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I. THE NOTICE OF CLAIM

a. When is a Notice of Claim even Required?

Smith v. Pierce, 181 A.D.3d 849, 119 N.Y.S.3d 867 (2nd Dep't 2019). Plaintiff commenced this action against Newburg Bus Company and Leprechaun Lines, Inc., both private for-profit corporations, for injuries sustained when a bus collided with his vehicle in Newburgh, Orange County. Defendants moved for summary judgment dismissing the complaint on the ground that the plaintiff failed to serve a timely notice of claim on the nonparty County of Orange within 90 days of the accrual of his claim. They claimed such a notice of claim was required. The defendants established that the bus was owned by the County, which leased it to the defendant Newburgh Bus, and that the County also contracted with Newburgh Bus to provide public transportation to the residents of the County. The service contract between the County and Newburgh Bus contained a clause requiring Newburgh Bus to indemnify the County. Court held that plaintiff was required to serve a notice of claim since the defendants established that the County had a statutory duty to operate a transit system and"[t]he imposition of such duty created an obligation that the [C]ounty indemnify [Newburgh Bus] for any damages recovered against it and therefore a notice of claim was required".

Blackmon v. City of Syracuse, 2020 WL 4249924 (4th Dep't 2020). Current or former employees of defendant City of Syracuse's Department of Public Works commenced this action against the City and some of its employees for race discrimination in their employment and retaliation. The City moved to dismiss the complaint pursuant to CPLR 3211. In opposition to the motion, plaintiffs did not dispute that they failed to file a notice of claim, but rather argued that they were not required to do so. As to the Federal discrimination claims, there was certainly no requirement to follow New York notice-of-claim rules. As for the New York State Human Rights Law claims, plaintiffs contended that GML 50-e and 50-I (notice of claim required for ***torts, personal injuries***, ***wrongful death, and property damage)*** did not apply because they were suing under the Human Rights Law not for tort or breach of contract. The Court agreed with plaintiffs that they did not need to file a notice of claim with respect to their ***Federal*** discrimination claim, so those claims were allowed to proceed. However, as for the State Human Rights Law claims, the Syracuse City Charter § 8-115 (3) did not purport to limit the notice-of-claim requirement to tort claims or property loss claims. Instead, it provides in relevant part that "[n]o action or special proceeding, *for any cause whatever*, ... involving the rights or interests of the [C]ity shall be prosecuted or maintained against the [C]ity" unless a notice of claim was served on the City within three months after the accrual of such claim. While it is true that the notice of claim provisions of GML 50-e and 50-i are not applicable to Human Rights Law claims, that is so only because Human Rights claims "are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i" The Court held that the broad language of that notice of claim requirement encompassed plaintiffs' causes of action under the Human Rights Law. Thus, plaintiffs were not allowed to proceed with their Human Rights Law claims for failure to comply with a condition precedent, though they were free to continue with the Federal law discrimination claims.

b. Consequences of Suing without Having Served a Notice of Claim

Ahmad v. New York City Department of Education, 177 A.D.3d 834, 113 N.Y.S.3d 162 (2nd Dep't 2019). Plaintiff was working on elevated pipe scaffolding in a New York City school gymnasium when one of the scaffolding planks broke and he fell down to the floor and onto his lower back, sustaining injuries to his back and upper and lower extremities. His employer prepared an accident report. About 100 days after the accident, plaintiff filed a petition seeking leave to serve a late notice of claim on the City of New York and the New York City Department of Education. The petition was denied, but plaintiff nevertheless sued. It was undisputed that the plaintiff failed to timely serve the notice of claim and that the plaintiff did not succeed in obtaining leave to serve a late notice of claim. Accordingly, plaintiff's lawsuit was properly dismissed pursuant to CLR 3211(a)(7) for failure to state a cause of action.

