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. Immediately after the plaintiff was injured, he told the school's custodian how the accident occurred, a District employee called emergency medical services, and the plaintiff was transported to a hospital. An incident form was prepared by the District which indicated the time and place of the accident and the plaintiff's injuries, and the plaintiff's accident was discussed at a construction meeting attended by the school's superintendent. While the plaintiff's excuses for his failure to serve a timely notice of claim were not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and absence of prejudice.

McLeod v. City of New York, 105 A.D.3d 744, 962 N.Y.S.2d 641 (2nd Dep't 2013). Plaintiff was injured inside middle school gymnasium while playing tackle football without any safety equipment. The City defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose, as indicated by an affidavit from the plaintiff, wherein she stated that immediately following her son's injury, a teacher's aide took her son to the hospital where he was admitted and underwent surgery, and remained for two weeks. The plaintiff further stated that within one month after the incident, she told the dean of the school that she was upset that her son was permitted to play tackle football without safety equipment during gym class, and that she wanted to make a claim against the school.

Anderson v. Town of Oyster Bay, 101 A.D.3d 708, 955 N.Y.S.2d 183 (2nd Dep't 2012). Plaintiff's delay of more than eight months in filing petition for leave to serve late notice of claim against town prejudiced town's ability to

investigate alleged dangerous condition of trench into which he fell, and to interview potential witnesses while their recollections were fresh, especially since plaintiff filed amended workers' compensation claim form over one year after accident which altered his prior statement that there were no witnesses to accident. As for a reasonable excuse for the delay, plaintiff's conclusory assertion that his prior attorneys failed to file a timely notice of claim due to an unspecified error was insufficient. Plaintiff's oral report of the injury to his supervisor about one month after the accident and the filing of a workers' compensation claim with his employer two months after the accident did not provide the Town with actual knowledge of the accident. Even though two Town representatives were present on a regular basis at the construction site where the accident occurred, there was no evidence that they were aware of the essential facts constituting the claim. Case dismissed.

Dalton v. Akron Central Schools, 107 A.D.3d 1517, 966 N.Y.S.2d 787 (4th Dep't 2013).
Plaintiff stepped out of his vehicle and slipped on snow or ice in a parking lot of school. Plaintiff brought application to late-serve the notice of claim. The record established that plaintiff met his burden of demonstrating that defendant had actual knowledge of the incident, including knowledge of plaintiff's injuries. Plaintiff averred in his affidavit that he went inside the school and told school employees about "the incident." Because the "incident" was defined in his affidavit as both the fall in the parking lot and the injuries resulting therefrom. Thus, defendant had received actual knowledge of the both underlying occurrence and plaintiff's injuries. The dissent disagreed, noting that plaintiff did not offer a reasonable excuse for failing to serve a timely notice of claim, and defendant did NOT have actual knowledge of the essential facts underlying the claim within ninety days or a reasonable period thereafter. Dissent felt that plaintiff's affidavit, though ambiguous, fell short of stating he had informed defendant's employees of his injury.

Viola v. Ronkonkoma Middle School., 107 A.D.3d 1009, 968 N.Y.S.2d 876 (2nd Dep't 2013). The School District acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose where the District's employee witnessed the infant plaintiff's accident, which occurred during supervised cheerleading practice, and a designated school authority prepared a medical claim form within a week after the accident. Since the District acquired timely knowledge of the essential facts constituting the plaintiffs' claim, the plaintiffs met their initial burden of showing a lack of prejudice. The District's conclusory assertions of prejudice, based solely on the plaintiffs' two-month delay in serving the notice of claim, were insufficient to rebut the plaintiffs' showing. The absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and an absence of prejudice.

2. "Reasonable Excuse" for Late service

a. Medical Condition as Reasonable Excuse

Minkowicz v. City of New York, 100 A.D.3d 1000, 954 N.Y.S.2d 628 (2nd Dep't 2012). Plaintiff's assertions that she did not immediately appreciate the nature and severity of her injury and that she was caring for her seriously ill infant son were unavailing without supporting medical evidence. Also, no actual knowledge by City. Case dismissed.

Bell v. City of New York, 100 A.D.3d 990, 954 N.Y.S.2d 229 (2nd Dep't 2012). Plaintiff's ignorance of the law and late retention of counsel did not constitute reasonable excuses for failing to timely serve the notice of claim. Plaintiff failed to submit any medical evidence to support his assertion 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. The City did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the accident or a reasonable time thereafter. The defect indicated on a map filed with the New York City Department of Transportation by the Big Apple Pothole and Sidewalk Protection Corporation more than nine years before the accident did not suffice to give the City actual knowledge of the essential facts underlying the plaintiff's present claim or his theory of liability against the City. Case dismissed.

Walker v. Riverhead Cent. School Dist., 107 A.D.3d 727, 967 N.Y.S.2d 92 (2nd Dep't 2013). Plaintiff's assertion that he did not immediately appreciate the nature and severity of his injuries until approximately nine months after the subject accident was unavailing without supporting medical evidence explaining why the possible permanent effects of the injuries took so long to become apparent and be diagnosed. Furthermore, plaintiff failed to proffer any excuse for the significant delay between the time that he was diagnosed with his injuries and the time that he

served a late notice of claim. Plaintiff's contention that the District acquired actual knowledge of the essential facts constituting the claim against it within 90 days after the claim was also rejected.

b. Mistaken Identity of Defendant-Entity

Arteaga v. City of New York, 101 A.D.3d 454, 956 N.Y.S.2d 9 (1st Dep't 2012). Plaintiff served a timely notice of claim on defendant City when she slipped and fell on a platform in a subway station. The motion court correctly granted defendant's motion to dismiss since it demonstrated that the subway station was leased to the NYCTA, and it was an out-of-possession landlord and not liable for negligence on the part of NYCTA. Plaintiff's cross motion seeking relief as to nonparty NYCTA was properly denied since plaintiff never served a notice of claim on the NYCTA and the statute of limitations of one year and 90 days has expired.

Valila v. Town of Hempstead, 107 A.D.3d 813, 968 N.Y.S.2d 100 (2nd Dep't 2013). Plaintiff's mistaken belief that his employer at the time of his accident had entered into a contract with the County of Nassau rather than the Town of Hempstead was not an acceptable excuse, given his failure to explain the additional delay between the time that he discovered the error and the filing of the application to late-serve a notice of claim against the Town. Furthermore, the Town did not acquire timely, actual knowledge of the essential facts constituting the claim. While the plaintiff asserted that the Town's employees were present at the site at the time of the accident, there was no evidence that they were aware of the facts constituting the claimed negligence. The late notice of claim served upon the Town more than one month after the 90–day statutory period had elapsed did not provide the Town with actual knowledge of the essential facts constituting the claim.

Abramovitz v. City of New York, 99 A.D.3d 1000, 953 N.Y.S.2d 137 (2nd Dep't 2012). Plaintiff failed to demonstrate that the NYCTA acquired actual knowledge of the essential facts constituting the claim within 90 days after the accident or within a reasonable time thereafter. Even though the plaintiff consulted with an attorney and served a notice of claim upon the City of New York approximately one week after the accident, he did not serve a notice of claim upon the NYCTA or commence this proceeding to late serve until more than four months after the consultation. The NYCTA did not have any knowledge of the plaintiff's accident and injury, or the legal theory prior to being served with papers in the instant proceeding. Plaintiff failed to demonstrate a reasonable excuse for his delay. The excuse that he only recently came to realize that he may have a claim against the NYCTA was unacceptable.

Platt v. New York City Health and Hospitals Corp., 105 A.D.3d 1026, 963 N.Y.2.2d 223 (2nd Dep't 2013). Plaintiff's service of a notice of claim upon the Comptroller of NYC was insufficient to constitute service upon the HHC. As for permission to late-serve the N/C, plaintiff failed to demonstrate that the HHC had actual knowledge of the facts constituting the claim within 90 days after it arose or "within a reasonable time thereafter". The fact that a police accident report was prepared by the New York City Police Department did not constitute notice to the HHC of the essential facts constituting the claim. In any event, the police report merely indicated that the plaintiff's vehicle was struck as it was pulling out of a parking spot, so it would not have put the HHC on notice of the "facts that underlie the legal theory or theories on which liability is predicated". Moreover, the plaintiff's mistake as to the identity of the public corporation against which her claim should be asserted was not excusable. The plaintiff had information as to the ownership of the HHC's vehicle before her time to serve a timely notice of claim expired and it had long been the rule that the City of New York and the HHC are separate entities for purposes of notices of claim. Even after learning of the identity of the proper defendant, the plaintiff delayed for two months in moving to have her late-served notice of claim against the HHC deemed timely served. The plaintiff's motion to late serve was thus denied.

V AMENDING THE NOTICE OF CLAIM

Vallejo–Bayas v. New York City Transit Authority, 103 A.D.3d 881, 962 N.Y.S.2d 203 (2nd Dep't 2013). Plaintiff's notice of claim alleged that he was injured when a bus owned and operated by the defendant New York City Transit Authority struck a hanging wire which caused the wire to strike the plaintiff as he stood in front of his residence. The plaintiff's notice of claim provided the exact date, location, and nature of the alleged incident. Although the notice of claim incorrectly stated that the incident occurred at approximately 2:00 p.m. rather than at 1:15 p.m., this error was not a result of bad faith on the part of the plaintiff and the Transit Authority suffered no prejudice as a result of the error. Furthermore, although the plaintiff was not able to identify the bus with greater

particularity, under the circumstances, the information contained in the notice of claim, supplemented by the testimony of the plaintiff given at the General Municipal Law § 50-h hearing, was sufficient to allow the Transit Authority to conduct a meaningful investigation into the plaintiff's claim. Motion to dismiss denied and cross-motion for permission to late serve an amended notice of claim granted.

Gonzalez v. New York City Housing Authority, 107 A.D.3d 471, 967 N.Y.S.2d 963 (1st Dep't 2013). Plaintiff's notice of claim listed the wrong street address as the site of the accident. However, at his 50-h hearing, held five months after the accident, when shown photographs of the incorrect building and the correct adjacent building, the infant plaintiff identified the correct location of the accident. Under the circumstances, plaintiffs should have been allowed to correct the notice of claim pursuant to GML 50-e(6) as the mistake was not made in bad faith and NYCHA was not prejudiced by the inaccurate notice. Defendant failed to meet its burden of demonstrating prejudice, as the record did not indicate that defendant sent someone to investigate the scene of the accident or examine the scaffold either before or after it had been apprised of the correct location.

Green v. City of New York, 106 A.D.3d 453, 965 N.Y.S.2d 58 (1st Dep't 2013). In this trip and fall action, plaintiff's notice of claim listed the wrong street address (390 rather than 360 Central Park West) in describing the location of her fall on a sidewalk, adjacent to Central Park, and across the street from that address. However, plaintiff also annexed a photograph to the notice of claim which depicted the intersection of Central Park West and 96th Street, which is nearly four blocks south of the incorrect address provided in the notice of claim, and the written description of the location in the notice was consistent with the area depicted in the photograph. Moreover, at the 50-h six weeks after the notice was served, and three and a half months after the accident, plaintiff explicitly testified that her accident occurred on the sidewalk just a few car lengths south of the 96th Street intersection, and identified the location in the photograph as also shown. Thus, motion to amend the notice of claim should have been granted.

Bingsen Xu v. New York City Health and Hospitals Corp., 107 A.D.3d 888, 968 N.Y.S.2d 115 (2nd Dep't 2013). Plaintiff was taken first to Queens Center Hospital and soon thereafter transferred to Elmhurst Hospital for surgery, which took place the same day. The decedent died at Elmhurst Hospital a few days later. The plaintiff alleged that the defendants' employees either did not begin the surgery soon enough or did not perform the surgery correctly. In either event, all of the acts and omissions alleged to have been negligent took place on the same day. The plaintiff's original notice of claim did not mention Elmhurst Hospital, but plaintiff timely sought leave to amend the notice of claim to, inter alia, add allegations regarding the treatment at Elmhurst Hospital. The motion was granted. Defendants were not prejudiced by the proposed amendment of the notice of claim and, under the circumstances, there was no need to treat that amendment as the assertion of a new claim.

Johnson v. City of New York, 106 A.D.3d 664, 966 N.Y.S.2d 408 (1st Dep't 2013). In his notice of claim, complaint and bill of particulars, plaintiff alleged that his fall occurred on the sidewalk or walkway in front of 1040 Soundview Avenue, in the Bronx, which was owned by defendant Housing Authority. The City is not liable for defective conditions in such a sidewalk (*see* Administrative Code of the City of New York § 7-210). The Housing Authority's contention that plaintiff fell on the street, instead of the sidewalk, was raised in opposition to the City's cross motion to dismiss, some seven years after plaintiff's accident, based on deposition testimony given by the Housing Authority's witness three years after the accident. Until the Housing Authority raised this issue, plaintiff had not asserted that he fell anywhere but on the sidewalk, and plaintiff would now have to amend his notice of claim to assert this new theory. At this juncture, it is too late to do so. Accordingly, the City's motion to dismiss the complaint as to it should have been granted.

VI WAITING PERIOD FOR 50-H EXAMINATION DOES NOT EXTEND THE SOL

Singh v. New York City Health and Hospitals Corp., 107 A.D.3d 780, --- N.Y.S.2d ---- (2nd Dep't 2013). The Hospital defendants met their initial burden of establishing, prima facie, that the complaint was time-barred, in that the medical malpractice cause of action was interposed more than 1 year and 90 days after the decedent's death and the wrongful death cause of action was interposed more than two years after decedent's death. In opposition, the plaintiff failed to raise a question of fact as to whether the statute of limitations was tolled. The plaintiff's contention that the waiting period pursuant to GML 50-h for him to comply with the HHC's examination request before commencing this action tolled the statute of limitations pursuant to CPLR 204(a) was without merit, as the Legislature did not intend to extend the statute of limitations by the inclusion of that

statutory waiting period. Likewise without merit was the plaintiff's contention that the period between the day when he filed a petition to obtain limited letters of administration for the decedent's estate and the day the Surrogate's Court granted that petition tolled the statute of limitations.

VII GOVERNMENTAL IMMUNITY

A. **Governmental v Proprietary Function**

See, *Applewhite v Accuhealth, Inc.*, ___ N.Y.3d ___, 2013 WL 3185185 (2013), discussed below in subsection "B", where Court of Appeals decided that municipal emergency medical responders engage in a "governmental" rather than "proprietary" function when providing emergency medical services.

Kupferstein v. City of New York, 101 A.D.3d 952, 957 N.Y.S.2d 200 (2nd Dep't 2012). Plaintiff sued City claiming that his decedent's death was caused by the negligence of the ambulance personnel in delaying the transport of the decedent to the hospital and in administering the sedative "versed" to the decedent. The issue on defendant's summary judgment motion was whether the case sounded in medical malpractice, in which case the services were not a "governmental function" but rather a "proprietary" one, and the governmental immunity defense would not apply, or whether the services were emergency response services, in which case the governmental function immunity would apply. The Court found that the timing of the transport of the decedent from his residence to the hospital involved "the quintessential purpose of the municipal ambulance system—transporting the patient to the hospital as quickly as possible", i.e., a governmental function (*citing, Applewhite v. Accuhealth, Inc.*). Similarly, the decedent was administered Versed in order to effectuate his transport from the elevator into the ambulance, and not for the purpose of providing medical treatment. Accordingly, both the timing of the transport and the administration of Versed constituted governmental functions. Since governmental immunity was triggered and plaintiff failed to show the establishment of a "special relationship", the case must fail even if the emergency responders' actions were ministerial rather than discretionary.