c. Error in the Description of the Place or Address in the Notice of Claim

Scott v New York City Hous. Auth., 176 A.D.3d 576, 111 N.Y.S.3d 10 (1st Dep't 2019). Summary judgment was granted in this action where plaintiff alleged he was injured when he slipped and fell while descending an interior stairway in a building owned by defendant. The original notice of claim that was timely filed with defendant failed to provide it with the correct accident location and the photographs and plaintiff's 50-h testimony failed to correct the mistake. Although plaintiff properly corrected the street address at his 50-h hearing, he also testified at his 50-h hearing that he fell in stairwell "B" as he descended the stairway, but could not recognize the location shown in the photographs. It was not until his deposition two years after the accident that he testified that stairwell "A" was where he fell. Since plaintiff never sought to amend his notice of claim, which he was permitted to do pursuant to the GML, and the incorrect address was still in the only notice of claim properly served, defendant did not have to establish that it was prejudiced by plaintiff's mistake. Plaintiff could have and should have attempted to correct the error by bringing a motion to amend the notice of claim, but did not. Plaintiff's subsequent service of a corrected notice of claim that stated that the accident happened at 535 Havemeyer Avenue in stairwell "A" was unavailing since that notice is a nullity because it was served without leave of court. In any event, upon a search of the record, defendant was entitled to summary judgment on the merits.

d. New Claims Not Asserted in the Notice of Claim

Rubenstein v. City of New York, 176 A.D.3d 1132, 111 N.Y.S.3d 43 (2nd Dep't 2019). Plaintiff slipped and fell on ice on a pedestrian ramp leading from the sidewalk into a roadway. In her notice of claim plaintiff alleged that she "slipped and fell as a result of an ice condition," and that "the ice was covered by a freshly fallen thin layer of snow." At her 50-h plaintiff testified that it had been snowing lightly for approximately an hour before the accident, and that there was a "dusting" of snow on the ramp at the time of her fall. The complaint alleged that the icy condition on which the plaintiff fell was caused by "a backup of water from the closest sewer which flooded the pedestrian ramp," that the "sewer backup . . . was known to occur with regularity," and that the City was negligent in failing to repair the allegedly defective condition. The City subsequently moved for summary judgment dismissing the complaint on the ground that the complaint alleged a different theory of liability than the notice of claim. Motion granted since the notice of claim contained no allegation that the City caused or created the icy condition.

I.T.K. v. Nassau Boces Educational Foundation, Inc., 177 A.D.3d 962, 113 N.Y.S.3d 726 (2nd Dep't 2019). Plaintiff, raped by another student at school, was not allowed to proceed under the theory that the school district negligently failed to formulate an appropriate IEP for her, as the plaintiff did not include this theory in her notice of claim. In her notice of claim, she alleged only negligent supervision. This was not a technical change, but was an impermissible substantive change to the theory of liability. Further, there was no indication that the plaintiff sought leave to amend her notice of claim, and in any event, such a request would have been futile since § 50–e(6) allows good-faith, nonprejudicial technical changes, but not substantive changes in the theory of liability.

Brown v. City of New York, 67 Misc.3d 133 (1st Dep't 2020). In opposition to the City's SJ motion, plaintiff did not dispute that the evidence submitted by the City established that it did not receive prior written notice of the condition. Instead, plaintiff sought to demonstrate that an exception to the written notice rule applied, by attempting to raise a triable issue of fact as to whether the City may have caused or created the dangerous condition. But plaintiff had never asserted this theory in the notice of claim or even in the complaint, and instead waited until approximately 16 months after the accident to do so, in his bill of particulars. Nor did plaintiff seek leave to serve a late notice of claim containing the new theory prior to the expiration of the one year and 90-day statute of limitations period, and thus, at most she could seek leave to amend the complaint, but since this was a substantive rather than a technical change in the claim, that request would have been denied.

Weinstein v. County of Nassau, 180 A.D.3d 730, 115 N.Y.S.3d 698 (2nd Dept 2019). Plaintiff tripped and fell after stepping into a hole in a roadway. The plaintiff's allegation that the City was negligent in failing to provide adequate lighting in the subject area, which was improperly raised for the first time in his bill of particulars nearly three years after the accident, was rejected because plaintiff did not assert that theory of liability in the notice of claim or the complaint, and the plaintiff never sought leave to amend the notice of claim pursuant to General Municipal Law § 50–e.

II. AMENDING THE NOTICE OF CLAIM

Ebron v. New York City Housing Authority, 177 A.D.3d 530, 114 N.Y.S.3d 55 (1st Dep't 2019). Plaintiff's motion to amend the bill of particulars to include the allegation that water or condensation on the bathroom floor caused the accident was denied because neither the original notice of claim nor the amended notice contained that claim, and the limitation period of one year and 90 days to assert it against defendant had passed.

Dimattia v. City of New York, 183 A.D.3d 823, 124 N.Y.S.3d 400 (2nd Dep't 2020). Pedestrian tripped and fell on a sidewalk in Staten Island. Her notice of claim identified the location as "near 165 Seagate Court" in Staten Island. At her 50-h a year later, she testified that the accident occurred in front of a house on Father Capodanno Boulevard. She later moved to amend leave to amend the notice of claim to substitute 165 Father Capodanno Boulevard in the place of 165 Seagate Court as the location of the accident. The petitioner was not able to identify any witnesses to the accident or the alleged defective condition, did not receive any medical assistance at the site, and did not allege that the accident was

reported to anyone so as to give the City actual knowledge of the location of the alleged defective condition within the statutory 90–day period or a reasonable time thereafter. Court found that plaintiff failed to demonstrate that the error was made in good faith and failed to meet her initial burden of demonstrating that the City would not be prejudiced as a result of the petitioner's lengthy delay in seeking leave to correct the description of the accident location. Contrary to the petitioner's contention, she failed to establish that the alleged sidewalk defect had remained unchanged from the time of the accident until the time that she correctly identified its location more than one year later at the 50-h hearing. Motion to amend n/c denied.

Matute v. Town of Hempstead, 179 A.D.3d 1047, 114 N.Y.S.3d 688 (2nd Dep't 2020). Plaintiff was employed as a carpenter by a subcontractor hired by a general contractor which had been retained by the defendant Town to construct houses. Plaintiff was injured while using an electrical circular saw to cut wood. He served a timely notice of claim against the Town, but did not mention certain violations of Industrial Board regulations he would later allege. More than six months after the accident, plaintiff sued the general contractor and the Town. Town moved, inter alia, for summary judgment dismissing the LL 241(6) cause of action, as did the general contractor. The plaintiff then cross-moved pursuant to GML 50-e(6) and CPLR 3025 for leave to amend the notice of claim and the complaint to assert violations of certain Industrial Board regulations he had not previously asserted (12 NYCRR 23–1.5(c)(3) and 23–1.12(c)(1). The Supreme Court granted the motions and denied the cross-motion, leaving plaintiff without a LL 241(6) cause of action. Appellate Court reversed since the proposed amendments were not palpably insufficient or patently devoid of merit and leave to amend to identify certain relevant Industrial Code provisions should properly be granted, even after the note of issue has been filed, where, as here, the plaintiff made a showing of merit, and the amendment involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants.

III. LATE SERVICE OF THE NOTICE OF CLAIM

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

i. Patently Meritless Claim

Kmiotek v. Sachem Central School District, 176 A.D.3d 1063, 111 N.Y.S.3d 322 (2nd Dep't 2019). Five members of the high school football team were engaged in a strength conditioning drill carrying a heavy, large log or pole above their heads or on their shoulders. During the drill, a different team member (decedent) was severely injured when the log or pole became unstable and dropped. Approximately 10 months later the petitioners (parents of their infant children) bought a petition for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc upon the school district alleging intentional and negligent infliction of emotional distress, claiming they were all in the zone of danger at the time of the accident. Court found that petitioner's children were not immediate family members of the decedent and thus had no legally cognizable claim. The proposed notice of claim was thus dismissed as "patently meritless."

ii. Notice of Claim mailed to Wrong Entity

Matter of Brown v. New York City Hous. Auth., 182 A.D.3d 594, 120 N.Y.S.3d 807 (2nd Dep't 2020).

Plaintiff was injured when she tripped and fell on a defective step located in the lobby of a building owned by the New York City Housing Authority. Six weeks later, she served the City and attempted to serve NYCHA with a notice of claim together with photographs of the defective condition, taken two days after the accident, by delivering those documents both to the Comptroller of the City of New York at its address. Three months later, plaintiff served NYCHA with an amended notice of claim and photographs of the defective condition at its own address. By order to show cause shortly thereafter, plaintiff sought leave to serve a late notice of claim upon NYCHA. Court found that the error in serving NYCHA at the Comptroller's Office and at an incorrect address was an excusable error since the plaintiff's attorney promptly re-served NYCHA at its correct address after discovery of the mistake and followed up by commencing this proceeding. Furthermore, plaintiff met her initial burden of showing that NYCHA would not be substantially prejudiced by the late notice of claim, since the photographs taken by the petitioner depicted the defect as it existed at the time of the accident. In response to this initial showing, NYCHA produced evidence that the subject defect had been repaired approximately two months after the accident. Therefore, due to its own actions, NYCHA would not have been able to investigate the site of this transitory defect any more effectively than it could have had it been timely served 90 days after the accident. Thus, NYCHA failed to rebut the plaintiff's initial showing as to lack of prejudice with a particularized evidentiary showing that the petitioner's delay in serving a notice of claim would prejudice it in its defense on the merits.