Maccarello v. County of Suffolk, 100 A.D.3d 972, 954 N.Y.S.2d 609 (2nd Dep't 2012). Trip and fall on parking lot owned by County but leased to, and used by, a private tenant (Cornell University). Court held that, when a governmental agency is acting in a proprietary capacity as a property owner or landowner, it owes the same duty to maintain its property as a private landowner. Here, since the County merely leased the premises to Cornell, and thus acted as a landlord, and its responsibility to remove snow and ice from the Premises' paved areas arose from its agreement with Cornell, the County was functioning in a proprietary capacity. Thus, prior written notice was not necessary in order to find the County negligent.

Wittorf v. City of New York, 104 A.D.3d 584, 961 N.Y.S.2d 432 (1st Dep't 2013). Plaintiff and her boyfriend rode their bicycles to the entrance of the Central Park transverse road at West 65th Street, where a City Department of Transportation (DOT) crew supervisor was in the process of setting up warning cones to close off both lanes of the road to vehicular traffic before starting to repair a "special condition" in the transverse. The supervisor testified that a "special condition" was a defect "bigger than a pothole" but "less involved" than road resurfacing. Plaintiff's boyfriend asked the supervisor if they could ride through, and he told them "go ahead." Although plaintiff's boyfriend crossed the transverse safely, plaintiff was injured when she struck a large pothole. The bicyclist won a verdict at trial. The jury found that the roadway where the accident occurred was not in a reasonably safe condition. However, the City could not be held liable on that basis because the jury found that the City had not received timely written notice of the particular defect and did not cause or create the condition by an affirmative act of negligence. The sole basis for the City's liability was the jury's findings that the supervisor was negligent in allowing plaintiff to enter the transverse and that his negligence was a substantial factor (60%) in causing plaintiff's injuries. Subsequently, the trial court granted defendant's written motion pursuant to CPLR 4404 to set aside the verdict on the ground that the City was immune from liability because the supervisor was engaged in the discretionary governmental function of traffic control, not the proprietary function of street repair, when he allowed plaintiff to proceed. On appeal, the dissent believed that the City should be held liable for the supervisor's failure to warn plaintiff of the dangerous condition in the transverse, or for his negligently waving her

into a place of danger, because those acts were ***integrally related to the pothole repair*** undertaken by the City in a ***proprietary capacity***. However, the majority found that, at the time of plaintiff's accident, the ***repair work had not begun,*** and the supervisor was ***engaged in traffic control***, which is "a classic example of a ***governmental function*** undertaken for the protection and safety of the public pursuant to the general police powers". Thus, the City was entitled to governmental function immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed.

Rozell v. Milby, 98 A.D.3d 960, 951 N.Y.S.2d 74 (2nd Dep't 2012). The plaintiff's decedent died when his vehicle slid on an ice-covered portion of a Dutchess County turnpike. Another one-car accident had taken place on the same portion of the roadway approximately two hours prior to the subject accident. The plaintiff sued the County alleging negligently designed, constructed, and maintained roadway, and that the County was negligent in failing to have emergency personnel remain at the location of the prior accident and in failing to warn motorists of the icy road conditions with "flares and/or signs". While the County submitted some evidence that the subject roadway was owned, maintained, and controlled by the State of New York, and not the County, it failed to demonstrate that no significant dispute existed with regard to these facts, or with regard to whether the County was involved in the construction or design of the roadway. Thus, the County's motion in that respect was denied. However, the portion of the claim that alleged a failure by the County to have emergency personnel remain at the location of the prior motor vehicle accident and a failure to warn motorists of the icy road conditions with "flares and/or signs" was dismissed since these allegations concern the County's *governmental function*, and the complaint failed to allege a special duty owed to the plaintiff's decedent, as opposed to the public generally, with regard to these allegations.

B. **"Duty", "Special Duty", or "Special Relationship"**

Applewhite v Accuhealth, Inc., ___ N.Y.3d ___, 2013 WL 3185185 (2013). Twelve-year-old plaintiff suffered from uveitis, an eye condition, which required the intravenous administration of a prescribed medication. After a visiting nurse injected her with the drug at her home, she experienced an episode of anaphylactic shock, including breathing difficulties. Mom dialed 911 seeking assistance while the nurse performed whatever emergency care that she could provide. Girl went into cardiac arrest. Within minutes of the 911 call two Fire Department EMT's arrived in a basic life support (BLS) ambulance. No advanced life support (ALS) ambulance was available at the time. One EMT immediately began performing cardio-pulmonary resuscitation (CPR) on the girl while the other called for an ALS ambulance and then retrieved equipment from the ambulance. At some point, the girl's mother requested that the EMTs transport her daughter to a nearby hospital. The EMT continued to conduct CPR on the girl until paramedics from a private hospital, who arrived in an ALS ambulance, appeared at the scene. The girl survived but suffered serious brain damage and sued, *inter alia*, the City. The City moved for summary judgment on governmental immunity grounds. There were two main issues:

(1) whether the medical services provided by the City's EMT's was a "governmental" or a "proprietary" function. If it was the latter, then no governmental immunity defense could be raised. The City asserted that the provision of 911 referrals and emergency medical service responses were within the traditional responsibilities of municipal government, similar in nature to emergency fire protection services, and thus were a governmental function. Plaintiffs, however, maintained that the governmental function terminated with the arrival of the EMTs at the plaintiff's home, and then a proprietary function arose once emergency medical care was undertaken, since treatment of this nature is generally offered by private parties (e.g., doctors and hospital personnel). The Court here held that the services constituted a governmental function because protecting health and safety is one of municipal government's most important duties, and this responsibility extends to "the duty to provide police protection, fire protection *or ambulance service* " to the general public (same determination the Appellate Division had made). A concurring opinion by two judges (Smith and Pigott) found that the EMTs acted in a proprietary capacity once they began to render medical aid, since their conduct at that point was the same as medical services such as mental health care, obstetrics and surgery, which have been held to constitute "governmental activities that have displaced or supplemented traditionally private enterprises" and thus are of a "proprietary" nature. The majority responded that "EMTs cannot be realistically compared to the proprietary medical professionals whose licensure requires extensive educational and training credentials, and who typically provide services at hospital or medical facilities rather than in the unpredictable community-at-large".

(2) The Court then proceeded to determine the second big issue, i.e., whether the plaintiff had sufficiently established the existence of a special duty — an inquiry that would have been unnecessary if the EMT's services had been deemed a *proprietary* function. Plaintiffs established questions of fact on the applicability of the special duty doctrine, thereby precluded summary judgment for the municipal defendants. The facts at issue were: The girl's mother testified that once she realized the treatment provided by the EMTs would be limited to CPR, she "asked them to please take [her daughter] to Montefiore Hospital right away, because it was only a few minutes away from our house at that time." The EMT apparently continued performing CPR and indicated that he was awaiting the arrival of an ALS ambulance personnel. This presented a question of fact as to whether the EMTs, through their actions or promises, assumed an affirmative duty in deciding to have ALS paramedics undertake more sophisticated medical treatment rather than transporting the child to a hospital. The Court also found there was a fact issue to resolve the "justifiable reliance" element. A fact finder could conclude that it was reasonable for the girl's mother to rely on the EMTs' assurances rather than seek an alternative method for transporting her daughter to the nearby hospital since the child's mother claimed she was not informed it would take about 20 minutes for the ALS ambulance to arrive.

NOTE 1: The Court never addressed whether the emergency responders actions were ministerial or discretionary. If they are later found to be discretionary, suit is barred regardless of whether plaintiffs establish a "special relationship" (*see, McLean v City of NY,* 12 N.Y.3d 194).

NOTE 2: Judges Smith and Pigott, in their concurrence, thought that the services were proprietary, not governmental, and thus that the governmental immunity doctrine did not apply, and that there was thus no need to show a "special relationship" at all. They complained that, under this ruling, private emergency response providers would receive "favored treatment" *vis-à-vis* municipal emergency responders, though both would be performing the same function. They agreed with the outcome of reinstating the complaint, but only so that a trial could be had on the issue of negligence and proximate cause. Judge Abdus-Salaam offered a similar concurring opinion.

NOTE 3: The most important part of this Decision may be FOOTNOTE NUMBER 1. It states "contrary to the parties' arguments, our precedent does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis". This footnote invalidates Appellate Division case law that had held for decades that there was no need for a plaintiff to establish a "special duty" or "special relationship" where the governmental actor's negligence was *active* (misfeasance) rather than merely *passive* (nonfeasance). The footnote validates the First Department's footnote in *Applewhite* in which it stated, "in *McLean*, 12 N.Y.3d 194, 878 N.Y.S.2d 238, 905 N.E.2d 1167, the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function. Accordingly, we will not evaluate this case using a distinction between nonfeasance and misfeasance. We merely distinguish proprietary functions from ministerial functions". The Court of Appeals has now "affirmed" the First Department's footnote. Bottom line: "special duty" will always have to be shown, even in cases of *misfeasance,* for example, where a police officer fires a bullet in a crowded street.

Metz v. State, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (N.Y. 2012). The Ethan Allen was a public vessel operating as a tour boat on Lake George. In 2005, 20 passengers were killed and several others were injured when the boat capsized and sank. The injured passengers and representatives of those who died brought action against the State, alleging that the State was negligent in certifying tour boat to carry more than 14 passengers. As a public vessel, the Ethan Allen had been subject to yearly state inspections, which included certificating the vessel's maximum passenger capacity. At the time the vessel sank, it had been carrying 47 passengers and 1 crew member, within the 48–passenger maximum set forth in the certificate of inspection. The Ethan Allan had at first been a Coast Guard vessel. The Coast Guard had certified it for 48 persons and 2 required crew members, for a total capacity of 50 persons. When it became a tourist vessel in 1979, the State began certifying the ship year after year consistently with the old Coast Guard certification. This was so despite the fact that the Ethan Allen was modified in 1989–replacing its canvas canopy with a heavier canopy made of wood. Meanwhile, Americans were getting heavier. Yet the State never independently retested the passenger capacity in light of these developments; it just "rubber stamped" the old certification year after year. The Third Department had granted plaintiffs' motion to dismiss the State's affirmative defense of governmental immunity based on the State's failure to actually exercise "discretion" in rating the passenger capacity of the ship. It relied on prior Court

of Appeals case law (*see, Haddock v City of New York*) which says that the purpose of the governmental immunity defense is to allow the government to exercise discretion without fear of lawsuits, and thus if the government fails to exercise discretion, the defense is unavailable. Here, the Third Department reasoned, the State had merely "rubber stamped" year after year to old Coast Guard passenger capacity rating, and never exercised the discretion it clearly had to decide whether to make, or not make, an independent study. The Court of Appeals, however, refused to reach the issue of whether discretion was exercised. It pointed out that, in the recent case of *Valdez v. City of New York*, 18 N.Y.3d 69, 80, 936 N.Y.S.2d 587, 960 N.E.2d 356 (2011), it had set the precedent that a plaintiff must "first establish the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity". The Court then found that the State's duty to certify the capacity of the vessel was not a duty owed to the individual plaintiffs, but rather was intended to protect all members of the general public similarly situated, and thus there was no "special duty". As for whether the Navigation Law, which set forth the State's obligations in this regard, was intended to create a private right of action, the Court held this "would be incompatible with the legislative design" since the Navigation Law does not provide for governmental tort liability, but instead for fines and criminal penalties to be imposed upon vessel owners and operators. Case dismissed.

Coleson v. City of New York, 106 A.D.3d 474, 964 N.Y.S.2d (1st Dep't 2013). Plaintiff called police to the apartment when her husband, from whom she had an order of protection, tried to stab her with an ice pick. The husband left the building before police could apprehend him, but later that day, police returned to plaintiff's home and told her they had arrested him. When police took plaintiff to the precinct, she spoke with a police officer who told her that her husband was "going to be in prison for a while." The officer also told plaintiff "not to worry" since "they were going to give her protection." Plaintiff testified that she did not ask for specifics, as she was too nervous. Later that evening, an officer called from the precinct and told her that her husband was in the Bronx County Courthouse "in front of the judge" and that "they were going to sentence him." The officer said that she was going to "keep in contact" with plaintiff, and that "everything was in its process." Nevertheless, the criminal court released the husband on his own recognizance after arraignment. The next day, when plaintiff went to pick up her 7-year old child from school, her husband stabbed her in the back with a knife. Relying on *Valdez* and on *Dinardo* the court found these facts created no special duty toward plaintiff or her son. The statements allegedly made by police officers and other employees of defendants—that plaintiff's husband would spend time in jail, and that the police would provide "protection" of an unspecified nature—were too vague to constitute promises giving rise to a special duty.

Filippo v. New York City Transit Authority, 105 A.D.3d 665, 964 N.Y.S.2d 129 (1st Dep't 2013). Plaintiff police officers were injured in a subway station while a perpetrator struggled to resist their attempt to arrest him. The arrest stemmed from a criminal act that was committed in the street in plaintiffs' presence. The perpetrator fled and was chased by plaintiffs into the subway station. Upon entering the station plaintiffs, who were in plainclothes, displayed their shields and asked the station agent to call for backup support. At the time, the station agent was inside a locked token booth that was equipped with an Emergency Booth Communication System (EBCS) that would have enabled him to summon help by pressing a button or stepping on a pedal. Both plaintiffs were injured when the perpetrator put up a fierce and protracted struggle to resist arrest. The station agent watched the struggle from his token booth and did not activate the EBCS or make any other attempt to summon help. Plaintiffs claimed the station agent's failure to call for help constituted negligence which was a proximate cause of their injuries. The trial court granted the Transit Authority's motion for judgment, finding that the station agent was under no duty to call for any assistance to plaintiffs. The Appellate Division reversed. Public Authorities Law 1212(3) imposes liability upon the Transit Authority for the negligence of its employees in the operation of the subway system. In *Crosland v. New York City Tr. Auth.*, 68 N.Y.2d 165, 506 N.Y.S.2d 670, 498 N.E.2d 143 [1986], the Court of Appeals had held that the Transit Authority could be held liable for the negligent failure of its employees to summon aid as they watched a gang of thugs fatally assault a passenger. The fact that here the victims here were police officers was of no matter.

In re East 91st Street Crane Collapse Litigation, 103 A.D.3d 503, 960 N.Y.S.2d 31 (1st Dep't 2013). In this wrongful death action arising from a crane collapse during construction of a building, the court dismissed the cross claims against the City, as the construction defendants failed to show a special relationship between themselves and the City that gave rise to a special duty. Nothing in the record indicates that the City assumed an affirmative duty, either through promises or acts, to ensure the safety of the crane on the construction defendants' behalf. Rather, the City took steps to ensure the safety of the crane as an exercise of its duty to the general public.

There was also no evidence that the City directed and controlled the subject crane in the face of known, blatant, and dangerous safety violations. Rather, the record showed that at the time the City authorized the crane's operation on the site, it was not aware of the faulty weld condition that caused the accident. Given the absence of a showing of a special duty, the Court refused to reach the issue of whether the City's authorization of the use of the crane was discretionary or ministerial, but noted that it seemed discretionary.

Middleton v. Town of Salina, 108 A.D.2d 1052, --- N.Y.S.2d ---- (4th Dep't 2013). Homeowners brought action against town arising from backup of sewage in their house. Defendant met its burden on the SJ motion showing its duty was to the public at large, and no a special duty to plaintiffs, i.e., there was no "special relationship" established, by submitting evidence establishing that plaintiffs' alleged reliance upon representations allegedly made by defendant's agents was not justifiable. Even assuming, arguendo, that plaintiffs raised a triable issue of fact whether defendant owed a special duty to them, the Court concluded that defendant was engaged in a discretionary governmental function when it allegedly failed to install a check valve or similar anti-backflow device on plaintiffs' sewer line, and thus governmental immunity applied.

Ruiz ex rel. Rodriguez v. City of Buffalo, 100 A.D.3d 1388, 953 N.Y.S.2d 775 (4th Dep't 2012). Plaintiff, by the guardian of her person and property, alleged she suffered injuries as a result of the failure of defendant's Police Department to follow its own ministerial protocol when responding to a 911 telephone call from her roommate providing the information that plaintiff was attempting suicide. The police went to plaintiff's residence but awaited the arrival of she roommate before entering the premises. Plaintiff alleged the delay in entering the premises was a violation of police procedures and this caused or contributed to her injuries. Supreme Court properly granted defendant's motion seeking dismissal of the complaint for failure to state a cause of action based on the absence of a special relationship between plaintiff and the police giving rise to a special duty. The Court rejected plaintiff's argument that the Police Department's failure to comply with its ministerial duties provides a basis for liability despite the absence of a special relationship. As has been made clear by recent Court of Appeals case law, even where there is a ministerial failure directly related to a specific incident, "ministerial acts may support liability only where a special duty is found" (*McLean*). Given that here there was no allegation that plaintiff had *direct contact* (one of the 4 elements of "special relationship") with the police or even that she was aware that the police had been notified, the direct contact requirement of the special relationship test was not satisfied. Case dismissed.

Kirchner v. County of Niagara, 107 A.D.3d 1620, 969 N.Y.S.2d 277 (4th Dep't 2013). In malicious prosecution claim, the defendant Counties and the D.A. argued that plaintiff failed to state a cause of action against them for malicious prosecution because plaintiff did not allege any *special duty* that was owed by them to him. Court here says the "special duty" requirement does not apply to a malicious prosecution cause of action. Further, the defendants were not entitled to absolute prosecutorial immunity. Such immunity only applies "for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process", i.e., conduct that involves initiating a prosecution and in presenting the State's case, but does NOT apply to a prosecutor's investigative work, which was the focus of plaintiff's allegations here. Prosecutors are afforded only *qualified* immunity when acting in an investigative capacity. The Court also rejected defendants contention that their actions were discretionary, and thus that the governmental function immunity defense applied. Court found that the A.D.A.'s alleged coaching a witness to lie could not be deemed "discretionary". That alleged conduct plainly did not involve the exercise of "reasoned judgment which could typically produce different acceptable results".

VIII QUALIFIED IMMUNITY FOR DEFECTIVELY DESIGNED ROADWAYS

Marrow v. State, 105 A.D.3d 1371, 964 N.Y.S.2d 330 (4th Dep't 2013). At trial, plaintiff-motorist sought to establish that another motorist who struck her lost control of her vehicle due to the negligence of defendant in not repaving the entire shoulder of an entrance ramp, which resulted in a 2 1/2-inch drop-off in the middle of the shoulder. Appellate Division held that Court of Claims had erred regarding its ruling on the qualified immunity doctrine. Under the doctrine of qualified immunity, "a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan". Here, defendant did not raise the defense of qualified immunity in its answer to the claim or at trial and, in any event, defendant failed to establish that the decision to armor coat the entrance ramp and only part of the shoulder, rather than to resurface the entrance ramp including the entire shoulder, resulted from any study. Indeed, defendant's expert admitted that there was no "plan" with respect to that decision, and thus defendant failed to establish that the qualified

immunity doctrine was applicable. The court did not disturb, however, the Court of Claim's verdict and finding that the drop-off was not an unreasonably dangerous condition and, further, that the drop-off was not a proximate cause of the accident.

IX PRIOR WRITTEN NOTICE AND OTHER SIDEWALK/STREET LIABILITY ISSUES

A. Prior Written Notice Must Be in Writing and Comply Fully with Prior Written Notice Rule.

Kapilevich v. City of New York, 103 A.D.3d 548, 960 N.Y.S.2d 39 (1st Dep't 2013). The City established its entitlement to judgment where plaintiff tripped and fell on a metal vault cover located within a crosswalk after it suddenly began to shake. The City submitted evidence showing that it did not have prior written notice of the condition (*see,* Administrative Code of City of New York § 7–201[c][2]). In opposition, plaintiff failed to raise a triable issue of fact. Neither the permits issued by the City for the location nor the notice of violation issued by the Department of Environmental Protection for an unspecified failure by nonparty Consolidated Edison to comply with the terms and conditions of a Department of Transportation (DOT) permit provided the City with prior written notice of the loose metal vault cover. A citizen complaint made through its 911 system did not constitute prior written notice since a verbal or telephonic communication to a municipal body that is reduced to writing cannot satisfy the prior written notice requirement.

Hogin v. City of New York, 103 A.D.3d 419, 959 N.Y.S.2d 185 (1st Dep't 2013). In pedestrian trip-and-fall case, the documentation of various complaints made to the Department of Environmental Protection and repairs made by the Department of Transportation did not constitute "written acknowledgment" of the alleged sinkhole condition that caused plaintiff's fall (Administrative Code of City of N.Y. § 7–210[c][2]; *see Bruni v. City of New York*, 2 N.Y.3d 319, 778 N.Y.S.2d 757, 811 N.E.2d 19 [2004]). Only one of the documents referred to a sinkhole, but that document did not demonstrate that the City "had knowledge of the condition and the danger it presented". Indeed, it stated that the inspectors found no such condition. Moreover, the record was devoid of evidence that the City caused or created the condition by an affirmative act of negligence.

B. Issues Regarding Maintenance of Prior Written Notice Records.

Abramo v. City of Mount Vernon, 103 A.D.3d 760, 959 N.Y.S.2d 725 (2nd Dep't 2013). The City defendants failed to meet their prima facie burden based on the prior written notice law, section 265 of the Charter of the City of Mount Vernon. The City defendants' submission of sworn deposition testimony that arguably demonstrated that the City may not have maintained records of snow and ice complaints, as required by GML 50-g, raised a triable issue of fact. Motion to dismiss complaint thus denied.

Palo v. Town of Fallsburg, 101 A.D.3d 1400, 956 N.Y.S.2d 648 (3rd Dep't 2012). Motorist who lost control of car and skidded off road brought action against town, claiming that it negligently designed, maintained, controlled, engineered, and inspected the roadway. Town moved for summary judgment. Defendant satisfied its evidentiary burden by submitting the affidavits of its Town Clerk and Superintendent of Highways, who both averred that, after a review of the pertinent records, written notice of the alleged defective or dangerous condition on the roadway in question had not been received. The Court rejected plaintiff's contention that the failure of the Highway Department to issue written reports based upon its own routine inspection of defendant's roadways rendered the prior written notice statute null and void.

Betz v. Town of Huntington, 106 A.D.3d 1041, 966 N.Y.S.2d 471 (2nd Dep't 2013). Plaintiff tripped and fell over a defect in the defendant Town's parking lot. The defendant had adopted a prior written notice law, stating that written notices must be submitted to the *Town Clerk* or the *Town Superintendent of Highways*. Defendant failed to demonstrate its prima facie entitlement to judgment on the ground that it had no prior written notice of the alleged defect in the parking lot. In support of its motion, defendant submitted the deposition testimony of its deputy director of the *Department of General Services* and an affidavit from its *deputy comptroller*. However, neither of those individuals averred that they had specifically searched the records maintained by the Town Clerk and the Town Superintendent of Highways to determine whether the defendant had prior written notice of the defect at issue. Accordingly, the burden never shifted to the plaintiff to raise a triable issue of fact. Motion denied.

Chirco v. City of Long Beach, 106 A.D.3d 941, 966 N.Y.S.2d 450 (2nd Dep't 2013). Pedestrian was walking on the boardwalk when her foot became caught in a gap between the wooden slats. The evidence regarding six previous notices of claim failed to raise a triable issue as to whether the City had prior written notice of the alleged dangerous condition which caused plaintiff to fall, because those notices of claim involved conditions on different portions of the boardwalk some distance from the alleged dangerous condition which caused this fall. The records of the City's Police Department and Beach Maintenance Department did not raise a triable issue, since the City code required the filing of written notice with the City's Commissioner of Public Works.

C. Prior Written Notice Requirement Applies Only to sidewalks, streets, highways, crosswalk, culverts, bridges.

Hall v. City Fence, Inc., 36 Misc.3d 1237, 960 N.Y.S.2d 50 (Erie Co. Sup. Ct. 2012). Plaintiff tripped over a defect in fencing that jutted out into a path in a "dog park", which was part of a City park. Court found that "it is clear that the City's written notice of defect provision is invalid to the extent that it purports to extend the reach of the provision beyond a conventional sidewalk or its functional equivalent, i.e., to an "unimproved trail 'or path' " in a City-owned park". The area where she fell was not of cement or paved, but rather grassy and unimproved and thus not a "sidewalk". The fact that the path passed through a City-made "gateway" does not make it the functional equivalent of a "sidewalk". Thus, no prior written notice required, and defense's motion to dismiss for lack of prior written notice denied.

Mellor v. Village of Elmsford, 101 A.D.3d 1092, 956 N.Y.S.2d 540 (2nd Dep't 2012). The plaintiff fell as he stepped off a sidewalk into a roadway and tripped over an allegedly defective curb. The prior written notice requirement of Village Law § 6–628 was applicable to the curb, which was deemed part of sidewalk. On its motion for summary judgment, the defendant established it did not receive prior written notice of the alleged defect. Case dismissed.

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

Hawley v. Town of Ovid, 108 A.D.3d 1034, --- N.Y.S.2d ---- (4th Dep't 2013). Child-plaintiff who fell off bicycle while cycling onto a bridge, from a road, alleged, inter alia, that Town created the dangerous and/or unsafe condition consisting of a gap between the roadway and the steel deck bridge. There was no prior written notice. Plaintiff alleged Town affirmatively created the defect. Plaintiff's expert stated by affidavit that there was a small gap in the expansion joint that had become "dangerously large due to gradual deterioration," and that the "crumbling has gradually occurred over years and is not a recent sudden failure." He also pointed out that defendant hired a contractor to apply a "cold mix pave" for six-tenths of a mile, starting at the bridge. After the job was completed, defendant's representative told the contractor that there was not enough crown in the road, so the contractor came back and applied a "one-inch overlay with a crown in it." To avoid any "lump/bump" next to the bridge, the contractor applied the overlay starting a little further back from the bridge. The majority found a question of fact as to whether the Town created the defect (apparently, majority felt it made the gap *worse*). The dissent would have dismissed the complaint because, in its view, the repaving project did not create the gap in the bridge; it merely *failed to fix* the gap, but did not make it worse.

Miller v. Village of East Hampton, 98 A.D.3d 1007, 951 N.Y.S.2d 171 (2nd Dep't 2012). Here, plaintiff alleged in her notice of claim, complaint, and bill of particulars that the defendant affirmatively created the dangerous condition which caused the accident through various specified acts of negligence in the design and construction of the sidewalk, the lighting, and the landscaping. Defendant was required to eliminate all triable issues of fact as to whether it affirmatively created the alleged dangerous condition through negligent design and construction to sustain its prima facie burden. Since the defendant failed to do so, the Supreme Court properly denied its motion for summary judgment without regard to the sufficiency of the plaintiff's opposition papers.

Masotto v. Village of Lindenhurst, 100 A.D.3d 718, 954 N.Y.S.2d 557 (2nd Dep't 2012). Plaintiff slipped and fell in a municipal parking lot owned by the defendant. Defendant established its prima facie entitlement to judgment by demonstrating that it did not receive prior written notice of the frozen snow plow track upon which the plaintiff allegedly slipped and fell, as required by section 116–1 of the Code of the Village of Lindenhurst, and that it did not create the dangerous condition through an affirmative act of negligence. In opposition, the plaintiff failed to raise a triable issue of fact. Her reliance on *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 919

N.Y.S.2d 459, 944 N.E.2d 1098 was misplaced. In contrast to the situation presented in *San Marco*, there was no evidence that the defendant's snow removal efforts created any new, dangerous condition. The frozen snow plow track upon which the plaintiff allegedly fell was not caused by the defendant's method of snow clearance, but was simply a remnant left by the snow removal machinery during the plowing operations. Moreover, the alleged failure by the defendant to remove every bit of snow and ice from the parking lot was not actionable as a municipality's failure to remove all snow and ice from a parking lot is passive in nature and does not constitute an affirmative act of negligence excepting it from prior written notice requirements.

Romano v. Village of Mamaroneck, 100 A.D.3d 854, 954 N.Y.S.2d 593 (2nd Dep't 2012). Plaintiff tripped and fell over a tire mud flap that was depressed into the roadway of a parking space in the Village of Mamaroneck. The Village showed it did not receive prior written notice of the condition complained of in the roadway where the plaintiff fell, as required by Village Law § 6–628, and that it did not create the alleged dangerous condition through an affirmative act of negligence.

Carlucci v. Village of Scarsdale, 104 A.D.3d 797, 961 N.Y.S.2d 318 (2nd Dep't 2013). The plaintiff's pleadings alleged that the defendant affirmatively created the dangerous condition that caused the accident through negligence in the design and construction of the sidewalk. The defendant was required to eliminate all triable issues of fact as to whether it affirmatively created the alleged dangerous condition through negligent design and construction to sustain its prima facie burden. The defendant failed to do so.

Wiles v. City of Schenectady, 103 A.D.3d 1061, 962 N.Y.S.2d 427 (3rd Dep't 2013).
Pedestrian brought action against city and its contractors alleging that its negligence caused a defective road condition, a depression in the pavement, that caused her to fall and sustain injuries. Plaintiff did not contest the lack of prior written notice or argue any special use, but argued they performed an affirmative negligent act resulting in the creation of the defective condition. Plaintiff claimed the depression was caused when defendants replaced a gas line a few years before. However, in support of their successful motions, defendants presented unrefuted evidence that the work was not performed at the location where plaintiff fell.

Crew v. Town of Beekman, 105 A.D.3d 799, 962 N.Y.S.2d 677 (2nd Dep't 2013).
Town established its prima facie entitlement to judgment dismissing the complaint by submitting proof that the notice of claim made no allegations that the Town defectively designed or negligently constructed the roadway where the accident occurred. In opposition to this showing, the plaintiffs failed to raise a triable issue of fact. In addition, to the extent that the notice of claim alleged the existence of a dangerous condition that was not created by the Town, the Town nevertheless established that it had no prior written notice of any alleged defect in the roadway, as is required by the Town Code (*see* Code of Town of Beekman § 109–1). In opposition, the plaintiffs failed to raise a triable issue of fact.

Giaquinto v. Town of Hempstead, 106 A.D.3d 1049, 968 N.Y.S.2d 506 (2nd Dep't 2013). Plaintiff stepped on a catch basin cover on a sidewalk near her home. The cover dislodged, and the plaintiff fell into the catch basin. She sued the Town, claiming it created the defect by installing an inadequate cover, or a cover of the wrong size, on the catch basin. The Town moved for summary judgment on no prior written notice grounds. Court notes that the plaintiff clearly alleged in her pleadings that the defect was affirmatively created, i.e., that the Town's construction of the catch basin was faulty in that an inadequate cover was installed on the catch basin. Consequently, the Town was required to address that issue satisfactorily as part of its initial burden on its motion for summary judgment, which it failed to do. Motion denied.

E. Affirmative Act of Negligence Must "Immediately Result" in Defect

Laracuente v. City of New York, 104 A.D.3d 822, 961 N.Y.S.2d 527 (2nd Dep't 2013). To get past the prior written notice rule, the plaintiff alleged the City had affirmatively created a dangerous condition consisting of a curved section of fence erected alongside the roadway that was a proximate cause of her getting hit by a car as she crossed the roadway. Plaintiff's problem was that the fence was not defective when installed, but became a problem over time. Recent Court of Appeals case law says that, to allege affirmative creation of a dangerous condition, you must show that the danger was "immediately apparent" upon creation. That was not the case here, so plaintiff's case was dismissed.

Smith v. City of Mount Vernon, 101 A.D.3d 847, 955 N.Y.S.2d 635 (2nd Dep't 2012). In trip-over-flag-stone case, defendant showed no prior written notice, and any testimony by plaintiff's expert that the crack could have been caused over time by water erosion and the application of salt to the sidewalk following snowstorms was speculative and did not raise a triable issue of fact as to whether the City affirmatively caused the defect that was immediately apparent, thereby triggering the affirmative negligence exception. Case dismissed.