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

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

Matter of D.S. v South Huntington Union Free Sch. Dist., 176 A.D.3d 1075, 111 N.Y.S.3d 687 (2nd Dep't 2019). Record supported the Supreme Court's determinations that the ***two-month delay*** in serving the notice of claim was reasonable under the circumstances and in any event, the school district acquired actual knowledge of the essential facts constituting the claims within a reasonable time after the expiration of the 90-day period. Moreover, school district failed to rebut the petitioners' showing of an absence of prejudice, with particularized evidence.

Vitko v. Simon, 179 A.D.3d 1515, 119 N.Y.S.3d 341 (4th Dep't 2020). Appellate Court held that Supreme Court abused its discretion in granting plaintiff's application for leave to serve a late notice of claim against defendant Town nearly ***eleven months after the incident (eight months late)***. Plaintiff failed to meet her burden of demonstrating that the Town had actual knowledge of the incident within 90 days of its occurrence and failed to offer a reasonable excuse for her failure to timely serve the notice of claim.

2. Med Mal Cases: Test Is Whether Med Malpractice was Apparent in the Med Records.

M.M. v. New York City Health and Hospitals Corporation, 175 A.D.3d 1209, 109 N.Y.S.3d 292 (1st Dep't 2019). The motion court did not abuse its discretion in denying plaintiff leave to file a late notice of claim. Defendant's records alone, on their face, did not evince that defendant's acts or omissions caused plaintiff's

injuries, and thus defendant could not be said to have actual knowledge within the statutory period. There was nothing in the record that supported the assumption that plaintiff should have been delivered by Caesarian section, and he did not submit an affidavit from a medical expert. Furthermore, plaintiff failed to meet his burden to show that defendant would not be substantially prejudiced as a result of his nine-year delay in seeking leave to file a late notice of claim. The hospital records available to defendant did not alert them to a claim of malpractice and thus could not, ipso facto, establish a lack of prejudice. Plaintiff also does not dispute that the handwritten records pertaining to the events that give rise to his medical malpractice claims, including the prenatal care record, labor and delivery notes, the recovery notes and the obstetrics physicians post-partum progress notes, were destroyed in a fire before leave to late-server the notice of claim was brought, and thus defendant was not substantially prejudiced, despite the availability of electronic records, because there was no dispute that those electronic records do not set forth who provided medical treatment to plaintiff and his mother or what treatments were rendered. Leave to late serve denied.

Sacha v. City of New York Health and Hospitals Corporation, 2020 WL 4495749 (2nd Dep't 2020). Plaintiff was taken to a municipal hospital emergency room with complaints of a severe occipital headache, for which she was given a morphine injections and discharged with a diagnosis of a recurrent migraine headache. The next day, her headache returned and she was taken by ambulance to the emergency room at another municipal hospital. The ER there evaluated her and was discharged with prescriptions for certain medications and advised to follow up with her primary care physician, to whom she went upon discharge. The following day, she was taken by ambulance to yet another municipal hospital, which transferred her to a private hospital, for emergency surgery to remove a blood clot in her brain which had caused a hemorrhagic stroke. Seven months later, she brought an application for leave to serve a late notice of claim upon the two municipal hospitals. Leave denied because plaintiff failed to show the hospitals had "actual knowledge" of the claim through the medical records and failed to show the hospitals would not be prejudiced by the delay.

Matter of Dusch v. Erie County Medical Center, 184 A.D.3d 1168, 125 N.Y.S.3d 511 (4th Dep't 2020). Plaintiff moved to late-serve a notice of claim for medical malpractice. Court held that plaintiff's medical records showed that the defendant municipal hospital had actual knowledge of the essential facts constituting the claim during his hospitalization. The medical records indicated that, following the surgical skin graft procedure, claimant developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that the medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg. Claimant also met his initial burden of showing that the late notice would not substantially prejudice defendants and, in opposition, defendants failed to make a "particularized showing" of substantial prejudice caused by the late notice. Two justices dissented and would have denied leave to serve the late notice of claim. They did not agree that claimant met his burden of demonstrating defendants' actual knowledge of the essential facts because claimant did not attach his medical records to his application and submitted no evidence regarding what material within those records provided notice to respondents. He submitted them only in a reply affidavit, which, although the majority here allowed, these dissenters would not have allowed.