Christy v. City of Niagara Falls, 103 A.D.3d 1234, 959 N.Y.S.2d 581 (4th Dep't 2013). Plaintiff was thrown from his motorcycle upon hitting a pothole. Even assuming, arguendo, that defendant "performed a negligent pothole repair" by failing to apply a tack coat over brick and steel rails, the defective nature of the repair was dependent upon the passage of time, and thus the defect would not have been immediately apparent. Case dismissed.

Duffel v. City of Syracuse, 103 A.D.3d 1235, 958 N.Y.S.2d 916 (4th Dep't 2013). Plaintiff tripped and fell on the edge of a tree grate that had sunk or collapsed 1/2-inch below the surrounding sidewalk. Defendant met its initial burden by establishing that the tree grate was part of the sidewalk for purposes of the prior written notice requirement and that it did not have prior written notice of the alleged defect. As for the allegation that the City affirmatively created the defect, plaintiff failed to show that the depression was present immediately after installation of the tree grate.

F. Abutting Landowner Liability for Sidewalk Defects

David v. Chong Sun Lee, 106 A.D.3d 1044, 967 N.Y.S.2d 80 (2nd Dep't 2013). Plaintiff slipped and fell on snow and ice on the sidewalk abutting a vacant restaurant owned by the defendant. The defendant established his prima facie entitlement to judgment by demonstrating, through the plaintiff's deposition testimony, that when she fell there were several inches of snow on the ground and that the sidewalk abutting the restaurant had not been shoveled at all, that he did not engage in snow removal activities which created or exacerbated any dangerous condition. The plaintiff's contention that the defendant created the alleged icy condition by negligently piling snow on the sidewalk, which then melted and refroze over the area in which she fell, was not supported by any evidence other than the conclusory and speculative assertions of an eyewitness to the accident who had been walking behind her when she fell.

Morelli v. Starbucks Corp., 107 A.D.3d 963, 968 N.Y.S.2d 542 (2nd Dep't 2013). The plaintiff allegedly sustained injuries when she tripped and fell on defective brickwork in a tree well while walking on a public sidewalk in the City of Rye, New York. The tree well was located in front of a store owned by the defendant First Dixon Realty, LLC and leased by the defendant Starbucks Corporation. Starbucks and First Dixon got out on summary judgment by showing they did not create the alleged defect in the brickwork, did not cause it to occur because of a special use, and did not violate a statute or ordinance which expressly imposed liability upon them for failing to maintain the subject tree well. The City's motion was denied, however, because it failed to make a prima facie showing that it did not have constructive notice of the alleged defect (The City's contentions regarding its prior written notice statute somehow were not properly before the Court and thus the Court refused to address them) or that it did not create the defect.

G. Big Apple Map Notice

Silverio v. City of New York, 100 A.D.3d 543, 954 N.Y.S.2d 517 (1st Dep't 2012). Dismissal of the complaint was warranted since plaintiff failed to demonstrate that defendant had received prior written notice of the sidewalk defect that allegedly caused plaintiff's fall and resultant injuries (*see* Administrative Code § 7–201[c]). The violation notices cited by plaintiff, dated 15 and 28 years before the accident, were too remote in time, and were superseded by a Big Apple map filed in 2001, which failed to depict any defect. Moreover, the notices relied upon by plaintiff failed to specify the defective condition, and indicated that they related to an address other than the location of the defect referred to by plaintiff in his notice of claim, complaint and testimony.

O'Donoghue v. City of New York, 100 A.D.3d 402, 953 N.Y.S.2d 494 (1st Dep't 2012). In opposition to the City's showing of entitlement to judgment as a matter of law, plaintiff submitted, inter alia, a Big Apple map to prove that the City had notice of the allegedly defective condition. However, the map only provided notice that every tree well on the block lacked a fence or barrier, which was not sufficient to bring the particular tree well defect to the City's attention.

Vega v. 103 Thayer Street, LLC, 105 A.D.3d 405, 961 N.Y.S.2d 467 (1st Dep't 2013). Pedestrian tripped and fell as a result of a hole on a pedestrian ramp located at the northeast corner of Broadway and Thayer Street. The City moved for summary judgment on the ground that plaintiff could not prove prior written notice to the City as required under Administrative Code of the City of New York § 7–201(c)(2) because the Big Apple map received by the Department of Transportation on October 23, 2003 did not indicate the specific marking (a circle) for a "hole or other hazardous depression" at the location of the accident. The majority found that the City failed to make a prima facie showing of entitlement to judgment as a matter of law because the markings on the Big Apple map it submitted raised an issue of fact as to whether it had prior written notice of the alleged defect. Dissent says that, as a matter of law, the ambiguous symbol depicted at the location of the accident did not give the City notice of the defect which caused plaintiff to trip and fall.

Yousef v. Kyong Jae Lee, 103 A.D.3d 542, 959 N.Y.S.2d 440 (1st Dep't 2013). The City failed to demonstrate an absence of prior written notice of the alleged defective condition of the curb. The Big Apple map submitted by the City included symbols reflecting an "extended section of broken, misaligned, or uneven curb," and an "extended section of raised or uneven sidewalk" in the area where plaintiff allegedly fell, and the City did not submit any evidence explaining the symbols on the map. "Factual disputes as to whether the map gave notice of the particular defect that caused the accident are for a jury".

Mora v. City of New York, 103 A.D.3d 610, 959 N.Y.S.2d 264 (2nd Dep't 2013). City moved for SJ claiming the map filed by Big Apple for the area where the plaintiff fell did not provide it with prior written notice of the alleged defect. The plaintiff alleged that she fell as a result of tripping over raised cobblestones in the sidewalk area in front of 4504 Fifth Avenue in Brooklyn. The Big Apple map filed with the DOT included a notation indicating a "raised or uneven portion of the sidewalk" in the vicinity where the plaintiff alleged she fell. Whether or not the sidewalk defect which plaintiff claims caused her to fall was depicted on the Big Apple map presented an issue of fact for the jury.

H. Special Use Exception

D'Antuono v. Village of Saugerties, 101 A.D.3d 1331, 956 N.Y.S.2d 264 (3rd Dep't 2012). Plaintiff was injured when he slipped while attempting to traverse a snow bank to insert money into a parking meter owned by defendant Village. Plaintiff fell backward into the street, resulting in various injuries, including a fractured vertebra. It was undisputed that the Village did not receive written notice of the dangerous condition, as required by Village Law § 6–628. Plaintiffs argued, however, that questions of fact exist regarding the applicability of the two exceptions to the statutory rule, i.e., "affirmatively created" and that a "special use" conferred a benefit on the municipality. As for "affirmatively created", plaintiffs failed to submit any evidence demonstrating that the Village recently plowed the area or performed any other activity that created the dangerous condition. As for "special use", the Village did not derive a special benefit from that property unrelated to the public use, and thus the special use exception did not apply. Case dismissed.

I. Primary Assumption of Risk in Sidewalk/Street Cases

Custodi v. Town of Amherst., 20 N.Y.3d 83, 980 N.E.2d 933, 957 N.Y.S.2d 268 (2012). The doctrine of primary assumption of the risk did not preclude the negligence claim by an experienced rollerblader against the Town and a private homeowner. One of plaintiff's skates struck a two-inch height differential where the edge of the homeowner's driveway met a drainage culvert that ran the length of the street causing plaintiff to fall. Court noted that in general, the application of the doctrine should be limited to cases arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues. No exception to that general principle was warranted under the facts of this case. Plaintiff was not rollerblading at a rink, a skating park, or in a competition. Nor did defendants actively sponsor or promote the activity in question. Moreover, extension of the doctrine of primary assumption of the risk to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners, both public and private, to maintain their premises in a reasonably safe condition. The exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed inherent risks assumed by non-pedestrians who sustain injuries, whether they be joggers, runners, bicyclists or rollerbladers.

J. Article 16 Apportionment between Municipal Defendant and Abutting Owner

Belmer v. HHM Associates, Inc., 101 A.D.3d 526, 957 N.Y.S.2d 16 (1st Dep't 2012). The tire of a bus plaintiff was driving rolled into a large hole in a roadway. Plaintiff sued a commercial contractor who had contracted with the nonparty (never sued) City of New York to replace sewer mains along a stretch of roadway that included the site of the accident. The project entailed excavating and restoring the roadway. According to the City's consulting engineer, the roadway had been restored with temporary asphalt when the accident occurred. Plaintiff's theory at trial was that the commercial contractor defendant had left the hole in the roadway while performing its work. Defendant sought Article 16 apportionment with the nonparty City. There was evidence of constructive notice on the part of the City. Plaintiff had testified that the hole was there for at least one month prior to the accident. The Court noted that the City was under a nondelegable duty to maintain its streets in a reasonably safe condition. "That duty remains fixed even if a dangerous street condition that causes injury is created by an independent contractor". In light of the City's nondelegable duty, the Court was not persuaded by plaintiff's argument that there was no evidence of a failure by the City to exercise reasonable care. The majority found the defendant contractor had a right to Article 16 apportionment vis-à-vis the City's alleged negligence. The dissent disagreed, finding that "the statutory language [of article 16] clearly indicates that the Legislature did not intend apportionment to be predicated on obligations that are ... nondelegable." The majority, however, felt that where, as here, an independent contractor *is not responsible to third parties for the tortious acts of its principal* (the City) a defendant may seek apportionment under Article 16. Further, the majority found that the prior written notice law (Administrative Code of the City of New York § 7–201[c] [2]) does not bear upon the independent contractor's right to have a jury determine the City's relative culpability under CPLR 1601. By its own terms, the prior written notice law is limited in application to actions "maintained against the city". The prior written notice law is therefore inapplicable where, as here, the City was not even a party to this action.

X NEW YORK CITY SIDEWALK LAW

A. What is a "Sidewalk" or a "Street"?

Stoloyvitskaya v. Dennis Boardwalk, LLC, 101 A.D.3d 1106, 956 N.Y.S.2d 525 (2nd Dep't 2012). Plaintiff tripped and fell over a defective condition on a boardwalk. Abutting commercial defendant moved for summary judgment dismissing the complaint insofar as asserted against it, contending that it had no duty to maintain the **boardwalk** abutting its premises since it **was not a sidewalk** within the meaning of the Administrative Code of the City of New York §7-210 (*see* Administrative Code of City of N.Y. §7-210). Although section 7-210 of the Administrative Code does not define the term "sidewalk," section 19–101(d) of the Administrative Code describes a sidewalk as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." The boardwalk at issue did not abut a roadway, and thus this defendant established, prima facie, that the subject boardwalk was not a sidewalk within the meaning of section7-210 of the Administrative Code. In opposition, the plaintiff failed to raise a triable issue of fact.

James v. 1620 Westchester Ave., LLC, 105 A.D.3d 1, 962 N.Y.S.2d 4 (1st Dep't 2013). The definition of the term "sidewalk" in section 19–101(d) here required denial of defendants' motion for summary judgment. According to plaintiff, the accident took place between the curb line of Morrison Avenue and the adjacent property line of defendants' building. This location fits squarely within the definition of sidewalk contained in section 19–101(d).. Although not raised by defendants, there is no question that this paved section of the sidewalk was "intended for the use of pedestrians" (Administrative Code § 19–101[d]). In disclaiming liability under section 7-210, defendants argued that the part of the sidewalk where plaintiff allegedly fell did not abut their property, but rather abutted the unpaved grassy area, which defendants characterized as a separate "parcel of land" and a "park area." Defendants' use of these terms to describe the grassy area was unsupported by the record. The undisputed evidence established that, although under the ownership of the City, no separate tax lot was assigned to this area. Nor was there any evidence that the grassy area was ever designated as a park. Liability under section 7-210 should not fail to attach merely because there is an unpaved area of grass, not comprising a separate lot of property, between the location of the accident and defendants' abutting property. Court noted that defendants' view, if accepted, would lead to absurd, and unintended, results. If a plaintiff were to fall on one side of a grassy area (or tree well, for that matter) in a public sidewalk, liability would attach to the adjacent property owner. On

the other hand, if the plaintiff were to fall on the other side, the City would be liable. Such a result would be inconsistent with the purposes behind enactment of section7-210.

Yousef v. Kyong Jae Lee, 103 A.D.3d 542, 959 N.Y.S.2d 440 (1st Dep't 2013). Triable issues of fact existed where plaintiff tripped and fell in a hole on the "edge" of the sidewalk and identified on a photograph as a condition located between the sidewalk and the curb. While the City may not be liable to plaintiff if he was injured as the result of a dangerous condition in the **sidewalk** abutting the owners' property (*see* Administrative Code of City of N.Y. § 7–210 [C]), it may be liable if the accident resulted from a dangerous condition of the **curb**.

Georgescu v. City of New York, 107 A.D.3d 946, 968 N.Y.S.2d 159 (2nd Dep't 2013). Plaintiff's foot and leg slid between edge of sewer grate and sidewalk. The jury found that the City of New York had not received prior written notice of the condition which caused the plaintiff's accident. The plaintiff on appeal contended that the Court improperly instructed the jury on the issues of notice and liability. In essence, the plaintiff argued that the Supreme Court failed to instruct the jury that the word "**street**," as defined in Administrative Code of the City of New York § 7–201(c)(1)(a), includes the "**curb**" and, therefore, the jury was misled as to the allegedly defective condition that caused the plaintiff's accident and was hindered in its ability to determine whether the City received prior written notice of such condition. The Court disagreed with plaintiff's argument, and found that the charge was sufficient, when read as a whole, to convey the correct legal principles to the jury and that the charge was not misleading, and did not hinder the jury's ability to determine whether the plaintiff's fall was caused by a section of missing curb of which the City received prior written notice through the filing of a map prepared by the Big Apple Pothole & Sidewalk Protection Committee, or a defective sewer grate which was not depicted on the subject map.

B. Abutting "Owner" Liability

Fayolle v. East West Manhattan Portfolio L.P., 108 A.D.3d 476, --- N.Y.S.2d ---- (1st Dep't 2013). Plaintiff tripped and fell on a sidewalk located in front of a condominium building owned by defendant Gallery House Condominium. The court dismissed the action against defendant East West Manhattan Portfolio L.P., the owner of the first floor commercial unit, because it is not an "**owner**" within the meaning of Administrative Code of the City of New York § 7-210 and owed no other duty to maintain the sidewalk. Moreover, the condominium declaration and bylaws limit the commercial unit owner's interest to the interior of the building and place responsibility for the common elements with the condominium's board, which maintained the sidewalk. The court also properly found that the alleged defect—a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs—was "trivial" and therefore non-actionable as a matter of law. Unlike in *Young v. City of New York* (250 A.D.2d 383 [1st Dept 1998]), the defect here is not alleged to have run along the full width of the sidewalk. The dissent found an issue of fact as to whether the defect was trivial. It pointed out that the conditions of the sidewalk appeared to constitute violations of sections 7-210 and 19–113 of the Administrative Code of the City of New York and section 2–09 of Title 34 of the Rules of City of New York Department of Transportation (34 RCNY 2–09), as well as New York City Department of Transportation Specifications.

Adamson v. City of New York, 104 A.D.3d 533, 961 N.Y.S.2d 402 (1st Dep't 2013). The owner of the property abutting the sidewalk, and not the City, was responsible for maintaining the sidewalk under New York City Administrative Code § 7–210, and thus City was granted summary judgment. In any event, the record showed that the City did not have prior written notice of the defective sidewalk condition, as required by Administrative Code § 7–201[c][2], and there was no special use exception applied to overcome the prior written notice requirement.

O'Brien v. Prestige Bay Plaza Development Corp., 103 A.D.3d 428, 959 N.Y.S.2d 193 (1st Dep't 2013). Pedestrian tripped and fell over piece of metal on edge of curb cut adjacent to sidewalk in front of a shopping plaza. The commercial tenant of the shopping center was not an abutting "landowner", but merely a tenant, and thus had no statutory obligation to maintain the public sidewalk adjacent to its store (Administrative Code of the City of New York § 7–210). Further, under the terms of the lease, the commercial tenant has no obligation to maintain the sidewalk. Even if it were shown that the tenant constructed the subject sidewalk after entering into the lease, there was no evidence that the construction was negligently performed, or that the defect that caused plaintiff's accident 8 to 10 years later resulted from such construction rather than the effects of the passage of

time. Nor was the tenant liable under a special use theory, since it made no special use of the public sidewalk, and there is no evidence that the alleged defect was caused by its use of the sidewalk.

Weinberg v. 2345 Ocean Associates, LLC, 108 A.D.2d 524, 968 N.Y.S.2d 551 (2nd Dep't 2013). The plaintiff was riding his bicycle at night on a sidewalk abutting a building owned and managed by the defendants when he was caused to fall off his bike. He testified at deposition that there were garbage bags and other debris, including wood, at the curb and on the sidewalk in front of the subject building. He claimed that his bicycle struck a piece of wood that allegedly extended out from the garbage bags and covered most of the sidewalk. The building's superintendent testified that the building's trash compactor was not functional. Tenants disposed of garbage in a chute, and the building's porter removed it and put it in black plastic bags. In addition, old kitchen cabinets were sometimes broken up before being removed from the building and placed on the sidewalk by the porter. The defendants failed to establish their entitlement to judgment as a matter of law. They failed to demonstrate that they did not create a dangerous condition, nor did they establish that they properly maintained the sidewalk as required by Administrative Code of the City of N.Y. § 7-210.

C. Exception for "One, Two, Or Three Family Residential Real Property that is ... Owner Occupied"

Cuapio v. Skrodzki, 106 A.D.3d 769, 966 N.Y.S.2d 438 (2nd Dep't 2013). Since the defendants' property, a two-family house, was owner-occupied and used exclusively for residential purposes, the defendants were exempt from liability imposed pursuant to Administrative Code of the City of New York § 7-210 (b) for negligent failure to remove snow and ice from the sidewalk. Thus, the defendants may be held liable for a hazardous snow and ice condition on the sidewalk only if they undertook snow and ice removal efforts that made the naturally occurring condition more hazardous or caused the defect to occur because of a special use. The defendants established that their snow removal efforts on the night before the accident did not create or increase an existing hazard. Case dismissed.

Crawford v. City of New York, 98 A.D.3d 935, 950 N.Y.S.2d 743 (2nd Dep't 2012). Plaintiff tripped and fell over a defect while walking on the sidewalk abutting premises located in Staten Island which were owned by defendant homeowner. In the vicinity of the location where the plaintiff fell was a "curb valve" located at the edge of the homeowner's front lawn. The curb valve was owned by National Grid. Homeowner moved for SJ because he did not cause the defect and did not own, install, or repair the curb valve, and further he did not own the sidewalk. In support of his motion, he submitted the plaintiff's notice of claim, verified complaint, and verified bill of particulars, in which she alleged that the accident occurred while she was traversing the public sidewalk in front of the homeowner's premises and, thus, not on his premises. Appellate Court agrees with him and dismisses all claims against defendant homeowner.

D. Special Use

Doyley v. Steiner, 107 A.D.3d 517, 967 N.Y.S.2d 704 (1st Dep't 2013). Defendant property owners failed to establish, as a matter of law, that they had no duty to maintain the electrical shunts that defendant Con Edison placed across the sidewalk in front of their property to provide emergency power for the tenants residing there. There was an issue of fact exists whether such equipment constituted a special use of the sidewalk that created a duty of care on the part of the property owner. The property owners offered no support for their theory that the shunts on which plaintiff allegedly tripped constituted "electrical equipment," and so failed to carry their burden of establishing that they were prohibited from working within three feet of them, or otherwise "interfering" with them. Further, the record was devoid of any evidence that the property owners would have had to access "electrical equipment" to make safe the tripping hazard posed by the shunts. Plaintiff alleged only that a protective board or other device covering up the shunts was required. In any event, even if a shunt was "electrical equipment," nothing in the rules appears to prohibit the property owners from taking steps to warn pedestrians about the hazard. Court also rejected the property owners' argument that, even if they had control over the shunts, they had no duty to maintain the condition, pursuant to section 7-210 of the Administrative Code of the City of New York. That section states that "[f]ailure to maintain [a] sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk." The tripping hazard posed by electrical shunts traversing a sidewalk implicates the Administrative Code and the

property owners had a nondelegable duty to keep the sidewalk safe. The dissent was not persuaded by the majority's arguments, and would have granted defendants summary judgment.

XI EMERGENCY VEHICLES (V&T Law 1104)

A. Must Be Engaged in One of the Categories of Conduct Listed in V&T Law 1104(b)

Starkman v. City of Long Beach, 106 A.D.3d 1076, 965 N.Y.S.2d 609 (2nd Dep't 2013).The defendant police officer was patrolling the beach at noon in his patrol car when his vehicle struck the plaintiff, who was lying on the beach in a beach chair. At his deposition, the officer testified that, on the day of the accident, he noted that the beach was crowded. He saw people gathering on the boardwalk, pointing to the water and shouting. He drove toward them, and then toward the water to see "what was happening, if there was an emergency," at a speed of between five and seven miles per hour, and struck the plaintiff. He acknowledged that when he struck the plaintiff he was "not aware of any emergency situation that needed to be addressed." When he struck the plaintiff, he felt the vehicle "go over what appeared to be a bump," and saw the plaintiff for the first time when he looked in his rear view mirror. On these facts, defendants asserted a V&T 1104 defense and an emergency doctrine defense. The plaintiff moved for summary judgment, inter alia, dismissing these defenses. The court dismissed the V&T 1104(b) defense because the officer's negligence — the failure to see that which was there to be seen—was not conduct specified in that statute as exempt from the rules of the road. Accordingly, his conduct was governed by the principles of ordinary negligence. Further, since the officer admitted at deposition that at the time he struck the plaintiff, he was "not aware of any emergency situation that needed to be addressed," the common-law emergency doctrine was not applicable. Accordingly, the emergency doctrine defense was dismissed. Finally, on these facts, where defendant admitted he did not see the plaintiff until he had run over her in plain daylight, plaintiff was entitled to summary judgment on liability as well.

B. What Constitutes "Reckless Disregard"?

Rodriguez v. City of New York, 105 A.D.3d 623, 963 N.Y.S.2d 640 (1st Dep't 2013). Police officer put on his siren and lights to pursue what appeared to be an underage driver. The suspect eventually took a left hand turn, lost control of the car, and hit some pedestrians (plaintiffs), who were injured. V&T 1104 was triggered because the officer was pursuing an actual or suspected violator of the law, i.e., an 'emergency operation' under V&T § 114–b, and passed through a red light. The question thus was whether the officer's conduct was reckless. Plaintiff alleged that the officer was traveling too fast on an icy road and that this caused the suspect being pursued to do the same, and thus to lose control and strike the plaintiffs. A witness' statement that the fleeing suspect's car made the left turn at 50 miles per hour was insufficient to raise an issue of fact as to whether the officer was driving at the same speed during the pursuit. Summary judgment granted to defendant.

Miller v. Suffolk County Police Dept., 105 A.D.3d 918, 962 N.Y.S.2d 708 (2nd Dep't 2013). The defendant police officer was responding to an emergency call so that V&T 1104 was implicated, but here plaintiff raised a triable issue of fact as to reckless disregard. There was an issue as to whether the siren and emergency lights on the police officer's vehicle were activated and whether the vehicle slowed down prior to entering the intersection at which the collision occurred. But what really may have created the question of fact was the officer's admission at deposition that he looked to the right rather than the left—the direction from which the plaintiff's vehicle was approaching—before entering the subject intersection as he passed the stop sign without stopping.

Frezzell v. City of New York, 105 A.D.3d 620, 963 N.Y.S.2d 637 (1st Dep't 2013). City police officer, who was injured following collision between his police car and another police car driving the wrong way on a one-way street during an emergency operation, sued City and fellow officer. Defendants established on SJ motion that fellow officer did not act in "reckless disregard for the safety of others" while operating his vehicle in the wrong direction on a one-way street. The vehicle's emergency lights and siren had been activated prior to the accident, the officer reduced his speed before turning onto the one-way street, and he veered to his right in an attempt to avoid impact. In opposition to the motion, plaintiff failed to raise a triable issue of fact. There was no evidence, according to the majority, that the fellow officer's view of traffic was obstructed. The fact that his siren was not on constantly, according to the majority, did not rise to the level of conduct required to meet the "reckless disregard" standard. Plaintiff's testimony that the officer was driving at a "high" rate of speed, which plaintiff was admittedly unable to estimate, was conclusory and speculative. Dissent disagreed, finding that "a jury could

certainly find that entry into a one-way street in disregard of the traffic signal, in the absence of lights and siren and in the presence of an obstructing truck, when other units were already in pursuit of the suspect and defendant had undertaken on his own initiative to pursue the chase, constituted reckless disregard".

Connelly v. City of Syracuse, 103 A.D.3d 1242, 959 N.Y.S.2d 779 (4th Dep't 2013). Bicyclist collided at intersection with police vehicle. Plaintiff moved for partial summary judgment on liability, i.e., negligence and serious injury, and apportionment of fault, and defendants cross-moved for summary judgment dismissing the complaint on the ground that they were afforded qualified immunity by Vehicle and Traffic Law § 1104(e). At the time of the collision, defendant officer was pursuing two motorcyclists who had committed traffic violations in his presence and was therefore operating an authorized emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 114–b) but there was an issue of fact whether defendant officer acted with reckless disregard for the safety of others by entering a limited-visibility intersection controlled by a four-way stop sign shortly before midnight without slowing, stopping, or activating his emergency lights or sirens.

XII SCHOOL LIABILITY

A. Sports Injuries

Corona v. City of New York, 100 A.D.3d 541, 954 N.Y.S.2d 92 (1st Dep't 2012). Plaintiff was injured while participating in a recreational softball game. As plaintiff was running, he stepped in a rut in the field and injured his leg. Court held plaintiff assumed the risk of injury by voluntarily participating in the sport of softball and the risks inherent in the sport include those associated with the construction of the playing surface. The game was played on a natural surface and plaintiff, had the experience to know that imperfections might be present, and indeed, may have been created or increased over the course of the game.

Stach v. Warwick Valley Cent. School Dist., 106 A.D.3d 720, 964 N.Y.S.2d 241 (2nd Dep't 2013). Defendants established that the infant plaintiff voluntarily engaged in the activity of cheerleading, including the performance of stunts, and that, as an experienced high school cheerleader, she knew the risks inherent in the activity, including those associated with practicing on a bare lobby floor. The defendants also made a prima facie showing that they did not fail to supervise the cheerleading practice. In opposition, the plaintiffs failed to raise a triable issue of fact. The infant plaintiff's voluntary participation in practice on the bare lobby floor on the date of the accident did not implicate the doctrine of inherent compulsion.

Philippou v. Baldwin Union Free School Dist., 105 A.D.3d 928, 963 N.Y.S.2d 701 (2nd Dep't 2013). Middle school student and his mother brought personal injury action against two school districts involved in wrestling match, seeking damages for injuries allegedly sustained when two wrestling mats which had been taped together came apart during match. Defendants failed to establish, prima facie, that the injured plaintiff, by participating in the wrestling match, assumed the risk of being injured in the manner in which he was injured here. Defendants failed to show that the dangerous condition caused by the improperly taped or secured mats did not unreasonably increase the risk of injury inherent in the sport of wrestling.

B. Sexual Assaults

Kelly G. v. Bd. of Educ. of City of Yonkers, 99 A.D.3d 756, 952 N.Y.S.2d 229 (2nd Dep't 2012).
High school student was the victim of sexual misconduct and harassment by a music teacher. Plaintiffs raised a triable issue of fact as to whether the subject teacher's propensity to engage in sexual misconduct with students was known to the Board or should have been known to it before these incidents occurred. The Board had previously commenced an administrative disciplinary proceeding against the subject teacher based on similar complaints by female students in another school in the district where he was teaching at the time.

Doe 1 v. Board of Educ. of Greenport Union Free School Dist., 100 A.D.3d 703, 955 N.Y.S.2d 600, (2nd Dep't 2012). Student and his parents sued school district, board of education, president of school district, and superintendent, seeking damages for personal injuries based on vicarious liability for actions of teacher's aid who allegedly engaged in sexual relationship with student and based on alleged negligent hiring and supervision of teacher's aid. The infant plaintiff's own testimony at the 50-h established that all of the improper acts by the

teacher's aid took place off school premises and/or outside of school hours, when the school defendants had no custody or control of the infant plaintiff and no duty to monitor or supervise the conduct of the teacher's aid, and thus case dismissed, especially since the evidence established that the teacher's aid was properly investigated prior to being hired, and that the school defendants had no notice of any propensity on her part to sexually assault students, and the plaintiffs did not allege that the school defendants knew or had reason to know of any improper behavior.

Geywits ex rel. Geywits v. Charlotte Valley Cent. School Dist., 98 A.D.3d 804, 949 N.Y.S.2d 834 (3rd Dep't 2012). First grade students were allegedly abused by sophomore student in school bathroom. They sued for negligent supervision. The six-year-old children were regularly permitted to walk from the school cafeteria to their classroom unattended. The hallways and the restroom in which the alleged assaults occurred were also used by secondary students, including the perpetrator who, at the time of the events, was a high school sophomore. The School had no notice that the perpetrator was a "bad" kid, and no notice of prior similar conduct. The majority threw the case out, citing Court of Appeals cases standing for the principle that a school will generally not be held liable for the unanticipated acts of a third party toward a student unless the school had "actual or constructive notice of prior similar conduct," such that the school could have reasonably anticipated the acts of the third party. Dissent says the claims should survive and go to trial because "the rule requiring notice may be applied to insulate a school district from liability, as a matter of law, only in those cases where the adequacy of the supervision with respect to the plaintiff is not in question". Here, the injuries were reasonably foreseeable because they were the result of circumstances created by the school's inaction, despite the absence of actual or constructive notice of prior similar conduct. The issue of whether the level of supervision provided by a school is adequate and reasonable—and, if not, whether the school's negligence is the proximate cause of the plaintiff's injuries—is almost always a question of fact. It cannot be said as a matter of law, that defendant acted as a reasonably prudent parent would when it allowed these six-year-old children to use the same bathrooms as high-schoolers.

C. Playground Liability

Paredes ex rel. Nunez v. City of New York, 101 A.D.3d 424, 955 N.Y.S.2d 317 (1st Dep't 2012). Summary judgment granted to defendant where the infant plaintiff was injured in a spontaneous playground accident. The DOE employee supervising the playground at the time of the accident testified that she instructed the students on how to properly ride the apparatus from which the infant plaintiff fell, and there is no indication that any type of instruction would have prevented the accident.

D. Student on Student Assaults/negligence

Conklin v. Saugerties Cent. School Dist., 106 A.D.3d 1424, 966 N.Y.S.2d 575 (3rd Dep't 2013). Plaintiff-student injured when she was assaulted in school hallway by other female student. Regardless of any questions of fact regarding whether enough staff members were present in the hallway to prevent or break up the fight, Court held that defendant was entitled to summary judgment because it established that it could not have reasonably anticipated the attack. The facts the Court relied on were: Plaintiff's father informed school officials that he saw a MySpace post by one of his daughter's friends regarding another student wanting to fight her, but this was merely a rumor rather than a direct threat from the other child. The girls had passed each other in the hall that morning without incident. Plaintiff had informed the school counselor of two or prior screaming matches and name-calling incident between the two girls, but there was no previous physical violence. During a mediation just before the assault, both girls had remained calm. The attack was thus not foreseeable.