W.Z. v. New York City Health and Hospitals Corporation, 2020 WL 3815885 (2nd Dep't 2020). Plaintiff allegedly sustained brain injuries as the result of medical malpractice when he was born prematurely via an emergency C-section. Five years later, a notice of claim was served, without leave of court, and a lawsuit was then filed. Plaintiff then moved for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc. The Court here first notes that plaintiff's service of the late notice of claim on, without leave of court was a nullity. The plaintiff did not purport to have a reasonable excuse for the failure to timely serve a notice of claim, or for the lengthy delay in seeking leave to serve a late notice of claim. Plaintiff also failed to establish that the plaintiff's medical records maintained by the defendant supplied the defendant with actual notice of the essential facts constituting the claim. The medical records failed to evince that the defendant's medical staff, by its acts or omissions, inflicted injury on the plaintiff, notwithstanding the opinion of the plaintiff's expert that had the defendant's medical staff taken a different course of treatment, there could have been a better result. Leave to late-serve denied.

3. Actual Knowledge from Police Reports

Melcer v. City of New York, 2020 WL 3816070 (2nd Dep't 2020). Decedent and his brother were playing in a soccer match on the premises of a public high school and, after the game was terminated by the referees due to excessive violence during the match, members of the opposing soccer team stabbed the decedent and his brother causing the decedent's death and injuries to his brother. The criminal complaint prepared by NYPD was not evidence that the defendants acquired actual knowledge of the essential facts underlying the claims because it indicated only that the decedent was stabbed multiple times causing his demise, failed to provide actual notice of the facts constituting the plaintiffs' claims of, inter alia, negligent supervision, failure to provide adequate security and staffing, failure to prevent foreseeable injury, and failure to call for additional police support, or that the decedent's brother was injured as a result of the defendants' alleged negligence. The plaintiffs also did not demonstrate a reasonable excuse for their failure to serve a timely notice of claim. The fear of retaliation by the government because of the decedent's brother and other family members' lack of legal status in the United States was not reasonable. Plaintiffs also failed to sustain their initial burden of presenting "some evidence or plausible argument" that the defendants were not substantially prejudiced by the one-year delay from the expiration of the 90–day statutory period in defending on the merits" since the delay deprived the defendants of the opportunity to promptly find and interview witnesses and obtain a medical examination of the injured plaintiffs, or otherwise conduct a timely and meaningful investigation of the claims. Petition to late-serve denied.

Durand v. MV Transportation, Inc., 2020 WL 4659569 (2nd Dep't 2020). Plaintiff was injured when he was struck by a van and nine months later served a notice of claim upon the municipal defendants. Six months after that, plaintiff sought leave to serve a late notice of claim or to have the previously served one deemed served nunc pro tunc. Plaintiff failed to provide a reasonable excuse for his failure to serve a timely notice of claim. The bald and unsubstantiated assertion of the plaintiff's present attorney that the plaintiff's former attorney was not aware of the requirement to serve a notice of claim upon the municipal defendants within 90 days after the claim arose was insufficient to demonstrate a reasonable excuse. The plaintiff also failed to proffer any explanation for the additional six-month delay between the time that he discovered the error and the filing of his motion for leave to serve a late notice of claim. The police accident report, which was prepared by an officer who responded to the scene of the plaintiff's

accident, was insufficient by itself to establish that the municipal defendants acquired actual knowledge of the plaintiff's claim. The fact that the NYPD had knowledge of this accident did not establish actual knowledge by the municipal defendants. There was no evidence that the accident was reported to the municipal defendants within 90 days after the claim arose. Moreover, the service of a notice of claim upon the municipal defendants five months after the 90–day statutory period had expired was too late to provide the municipal defendants with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of that statutory period.