Gilman v. Oceanside Union Free School District., 106 A.D.3d 952, 966 N.Y.S.2d 460 (2nd Dep't 2013). Eight-year old was waiting to use the bathroom located in his first-grade classroom. As a fellow student exited the bathroom, the infant plaintiff placed his right hand near the door hinge, causing injuries to his middle and ring fingers. At the time, a teacher's aid was standing approximately three to six feet away from the infant plaintiff. She testified that, as the door was being opened, the infant plaintiff "whipped his body around" and placed his fingers inside the hinged side of the bathroom door. She further testified that the whole incident took approximately one second and occurred "instantaneously." Case dismissed because "where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the ... defendant is warranted."

Braunstein v. Half Hollow Hills Cent.School Dist., 104 A.D.3d 893, 962 N.Y.S.2d 340 (2nd Dep't 2013). Plaintiff assaulted in a school auditorium by a fellow high school student. There were triable issues of fact as to whether the school District acted reasonably in response to a threat allegedly made by the assailant against the infant plaintiff.

E. School Liability for Incidents Off School Premises or After School Hours

Stephenson v. City of New York, 19 N.Y.3d 1031, 978 N.E.2d 1251, 954 N.Y.S.2d 782 (N.Y. 2012). Student brought action against city, school, and others, alleging school negligently failed to prevent assault by fellow student. The assault occurred two blocks from the boys' school prior to school hours. The two had been involved in a fight at school, between classes, just two days earlier. Both boys received in-school suspensions for that. The assistant principal dismissed plaintiff from school early, making sure the boys' dismissal times were not the same so that no further altercations would occur after they left the school that day. Defendants moved for summary judgment, arguing, among other things, that since the incident occurred before regular school hours and off school property, defendants owed no duty to plaintiffs and, therefore, could not be held liable for the incident. Supreme Court denied the motion; the Appellate Division, with two Justices dissenting, reversed by granting defendants' motion to dismiss the complaint. Here the Court of Appeals affirms the granting of summary judgment. The Court points out that generally a school cannot be held liable for off-school ground assaults. However, in certain situations, the duty of the school can be extended to off-school premises injuries. But this is so generally only where the assault occurred, either during school hours or ***shortly thereafter upon the student's departure from the school.*** None of these circumstances were present here. Here, the plaintiff was adequately supervised at school, and the school addressed the altercation that occurred on school property between the two boys by punishing them. The second altercation which resulted in plaintiff's injuries was out of the orbit of the school's authority, as the incident occurred away from the school and before school hours where there was no teacher supervision. Further, contrary to plaintiffs' urging, the school could not be held liable for a failure to comply with a separate duty to notify the plaintiff's mother of the impending danger. There was no statutory duty to inform the parents about generalized threats made at school, and the circumstances here did not give rise to a common-law duty to notify parents about threatened harm posed by a third party. This case did not involve threatened conduct that would occur while the child was in custody and control of school officials.

Johnson v. Rochester City School Dist.,101 A.D.3d 1641, 956 N.Y.S.2d 370 (4th Dep't 2012).
Student was assaulted by fellow student at city transit bus stop across the street from their school building after school's dismissal. Defendant moved for summary judgment dismissing the complaint on the grounds that it had no duty to supervise students off school premises after dismissal from school; that the assault could not have been foreseen or prevented; and that the level of supervision that it provided was not a proximate cause of the injuries to plaintiff's son. The Court agreed with defendant and dismissed the complaint. "Defendant established its entitlement to judgment as a matter of law with respect to the element of duty by demonstrating that plaintiff's son was safely dismissed from school grounds before the assault, which occurred beyond the boundaries of school property". Plaintiff's assertion that defendant knew or should have known of the assailant's alleged violent propensities before or on the day of the assault was irrelevant since plaintiff was no longer in defendant's custody at time of assault.

Butler ex rel. Tucker v. Germantown Cent. School Dist. Parent Teacher Student Ass'n, 101 A.D.3d 1415, 956 N.Y.S.2d 333 (3rd Dep't 2012). Five-year-old student's parents brought personal injury action against PTSA and School District for injuries suffered at event, a "Family Fun Night", on school premises. A member of the PTSA had brought interactive "pinscreen" that he invented as an exhibit at the event. Plaintiff climbed on the pinscreen—which measured 72 inches tall and weighed approximately 70 pounds—and it fell on top of her. Plaintiffs have alleged, among other things, that the School District and the PTSA failed to properly supervise or monitor the use of the pinscreen exhibit during the Family Fun Night. They also allege that the PTSA did not take the steps necessary to insure that the pinscreen was safe. As for the School District's motion for summary judgment, the Court noted that its legal duty depended upon whether it had sufficient control over the event to be in a position to prevent the negligence" that caused the injuries. It noted that School District's permission was required for the PTSA to hold this event on school grounds and, on the same night that the Family Fun Night event occurred, the School District was conducting a science fair on the premises. Both events were jointly promoted by the School District on its website, as well as in fliers it distributed throughout the School District. Moreover, its personnel helped set up the tables that were used for the Family Fun Night, and the School District

nurse was on the scene to provide medical aid if needed. Thus, there were triable questions of fact as to whether the School District had sufficient control over this event so that it could have taken reasonable steps that would have prevented this accident. The PTSA's motion for summary judgment was also denied.

Khosrova v. Hampton Bays Union Free School Dist., 99 A.D.3d 669, 951 N.Y.S.2d 235 (2nd Dep't 2012). Seventh-grade student assaulted by a fellow student while waiting for a school bus just outside his school, on school grounds, sued the school district. The school provided a late bus for students who stayed at the school for after-school activities. The student's assailant struck him more than once, and the incident spanned a period of several minutes. There was no adult present during the incident. While there was no evidence of prior similar conflict between the injured plaintiff and the assailant, the assailant's lengthy disciplinary record showed that, prior to the incident, he had exhibited violent tendencies and assaulted other students and an assistant principal. The Superintendent submitted an affidavit in support of the School's summary judgment motion in which she said she "did not recall" whether, prior to the incident, there were any fights or disciplinary problems that occurred at the pick-up area. The Court held that defendant thus failed to sustain its burden of establishing that it had no actual or constructive notice of prior conduct similar to the subject incident. To the extent that the defendant contended that it did not owe a duty of adequate supervision to the injured plaintiff because the incident *occurred outside the school building* and *after normal school hours*, that contention was without merit because the incident occurred *on school grounds*, while the injured plaintiff and 10 to 15 other students were awaiting the late school bus as part of the school's school services.

Williams v. Weatherstone, 104 A.D.3d 1265, 961 N.Y.S.2d 673 (4th Dep't 2013). Twelve-year old student had been waiting at her school bus stop at the end of her driveway when the school bus driver mistakenly passed her. The bus continued a short distance and then turned around and approached the child on the opposite side of the road. The bus driver testified at his deposition that he intended to turn around again and pick up the child at her stop. The child, however, crossed the road in an effort to catch the bus on the opposite side of the road, and was struck by a passing vehicle. The issue on defendant's sj motion was whether defendant had a duty toward plaintiff. Court rejected plaintiff's contention that defendant owed the child a duty of care by virtue of her status as a special education student with an individualized education program (IEP). With respect to her special transportation needs, the child's IEP required only that defendant provide transportation to school. The IEP did not place her within defendant's " 'orbit of authority' " while she waited for the school bus, nor did the IEP give rise to a duty on the part of defendant to ensure that the child was safe while waiting for the bus outside her home. However, the child was within the orbit of defendant's authority such that defendant owed a duty to the child based upon the actions of defendant; i.e., the bus arrived at the bus stop, passed it, and the driver turned around to pick up the child. The injury occurred during the act of busing itself, broadly construed. Where, as here, it was reasonably foreseeable that the child would be placed "into a foreseeably hazardous setting defendant had a hand in creating," defendant owed a duty to the child. Dissent disagreed, finding that defendant owed no duty of care to plaintiff's daughter. It rejected plaintiff's contention that defendant assumed a duty to the child as a consequence of the "potentially hazardous situation" allegedly created by the school bus driver in turning the bus around after missing the bus stop Unlike the defendant school district in a prior, similar case, here defendant did not release the child from its custody and control into a situation of immediate and foreseeable danger. In fact, the child was never in defendant's custody or control on the day of the accident. Instead, the child was and remained in the custody and care of plaintiff, her mother, who was at home at the time of the accident.

XIII FIREFIGHTER AND POLICE CAUSES OF ACTION

A. General Municipal Law 205-a (Firefighters) and 205-e (Police Officers)

Blainey v. Metro North Commuter R.R., 99 A.D.3d 588, 953 N.Y.S.2d 18 (1st Dep't 2012). Plaintiff police officer asserted a claim against the City of New York, which owned the bridge and the fence from which plaintiff fell (as he was chasing a suspect) based on General Municipal Law § 205-e. Plaintiff's theory, on which the case was submitted to the jury, was that the City's alleged failure to maintain the fence in good condition violated former section 26–235 of the Administrative Code of the City of New York. The City argued that § 26–235 did not apply because "[t]he content of that code refers to buildings throughout it and not to fences on overpasses," and that § 26–235 "was not intended to apply to metal chain link fences, designed to deter individuals on bridge overpasses." Appellate Court agreed with defendant that § 26–235 did not apply to the fence on the bridge.

Hanlon v. Healy, 98 A.D.3d 1304, 951 N.Y.S.2d 623 (4th Dep't 2012). Plaintiff firefighter fell from a roof while fighting a fire at defendant's property. Plaintiff sued pursuant to GML 205-a predicated on violations of four sections of the National Fire Prevention Association (NFPA) Fire Code. Those NFPA Fire Code sections prohibited connecting an ungrounded extension cord to a grounded appliance (§ 11.1.7.4), running an extension cord under a door (§ 11.1.7.5), using a damaged extension cord (§ 11.1.7.3), and connecting the extension cord to an appliance that exceeds the maximum amperage for that extension cord (§ 11.1.7.2). Court agreed with defendant that plaintiff failed to meet his burden with respect to two of the four sections, i.e., section 11.1.7.4, because plaintiff failed to establish that the space heater that allegedly caused the fire was a grounded appliance, and section 11.1.7.5 because he failed to establish that running the cord under the door caused the fire to occur. Even assuming, arguendo, that plaintiff met his initial burden with respect to the other Fire Code sections, defendant raised a triable issue of fact whether there was a " 'practical or reasonable connection' " between those Fire Code violations and plaintiff's injury.

Gammons v. City of New York, _____ N.Y.S.2d ____, 2013 WL 3718067 (2nd Dep't 2013). On-duty cop falls from a police flatbed truck while loading wooden police barriers onto it, claiming negligence on the part of a co-officer working with her and on the part of NYPD for not equipping the truck with a back railing. She sued the City and NYPD to recover damages for common-law negligence and pursuant to General Municipal Law § 205-e, predicated upon a violation of Labor Law § 27-a, which sets forth safety and health standards for public employees. In opposition to the defendant's motion for summary judgment, plaintiff argued that the firefighter rule did not bar her common-law negligence cause of action because she was not injured as a result of a heightened risk associated with a police function. Moreover, plaintiff argued that Labor Law § 27-a(3)(a)(1) was a proper statutory predicate for the GML § 205-e cause of action, and that a fall from a truck was a "recognized hazard" pursuant to that statute. Alternatively, the plaintiff argued that the defendants violated Labor Law § 27-a(3)(a)(2) and 29 CFR 1910.23(c)(1) [from OSHA] by failing to equip the back of the truck with a railing. The Second Department considered whether the decision of the Court of Appeals in *Williams v City of New York* (2 NY3d 352) warranted a departure from its own holding in *Balsamo v City of New York* (287 AD2d 22). In a nut shell, the issue was whether Labor Law § 27-a(3)(a)(1) constituted a sufficient statutory predicate for a police officer's cause of action to recover damages pursuant to GML § 205-e even though Labor Law § 27-a does not provide for a private right of action. The Court adhered to its *Balsamo* decision, concluding that Labor Law § 27-a(3)(a)(1) can constitute a sufficient statutory predicate (and that it did here) for a police officer's cause of action to recover damages pursuant to GML § 205-e.The Court dismissed, however, the common-law negligence cause of action because the injury sustained was directly related to the particular risks and dangers which she was expected to assume as part of her duties as a police officer assigned to barrier truck detail ("Firefighter's Rule"). The Court reasoned that, while loading a flatbed truck may not be a task that is typically associated with police work, the injury occurred while the plaintiff was on a police vehicle, loading police barriers, and while she was assigned to the barrier truck detail, a location and job detail to which she was exposed solely as a result of her duties as a police officer.

Brenderline Blake, v. City of New York., --- N.Y.S.2d ----, 2013 WL 4082716 (2nd Dep't 2013). Plaintiff police officer was injured in an altercation with a female suspect. The plaintiff attempted to subdue the suspect by spraying her with Mace, but the cannister failed to work, thereby allowing the suspect to attack and injure him. The cannister of Mace had been issued to the plaintiff by the NYPD. The plaintiff tried to predicate his GML 205-e claim on a violation of Labor Law § 27–a(3)(a)(1), which requires every employer to furnish its employees with a type of employment and a place of employment that are "free from recognized hazards" that cause or are likely to cause death or serious physical harm to those employees. Court granted defendant's CPLR 3211 motion to dismiss because, "although Labor Law § 27–a(3) may serve as a proper predicate for a cause of action alleging a violation of GML 205-e, the plaintiff failed to allege that her injuries resulted from a 'recognized hazard' within the meaning of the Labor Law (Labor Law § 27–a[3][a][1])."

Cusumano v. City of New York, 104 A.D.3d 639, 960 N.Y.S.2d 194 (2nd Dep't 2013). Firefighter fell down a flight of stairs while attending training seminar in a building owned by city. At trial, plaintiff testified that when he attempted to access the basement of the building, he slipped on debris in a stairwell, lost his balance, fell forward, and unsuccessfully attempted to grab a handrail. He presented expert testimony to establish that the handrail, which was flush against the wall, was dangerous and defective. The plaintiffs asserted that the defective nature of the handrail violated Administrative Code of the City of New York §§ 27–127 and 27–128, and that these violations were a cause of the injured plaintiff's accident. The jury agreed, but the Supreme Court, in a post-

trial motion, found such a finding was against the weight of the evidence. The Appellate Division reversed and found for plaintiff. The Court also rejected defendant's contention that violations of Administrative Code §§ 27–127 and 27–128 may not form a predicate for liability under General Municipal Law § 205–a.

McLaughlin v. Ann–Gur Realty Corp., 107 A.D.3d 469, 968 N.Y.S.2d 12 (1st Dep't 2013). Plaintiff police officer slipped off a sidewalk "step-off" extending four feet into the sidewalk area from the building line of a landlord's corner-lot building and the entrance to commercial tenant. Plaintiffs' GML 205-a claim, predicated upon Administrative Code of City of N.Y. §§ 27–127 and 27–128 (since repealed and re-codified at Administrative Code § 28–301.1), and, belatedly, 34 RCNY 2–09(f), were dismissed as against the tenant because these statutory provisions are not applicable to lessees.

Byrne v. Nicosia, 104 A.D.3d 717, 961 N.Y.S.2d 261 (2nd Dep't 2013). Police officer slipped and fell on the top step of defendant's home at the front door. Plaintiff was awarded summary judgment on the GML § 205–e cause of action based on a determination that the defendants had violated section 302.3 of the 2007 Property Maintenance Code of the State of New York (*see* 19 NYCRR 1226.1), which states that "[a]ll sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." The defendants' contention that section 302.3 could not serve as a predicate for GML § 205–e liability was rejected.

B. General Obligations Law 11-106 (Common Law Negligence v. Firefighter's Rule)

Fazzolari v. City of New York, 105 A.D.3d 409, 962 N.Y.S.2d 124 (1st Dep't 2013). Police officer stepped off an allegedly defective curb onto the roadway to assist a motorist with directions. Although she was walking to a nearby deli to retrieve her lunch when she stopped to give directions, her common law negligence claims were barred by the firefighter's rule because "the acts undertaken in the performance of police duties placed ... her at increased risk for that accident to happen". In any event, even if the common-law negligence claims were not barred by the firefighter's rule, defendant presented prima facie evidence that it had no prior written notice of any defective condition of the curb and that the curb was not defective or dangerous by reason of its height, and plaintiff failed to raise an issue of fact. Defendant also was entitled to summary judgment dismissing the cause of action pursuant to GML§ 205–e. 34 RCNY 2–09(a)(2), and the publications cited in that subdivision, were insufficient to support such a cause of action, because they do not contain "a particularized mandate or a clear legal duty".

See, *Gammons v. City of New York*, discussed in subsection A, *supra*.

XIV COURT OF CLAIMS PROCEDURE

Hatzfeld v. State, 104 A.D.3d 1165, 961 N.Y.S.2d 670 (4th Dep't 2013). Although claimant timely filed a written notice of intention to file a claim for the alleged negligence of State based upon his falling from an upper bunk at a correctional facility, he failed to comply with Court of Claims Act § 10(3) because he did not file the claim with respect to that incident until more than two years after the claim's accrual. Although claimant could have sought to file a late claim pursuant to Court of Claims Act § 10(6), plaintiff sought that relief for the first time on appeal, which was too late.

Bennett v. State, 106 A.D.3d 1040, 966 N.Y.S.2d 479 (2nd Dep't 2013). State established its prima facie entitlement to judgment dismissing the claim by demonstrating that the claim accrued on September 8, 2008, and that the notice of intention to file a claim was not served until one year later on September 8, 2009. Thus, the State established that the claim was untimely. In opposition, the claimant argued that the continuous treatment doctrine applied herein to toll the 90–day period. However, the claimant failed to raise a triable issue of fact in that regard.

XV MISCELLANEOUS MUNICIPAL LIABILITY

A. Municipal Bus Liability

MacDonald v. New York City Transit Authority, 106 A.D.3d 1057, 966 N.Y.S.2d 477, (2nd Dep't 2013). A bus owned by the defendant New York City Transit Authority suddenly accelerated, causing her to fall. The

defendants established their prima facie entitlement to judgment as a matter of law by submitting a transcript of the plaintiff's deposition testimony, which demonstrated that the movement of the bus was not "unusual or violent" and of a "different class than the jerks and jolts commonly experienced in city bus travel".
Cividanes v. City of New York, 20 N.Y.3d 925, 981 N.E.2d 281, 957 N.Y.S.2d 685 (N.Y. 2012). Plaintiff testified at her 50-h that she injured her left ankle when she "stepped off the last step into a hole and fell" as she exited the rear of a bus owned and operated by defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority. Court of Appeals here held that the No–Fault Insurance Law was inapplicable because plaintiff's injury did not arise out of the "use or operation" of a motor vehicle and the bus was neither a "proximate cause" nor an "instrumentality" that produced plaintiff's injury. Court found that *Manuel v. New York City Tr. Auth.*, 82 A.D.3d 1059, 918 N.Y.S.2d 787 (2d Dept.2011), *which held on similar facts that the No–Fault Insurance Law's restrictions on tort liability were applicable, should not be followed.* Dissent disagreed, finding that plaintiff properly alleged that her accident was proximately caused by the use or operation of a motor vehicle and that her allegation could not be refuted as a matter of law.

B. Inmate on Inmate Assaults

Garcia v. City of New York, 98 A.D.3d 857, 951 N.Y.S.2d 2 (1st Dep't 2012). Plaintiff's theory of liability was that the defendants were on actual or constructive notice that the phone for inmate use was controlled by inmates who belonged to the Bloods gang and that other inmates, such as plaintiff, were at risk of assault if they chose to use the phone. Defendants submitted the deposition of correction officers who testified they had no knowledge of any issues with regard to the use of the phone or gang-related incidents prior to the incident in question. Plaintiff opposed the motion to dismiss with an affidavit from a confidential informant, who was interviewed after the assault, who was quoted as saying that one week before plaintiff's assault, a member of the Bloods refused to allow another inmate to use the phone and proclaimed it to be the property of the Bloods. But the record provided no basis for the Court to assume that the confidential informant was acting as defendants' agent at any time prior to plaintiff's assault. The Court therefore rejected plaintiff's argument that there was an issue of fact as to whether defendants had actual or constructive knowledge of the prior incident regarding the phone.

C. False Arrest, Malicious Prosecution and Excessive Force

Rodgers v. City of New York, 106 A.D.3d 1068, 966 N.Y.S.2d 466 (2nd Dep't 2013). Following his acquittal on murder charges, alleged perpetrator brought action against city, police department, and detective, for false arrest, false imprisonment, malicious prosecution, assault and battery, negligence, and various civil rights violations. In particular, the plaintiff alleged that the investigating detective failed to properly investigate the crime and disclose exculpatory evidence to him, the prosecutor, and the grand jury that indicted him. Assault and battery causes of action were dismissed because plaintiff's arrest was lawful and supported by probable cause, and the assault and battery causes of action were not based on allegations of excessive force. The malicious prosecution causes of action were dismissed because plaintiff was indicted by a grand jury for the subject incident, thus creating a presumption of probable cause and plaintiff failed to raise triable issues of fact as to this presumption and as to whether the prosecution was motivated by actual malice. The civil rights causes of action (42 USC 1983) were also dismissed because the plaintiff's arrest and prosecution were supported by probable cause and there has been no unreasonable seizure of the plaintiff's person in violation of the Fourth Amendment.

Zetes v. Stephens, 108 A.D.3d 1014, 969 N.Y.S.2d 298 (4th Dep't 2013). County defendants established that deputy sheriff had probable cause to file the misdemeanor information and that he did not act with actual malice since "information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest". Thus, malicious prosecution claim against County was dismissed on summary judgment. The alleged victim upon whose affirmation the deputy sheriff had filed the misdemeanor information, however, did not fare so well. The Court found triable issues of fact as to whether she had probable cause to file the criminal charges against plaintiff and whether she acted out of malice. Plaintiff submitted evidence suggesting that she commenced the criminal proceeding against him out of spite or retaliation based upon his enforcement of alleged deed restrictions and his claim against her for money owed to him for construction work that he performed, and that she provided incomplete or misleading information to the deputy sheriff.

Kirchner v. County of Niagara, 107 A.D.3d 1620, 969 N.Y.S.2d 277 (4th Dep't 2013). If a criminal defendant is to succeed in a malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith. Here a father was charged with criminal misconduct in connection with death of his seven-month-old daughter and then brought malicious prosecution action against counties, an assistant district attorney, and a county medical examiner following dismissal of charges against him. His complaint sufficiently alleged fraud, perjury, and conduct undertaken in bad faith so as to escape summary judgment on the malicious prosecution causes of action. Plaintiff's wife spoke with the defendant A.D.A., who allegedly began a campaign to bring charges against plaintiff despite knowing that plaintiff's wife was giving inconsistent information. Plaintiff alleged that the A.D.A. encouraged or coached a witness (county medical examiner) to provide false information to the police and false testimony to the grand jury regarding the infant's cause of death and time of death. The defendant Counties and the A.D.A. argued that plaintiff failed to state a cause of action against them for malicious prosecution because plaintiff did not allege any *special duty* that was owed by them to him. Court here says the "special duty" requirement does not apply to a malicious prosecution cause of action. Further, the defendants were not entitled to absolute prosecutorial immunity. Such immunity only applies "for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process", i.e., conduct that involves initiating a prosecution and in presenting the State's case, but does NOT apply to a prosecutor's investigative work, which was the focus of plaintiff's allegations here. Prosecutors are afforded only *qualified* immunity when acting in an investigative capacity. The Court also rejected defendants contention that their actions were discretionary, and thus that the governmental function immunity defense applied. Court found that the A.D.A.'s alleged coaching a witness to lie could not be deemed "discretionary". That alleged conduct plainly did not involve the exercise of "reasoned judgment which could typically produce different acceptable results".

Washington-Herrera v. Town of Greenburgh, 101 A.D.3d 986, 956 N.Y.S.2d 487 (2nd Dep't 2012). Former arrestee acquitted on all counts filed § 1983 action against town and arresting officer, claiming excessive force in violation of Fourth Amendment and asserting state common law causes of action for assault and battery, false arrest, and false imprisonment, and causes of action for malicious prosecution under both state law and pursuant to § 1983. Defendant arresting officer submitted evidence that the plaintiff was arrested pursuant to a facially valid arrest warrant issued by a court having jurisdiction". Accordingly, he established, prima facie, his entitlement to judgment as a matter of law dismissing the false arrest and false imprisonment causes of action by showing that the plaintiff's confinement was privileged. The plaintiff failed to raise a triable issue of fact in opposition. Contrary to the plaintiff's contention, the defendant was entitled to enter his home forcibly for the purpose of executing a felony arrest warrant founded on probable cause. As for the malicious prosecution claim, defendant also demonstrated his prima facie entitlement to judgment by showing that the plaintiff was indicted by a grand jury for the subject incident, thus creating a presumption of probable cause. In opposition, the plaintiff failed to raise a triable issue of fact. As for the excessive force claim, plaintiff could not identify which officer allegedly slammed him against a mirror and against a wall, and in any event, he sustained no injuries as a result of being slammed against a mirror, and thus defendant established his prima facie entitlement to judgment, and plaintiff failed to raise a triable issue of fact in opposition.

Pacheco v. City of New York, 104 A.D.3d 548, 961 N.Y.S.2d 408 (1st Dep't 2013). Plaintiff subdued by taser so he could be brought to the hospital failed in his excessive force claims since plaintiff's repeated outbursts and the police officers' testimony that he was emotionally disturbed made it reasonable for the officer to taser him so that he could be hospitalized. The Patrol Guide of the New York City Police Department permits an officer to use a Taser to restrain an emotionally disturbed person who threatens injury to himself or others.

Appendix A: ‘The Governmental Function Immunity’ Defense in Personal Injury Cases in the Post-McLean World”

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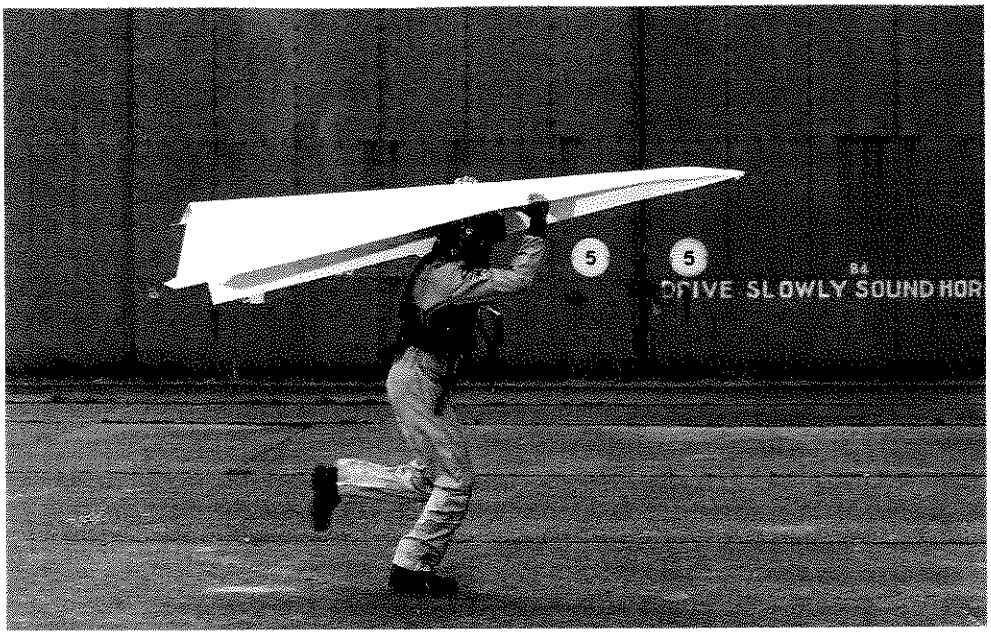

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The "Governmental Function Immunity" Defense in Personal Injury Cases in the Post-*McLean* World

By Michael G. Bersani

The Court of Appeals has, within the last few years, published a series of cases, starting with *McLean v. New York City*, which have troubled the waters of the "Governmental Function Immunity" defense.[1] This article is intended to help attorneys navigate the post-*McLean* seas.

What Is the Governmental Function Immunity Defense?

Despite the state's general waiver of *sovereign immunity* (Court of Claims Act § 8), our courts have applied the court-made doctrine of *governmental function immunity* to most policy-imbued governmental actions.[2] Generally, the government, and its various agencies and employees, benefit from immunity (either qualified or absolute) when they are legislating, adjudging, and making governmental or quasi-governmental discretionary decisions. The rationale for the survival of this vestige of sovereign immunity in personal injury actions is the courts' reluctance to second-guess governmental decisions of a quasi-judicial nature that implicate, at least to some extent, discretionary decisions on how to best allocate limited public resources for the provision of public services owed to the public at large, and that, if disallowed, may hamstring decision making for fear of lawsuits.[3]

The Pre-*McLean* World

Before *McLean*, most practitioners and judges were comfortable believing that the governmental function immunity defense, though somewhat muddled in the case law, could be described generally as follows: If a government's agent (e.g., police officer, clerk, housing inspector) negligently caused harm to a plaintiff, and the agent's harm-causing action or inaction was deemed *ministerial*, then the government employer could be held liable even absent a "special duty" to the individual plaintiff. On the other hand, if the harm-producing action or inaction was deemed *discretionary*, the government could be held liable only if the plaintiff proved the agent had a "special duty"

to the plaintiff, beyond the general duty the government has to the public at large.

The "special duty" could be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which the plaintiff is a member;[4] (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty;[5] or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.[6]

The second method – of establishing a "special relationship" with a governmental actor – is the most commonly litigated. To succeed, the plaintiff must meet all of four requirements: (1) an assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise.[7]

Several Appellate Division cases and two Court of Appeals cases, *Pelaez v. Seide*[8] and *Kovit v. Estate of Hallums*,[9] lent support to this general understanding that *ministerial* governmental actions could create liability even when no special duty was established, while a prerequisite for liability for *discretionary* governmental actions was a special duty toward the plaintiff. The rule as enunciated in *Kovit*, for example, was "municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, *except* when plaintiffs establish a special relationship with the municipality."[10] In *Pelaez*, the Court said, "[M]unicipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, except when plaintiffs establish a 'special relationship' with the municipality."[11]

McLean v. City of New York

The post-*McLean* world starts, obviously, with *McLean v. City of New York*.[12] In that case, the mother of a child who was injured at a city-registered home daycare center brought a negligence action against the city. Before sending her child to that daycare center, the mother had called the city agency responsible for "registering" privately owned home daycare centers. The agent on the telephone sent her a list of registered home daycare centers, and the mother picked a daycare from that list, assuming that registration indicated some kind of city supervision or inspection. As it turned out, the daycare center had a history of negligence-related child injuries, and the city agency had improperly, in *contra* of its own regulations, renewed the center's registration. In other words, if the agency had done what it should have done – that is, keep track of offending daycares and deny registration to them – the mother would never have selected that particular daycare.[13]

One of the main defenses to the case was that, although the agency may have acted negligently in failing to do what it should have done, the plaintiff could not establish a "special relationship" with the offending agency. Thus, the case should fail for lack of "duty." The plaintiff's lawyer, however, was no fool; he tried to circumvent the special relationship requirement by arguing that the agency's negligence in renewing the daycare's registration in contradiction of its own rules was a "ministerial" not a "discretionary" act. Under the governmental immunity doctrine, as the plaintiff then understood it, she was not required to show that the agency owed her a "special duty" or that she had established a "special relationship" with the city agency if the negligent act complained of was "ministerial" rather than "discretionary." The plaintiff was able to rely on precedent, including dictum from the Court of Appeals cases of *Kovit*[14] and *Pelaez*,[15] to support this argument.