Lugo v. GNP Brokerage, 2020 WL 3980626 (2nd Dep't 2020). Plaintiff was injured in a motor vehicle accident. An EMS vehicle owned by the City of New York responded to the scene and, as it was backing up, struck the petitioner's vehicle. A police accident report was prepared by a police officer who responded to the scene. Almost a year and 90 days later, and after plaintiff had already sued the driver of the first vehicle without naming the City or alleging negligence of the EMT driver, plaintiff brought a petition to late-serve the City for negligence of the EMT driver. Court held that City did not acquire timely, actual knowledge of the essential facts constituting the claim by virtue of the police accident report, which stated that the EMS vehicle caused "no damage" to the plaintiff's vehicle, and did not indicate that there was any connection between the plaintiff's injuries and any negligent conduct on the part of the operator of the EMS vehicle. Furthermore, law office failure was not a reasonable excuse for the lateness. Plaintiff also failed to present "some evidence or plausible argument" supporting a finding that the City would not be substantially prejudiced by the nearly one-year delay in seeking leave to serve a notice of claim. Notably, the delay prevented the City from promptly conducting a thorough investigation and interviewing witnesses while their memories were still fresh. Petition to late-serve denied.

Miskin v. City of New York, 175 A.D.3d 684, 107 N.Y.S.3d 96 (2nd Dep't 2019). Speech therapist was injured when she slipped and fell while walking on a paved roadway located in front of a City high school. Almost a year and 90 days later, she applied for leave to serve a late notice of claim upon the City of New York. Plaintiff failed to establish that the City acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The filing of an injury report with the New York City Board of Education, as well as applications for sick leave with the DOE—both of which are entities that are separate and distinct from the City – were of no matter as they did not provide actual notice of the facts constituting the petitioner's claim that she slipped and fell on "loose paving debris" as a result of the City's negligence. The injury report merely indicated that the petitioner fell after stepping on "rock/tar rock" and made no reference to the claims listed in the proposed notice of claim, inter alia, that the City was negligent in creating a dangerous condition. Plaintiff's failure to ascertain that the City was responsible for paving and maintaining the subject roadway was attributable to a lack of due diligence in investigating the matter, which is an unacceptable excuse. Moreover, given the transitory nature of the defect, plaintiff failed to sustain her initial burden of presenting "some evidence or plausible argument" that granting the petition would not substantially prejudice the City in defending on the merits. Leave to late-serve denied.

Matter of Molme v New York City Tr. Auth., 177 A.D.3d 601, 112 N.Y.S.3d 167 (2nd Dep't 2019). Plaintiff was injured when the vehicle she was driving collided with a bus owned by NYCTA. The same day as the accident, the bus driver prepared an "Operator's Daily Trip Sheet" and an NYCTA supervisor prepared a

"Supervisor's Accident/Crime Investigation Report." Plaintiff moved to late-serve a notice of claim several months after the 90-day statutory period. The Court found that NYCTA did not acquire timely, actual knowledge of the essential facts constituting the petitioner's claim. The Operator's Daily Trip Sheet and the police accident report did not indicate that anyone was injured in the accident, and the Supervisor's Accident/Crime Investigation Report stated that nobody was injured in the accident. Furthermore, the petitioner did not proffer any excuse for the failure to serve a timely notice of claim and the delay in commencing this proceeding. Moreover, the petitioner failed to present "some evidence or plausible argument" that her more than three-month delay in serving a notice of claim and commencing this proceeding did not substantially prejudice the NYCTA in defending on the merits. Notably, the delay prevented the NYCTA from promptly obtaining a medical examination of the petitioner. Leave to late-serve denied.

Matter of Galicia v. City of New York, 175 A.D.3d 681, 107 N.Y.S.3d 430 (2nd Dep't 2019). Plaintiff was injured when a police officer grabbed her from behind and threw her to the ground. She served a n untimely notice of claim on the City 25 days beyond the 90-day statutory period. The City did not send to plaintiff's attorney anything saying it rejected the notice of claim, and instead served a 50-h hearing notice Nearly 11 months after she served the untimely notice of claim, she petitioned permission to late-serve a notice of claim. As an excuse for her lateness, she asserted that she did not become aware of the severity of her left shoulder injury until after she had surgery on it two weeks after the 90-day statutory period expired. However, the medical records she submitted reflected that she consulted with a physician two days prior to the expiration of the statutory period and that she had complained to him of an inability to use or lift her left arm since the time of the occurrence, told him she had not had any treatment since she was injured, and elected to have surgery. Furthermore, the petitioner failed to offer any excuse for the additional 11-month delay between the time that she served her notice of claim without leave of court and her petition to late serve. Under these circumstances, Court found her excuse for the lateness was not reasonable. Further, the City did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The report prepared by Emergency Medical Service workers on the day of the incident indicated that the first responders, who were in the ambulance attending to the petitioner's friend, requested that the police remove the petitioner from the ambulance. According to the report, the petitioner, who appeared to be intoxicated, was treated for a shoulder injury following a possible fall. Nothing in the report provided the City with actual notice of the petitioner's claims, inter alia, of assault and battery, and use of excessive force by an NYPD police officer, or that she was allegedly injured as a result of the NYPD's wrongful conduct. The report made no connection between the petitioner's injuries and any alleged wrongful conduct by the City. ***The late notice of claim, served upon the City without leave of court almost one month after the 90-day statutory period had expired, was served too late to provide the City with actual knowledge of the essential facts constituting the claim within a reasonable time after the 90-day statutory period had expired.*** Plaintiff also failed to sustain her initial burden of presenting "some evidence or plausible argument" that granting the petition would not substantially prejudice the City in maintaining its defense on the merits. Leave to late-serve denied.