But, to the disappointment of the plaintiff, and the surprise of the bar, the *McLean* court disavowed this understanding of the governmental function immunity defense.[16] The Court distilled the rule to a simple sentence: "Discretionary municipal acts may never be a basis for liability; whereas, ministerial municipal acts may support liability only if a special duty is found to exist."[17]

This newly enunciated rule caused the *McLean* plaintiff to lose her case. The Court found that, even if the city agency's negligence in wrongfully renewing the daycare's registration in violation of its own rules could be qualified as "ministerial," *the plaintiff failed to show a duty*. The government's daycare registration requirements and rules for renewing them were intended to protect the public at large, not just the plaintiff, and she had failed to show that the agency had made some special commitment to her, in that casual telephone call, or else had otherwise established a *special duty* to her in at least one of the three permissible ways.[18]

McLean imparts two lessons to the bar: (1) governmental functions that are discretionary can *never* be the basis of liability; and (2) even if the act is ministerial, the plaintiff must still show a special duty. This second principle, though harsh for plaintiffs, is not, in fact, surprising. Every first-year law student knows that, in order for a negligence claim to prevail, a plaintiff must first establish that the defendant owed the plaintiff a duty of care. Since our courts determine "duty" based on public policy concerns, often with an eye toward hemming in boundless liability, it is not surprising that Court of Appeals jurisprudence determined long ago that a plaintiff must show a "special" duty was owed to the individual plaintiff, beyond the general duty owed to the public at large.

Dinardo v. City of New York

Duty is paramount. It trumps everything else. The Court of Appeals made this perfectly clear in its first post-*McLean* case, *Dinardo v. City of New York*.[19]

In *Dinardo*, a special education teacher was injured when she tried to restrain one student from attacking another. She alleged the school administrators had promised her, sometime beforehand, that "something" was going to be done about the assailant student, whose behavior had made the teacher fear for her safety. The Court rejected her claim, because the teacher-plaintiff could not show that she "justifiably relied" on the vague promises made by the school to "do something" about the troublesome student. Without justifiable reliance, there could be no "special duty" under the four-prong *Cuffy* test.[20] Because there was no duty, the Court refused to decide the issue of governmental immunity, that is, whether the school's failure to remove the student was "discretionary" or "ministerial." The distinction-drawing between ministerial and discretionary actions was of no matter because, post-*McLean*, a "duty" is always required.

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In Justice Lippman's *Dinardo* dissent, he summarizes the *McLean* rule (with which he disagrees) as follows: "According to *McLean*, the special relationship exception only applies where the challenged municipal action is ministerial." A more accurate restatement of the *McLean* rule, as clarified in *Dinardo*, is that the special relationship exception – the special duty – becomes relevant *only* if the action is ministerial. Even if there is a special duty, the plaintiff cannot prevail if the act was discretionary. Governmental discretionary actions are *always* insulated from liability, even when there is a duty.

Valdez v. City of New York

The next Court of Appeals pronouncement on the governmental immunity defense was *Valdez v. City of New York*.[21] In *Valdez*, a city police officer promised a frightened woman by telephone that the police would arrest her estranged boyfriend who had threatened to do her harm. The officer told her she could go home because the ex-boyfriend was going to be arrested. She returned to her apartment, feeling safe with the knowledge that her ex-boyfriend would not be there to stalk her. But the police failed to arrest the ex-boyfriend, and a few days later, when she opened her door to take out some trash, she was met with bullets.[22]

The Court of Appeals decided that the plaintiff could not prevail because she could not show that a special relationship had been formed, which would have created a special duty toward her. Specifically, she could not show the "justifiable reliance" element of a special relationship, specifically the *justifiable* part. The Court reasoned that she should have called to confirm that the ex-boyfriend had been arrested, and she was not *justified* in relying solely on the verbal promise. In conducting its analysis, the Court articulated the principle that duty should be analyzed separately from the governmental immunity defense itself. The "duty" requirement and the "governmental function immunity" defense are two separate creatures. The Court recognized that the two issues had been conflated in the case law, including Court of Appeals case law, over the years.[23]

Having determined that the duty element was lacking in *Valdez* (i.e., no special relationship), the Court noted that it had "no occasion to address whether . . . [the city] could have avoided liability under such a [governmental immunity] defense on the rationale that the alleged negligence involved the exercise of discretionary authority."[24] In other words, a plaintiff must first show "duty" before a court will engage in the governmental immunity defense analysis.[25]

Because "lack of duty" and "governmental immunity" are in fact two separate defenses, the *McLean* rule ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[26]) can be viewed as a shorthand manner of describing, in one breath, the tandem effect of both defenses. The "discretionary" and "ministerial" language pertains to the governmental immunity defense, while the "special duty" language pertains to the "lack of duty" defense. Since there must always be "duty" for liability to attach, and since discretionary actions are always immune under the governmental immunity doctrine whether or not there is a duty, it follows that "duty" becomes a relevant inquiry only if the action is deemed "ministerial." Stated otherwise, the issue of duty is moot when the action is *discretionary* because the government immunity doctrine has already annihilated any liability. Nevertheless, as the Court indicated in *Valdez v. City of New York*[27] and later in *Metz v. State of New York*,[28] discussed below, the Court prefers to first dispose of the "duty" issue and, only if it finds a duty, to then proceed to the governmental immunity defense analysis.

Metz v. State of New York

Metz v. State of New York concerned a boating accident on Lake George.[29] A privately owned tourist vessel, the *Ethan Allen*, was certified for many years, by the state

agency charged with conducting tour boat safety inspections, to hold a maximum of 48 passengers. The owner modified the vessel, equipping it with a new, heavier "canopy," which made it somewhat top heavy. Meanwhile, the average American's weight was climbing. The state agency nevertheless continued year after year to "rubber stamp" the 48-passenger capacity rating without re-testing the vessel. On a beautiful day, a small wave struck the vessel, and it capsized, killing and injuring many of its 48 elderly passengers. After-the-fact studies showed that the actual capacity rating of the top-heavy ship should have been only 18. The plaintiff claimed that the state's failure to conduct stability tests to determine safe maximum passenger limits in light of the ship's top-heavy remodeling, and the supersizing of Americans, amounted to negligence.[30]

At deposition, the state's employees readily admitted that they had *discretion* to conduct, or not to conduct, fresh stability tests to determine the vessel's correct passenger capacity. This might have seemed to them an unassailable defense, since *McLean* had declared that *"discretionary* municipal acts may never be a basis for liability."[31] The defendant here, however, learned the hard way that the rule as articulated in *McLean* was incomplete. The Third Department granted summary judgment to the plaintiff, dismissing the governmental immunity defense because, although the state had discretion to test the passenger capacity of the vessel, *it failed to exercise this discretion*. It engaged in no decision-making process as to whether to keep the old passenger capacity rating of 48 or conduct new testing. Rather, it simply rubber stamped the old rating with no thought whatsoever of changed circumstances.[32]

At the Third Department level, this was fatal to the state's governmental immunity defense because the court said that the state had not "exercised" the discretion it clearly had. Long before *McLean*, it was well settled that, where a government actor is entrusted with discretionary authority, but *fails to exercise any discretion* in carrying out that authority, the governmental defendant will not be entitled to governmental immunity from liability.[33] This makes sense, because the sole purpose of the governmental function immunity defense is to allow the government to exercise its governmental, policy and quasi-judicial *discretion* without fear of lawsuits. If the government actor fails to exercise any discretion at all, there is no policy reason to enforce the governmental immunity defense. In simple terms, we might call this the "don't-use-it-you-lose-it" rule.

The *Metz* plaintiff won the battle but however, lost the war. When *Metz* reached the Court of Appeals, the Court refused to address the governmental immunity defense analysis until it had first disposed of the issue of duty. The Court noted that the duty the state agency had to inspect passenger vessels, and ensure that the passenger capacity was safe, was to the public at large, and not to the particular plaintiffs in the lawsuit. No "special duty" had been established.[34]

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required.

The Court cautioned that the plaintiffs must *first* establish duty *before* the Court would tackle the governmental immunity defense proper. The Court stated: "As we recently made clear in *Valdez v. City of New York* . . . claimants must first establish the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity."[35]

The Complete Post-*McLean* Governmental Immunity Defense Rule

The rule as pronounced in *McLean* ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[36]) falls short of enunciating the complete rule encompassing the tandem workings of the "duty" requirement and the "government immunity" defense. The Court of Appeals cases that followed in the wake of *McLean* (*Dinardo, Valdez* and *Metz*) exposed the complete rule.

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is generally required. Only if such a duty is found will the actions or omissions of the government officer then be examined. If those actions or omissions are deemed *discretionary*, and that discretion was actually *exercised*, then the government is always immune. But if the action is *discretionary* and no discretion was *exercised*, or if the action was *ministerial*, the governmental immunity defense will fail.

Even this might not be complete statement of the rule, however, as the following discussion will show.

Does the Nonfeasance/Misfeasance Distinction Survive *McLean*?

A pre-*McLean* line of cases, including Court of Appeals cases, drew a distinction between governmental *misfeasance* and *nonfeasance*. If a government's agent (e.g., police officer, clerk, housing inspector) caused harm to

a plaintiff through his or her *misfeasance* (such as, for example, a police officer shooting his gun into a crowd), the government could be held liable for the officer's negligence regardless of whether a "special" duty was established. If, on the other hand, the alleged negligent act amounted to *nonfeasance*, in the sense of negligently failing to provide governmental services or to enforce a statute or regulation (for example, failing to provide police protection or firefighting services or to enforce housing regulations), then the plaintiff must show a *special* duty. In other words, if the negligence complained of amounted to active *misfeasance* rather than passive *nonfeasance*, the duty followed the act. Put another way, where the government official *actively* caused harm, rather than simply, passively permitted harm from some other quarter to befall the plaintiff by failing to provide governmental services or by negligently providing them, the act of causing the harm itself was sometimes deemed to create the duty.[37]

One post-*McLean* court has questioned whether the *misfeasance* exception to the general requirement that a "special duty" must be shown survives *McLean*.[38] In *Applewhite v. Accuhealth, Inc.*,[39] in a footnote, the First Department noted that "in *McLean*, the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function." The court thus refused to "evaluate this case using a distinction between nonfeasance and misfeasance."[40]

Nevertheless, an argument might be made that the *misfeasance/nonfeasance* distinction survives *McLean*. The only post-*McLean* Court of Appeals case that addressed an unambiguous case of *misfeasance* (the line between misfeasance and nonfeasance is often nebulous) was *Johnson v. City of New York*.[41] In that case, a police officer's decision to shoot at armed robbers (thus causing injury to a bystander) was deemed "discretionary," and thus the governmental immunity defense prevailed. Recall that the post-*McLean* Court of Appeals has announced it will not reach the issue of the governmental immunity defense until it first finds a duty. Since the *Johnson* court found the officer's actions were discretionary, we must assume the court first found the officer had a duty toward the injured plaintiff. This duty could not be a special duty because the facts of the case do not lend themselves to establishing a special duty in any of the three ways permitted by Court of Appeals case law.[42] The duty had to be there by virtue of the misfeasance itself. Thus, *Johnson* lends support to the argument that the misfeasance/nonfeasance distinction survives *McLean*.

If so, the full post-*McLean* rule encompassing the tandem workings of the duty requirement and the government immunity defense must be restated yet again as follows: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is required in cases of nonfeasance. In some cases of misfeasance, however, the misfeasance may create the duty. If any duty is found, then the actions of the government officer will be examined. If those actions are deemed discretionary, and that discretion was actually exercised, then the government is always immune. If the action is discretionary but no discretion was exercised, or if the action was ministerial, the governmental immunity defense must fail. ■

1. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
2. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428 (2011).
3. *Riss v. City of N.Y.*, 22 N.Y.2d 579 (1968); *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260 (1987).
4. In *Pelaez v. Seide*, 2 N.Y.3d 186, 202 (2002), the Court of Appeals enunciated a three-prong test to determine whether the Legislature, in passing the law in question, intended to create a private right of action for a plaintiff. The plaintiff must show that he or she is (1) one of a class of persons for whose particular benefit that statute was created; (2) that recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) that to do so would be consistent with the legislative scheme.
5. *Id.* at 195.
6. The third way of establishing a "special duty" between the public corporation and the injured person or class of persons is exceedingly rare. Examples of instances where it was established are: where a town knew of blatant, dangerous violations on a motel's premises, but the town affirmatively certified the premises as safe by issuing a certificate of occupancy, upon which representation plaintiffs justifiably relied in their dealings with the premises, then a proper basis for imposing liability on the town may well have been demonstrated. *See Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 (1983). And where a city sewer inspector observed that private sewer system trench violated rules and code since it had been excavated to a depth of over 11 feet without bracing or shoring and inspector stated to decedent, before he descended therein, that the walls looked pretty solid and that the inspector did not think they needed bracing, city was liable for death of decedent killed in cave-in of trench, by reason of the inspector's positive action in assuming direction and control at jobsite in absence of decedent's supervisor. *See Smullen v. City of N.Y.*, 28 N.Y.2d 66 (1971).
7. *Cuffy*, 69 N.Y.2d 255.
8. 2 N.Y.3d at 195.
9. 4 N.Y.3d 499, 505 (2005).
10. *Id.*
11. *Pelaez*, 2 N.Y.3d at 195.
12. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
13. *Id.*
14. *Kovit*, 4 N.Y.3d at 505.
15. *Pelaez*, 2 N.Y.3d at 195.
16. *See McLean*, 12 N.Y.3d 194.
17. *Id.*
18. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.
19. 13 N.Y.3d 872 (2009).
20. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).
21. 18 N.Y.3d 69 (2011).
22. *Id.*
23. *Id.*

24. *Id.*

25. *Id.*

26. *McLean*, 12 N.Y.3d 194.

27. *Valdez*, 18 N.Y.3d at 80.

28. *Metz v. State*, 20 N.Y.3d 175 (2012).

29. *Id.*

30. *Id.*

31. *McLean*, 12 N.Y.3d 194.

32. *Metz v. State of N.Y.*, 86 A.D.3d 748 (3d Dep't 2011), *rev'd*, 20 N.Y.3d 175 (2012).

33. *Mon v. City of N.Y.*, 78 N.Y.2d 309, 313 (1991); *Haddock v. City of N.Y.*, 75 N.Y.2d 478, 485 (1990).

34. *Metz*, 20 N.Y.3d 175.

35. *Id.* (citing *Valdez*, 18 N.Y.3d 69).

36. *McLean*, 12 N.Y.3d 194.

37. *See Perez v. City of N.Y.*, 298 A.D.2d 265 (1st Dep't 2002) (police could be held liable for accidental shooting of a bystander); *Wilkes v. City of N.Y.*, 308 N.Y. 726 (1954) (same); *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955) (same); *Rodriguez v. City of N.Y.*, 189 A.D. 2d 166 (1st Dep't 1993) (same, and Court explained that "the special duty rule is limited to cases involving nonfeasance, where the municipality is alleged to have failed to take action in breach of some general duty imposed by law or voluntarily assumed for the benefit of the public as a whole" . . . and "the rule has no application to plaintiff's theory of negligence in the officer firing across the crowded street and hitting plaintiff"). The rationale for finding a duty where *misfeasance* is involved is that "even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care." *Parvi v. City of Kingston*, 41 N.Y.2d 553 (1977) (police officers' taking intoxicated men into custody created a duty on the part of the police officers to exercise reasonable care to secure their safety and police could be held liable for leaving the intoxicated men near the Thruway where they were later hit by a passing car); *Walsh v. Town of Cheektowaga*, 237 A.D.2d 947 (4th Dep't 1997) (police officers who affirmatively prevented a drunk driver from driving his car, and then let him go on foot across a railroad track, could be held liable for his being hit by a train, despite absence of a "special duty"). *See also Schuster v. City of N.Y.*, 5 N.Y.2d 75, 81–82 (1958).

38. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).

39. 90 A.D.3d 501 (1st Dep't 2011).

40. *Id.*

41. 15 N.Y.3d 676 (2010).

42. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.