4. Actual Knowledge from prior Notices of Claim by other Plaintiffs

Bingham v. Town of Wheatfield, 2020 WL 42496759 (4th Dep't 2020). In November 2016 certain residents living near the Town's landfill received the results of environmental testing conducted on their properties, which revealed contamination. Some of them served timely notices of claim within 90 days, on respondent in early 2017. Others filed applications for leave to serve late shortly thereafter, which applications were granted. In the matter at hand, though, 67 claimants served late notices of claim (without leave) about two years after the November 16 contamination results were sent out and at the same time sued and moved to have the notices of claims deemed timely nunc pro tunc. Although more than one year and ninety days had elapsed between the November 2016 accrual date alleged in claimants' proposed notices of claim and their application for leave to serve late notices of claim, the court agreee with claimants that the filing of the federal class action in March 2017, in which claimants were putative class members, tolled the statute of limitations. This toll applies even though the federal court had not issued a determination regarding class certification. Because the applicable statute of limitations was tolled and had not expired, the court retained discretion to grant or deny claimants' application for leave to serve late notice of claim. Permission to late-serve was granted because the Town had timely actual knowledge of the claim, i.e., similarly situated individuals served timely notices of claim on respondent alleging "substantively identical" exposure to the Site's pollutants and resulting damages. Further, defendant was not substantially prejudiced by the delay inasmuch as respondent has been investigating similar claims since early 2017. Leave to serve the late notices of claim granted.

5. First-hand Actual Knowledge

Matter of Torres v. County of Westchester, 176 A.D.3d 720, 107 N.Y.S.3d 677 (2nd Dep't 2019). Plaintiff was arrested and subsequently charged with disorderly conduct. Nine months later, the charge against the petitioner was dismissed. A few days later, plaintiff applied to late-serve a notice of claim against several county defendants. Leave denied. Plaintiff failed to provide a reasonable excuse for his failure to serve a timely notice of claim and actual knowledge was not established. The involvement of a County in arresting plaintiff and in investigating the incident did not, without more, establish that the County acquired actual knowledge of the essential facts constituting the petitioner's claims of, inter alia, assault, battery, false arrest, false imprisonment, negligence, and prima facie tort within 90 days following their accrual or a reasonable time thereafter. In addition, the mere alleged existence of other County records and photographs, without evidence of their content, without more, was insufficient to impute actual knowledge to the County. Finally, plaintiff failed to show that the delay in serving a notice of claim would not substantially prejudice the County in maintaining its defense on the merits with respect to those claims.

Matter of Brooks v. County of Suffolk, 177 A.D.3d 969, 115 N.Y.S.3d 342 (2nd Dep't 2019). The notices of claim alleged that the petitioners were injured when their drinking well water was contaminated by PFOS and PFOA contained in a firefighting foam used at a municipal airport, which was owned and operated by the County. Court found that plaintiffs demonstrated that they did not discover their injury until they became aware of the contamination based on the County's news release advising of same, or within a reasonable time thereafter. The County's news release showed that the County had knowledge, as of that date, that these property owners may have sustained injuries by reason of the contamination of

their well water as the result of PFOS emanating from the airport. Inasmuch as the County acquired timely, actual knowledge of the essential facts of the petitioners' claims, the petitioners made an initial showing that the County was not prejudiced by their delay in serving the notices of claim. Moreover, the petitioners sought leave to serve late notices of claim only a little more than three months after the statutory period had expired. In opposition, the County failed to rebut plaintiffs' showing that the County was not prejudiced by their delay with any particularized evidence. Motion for leave to late serve granted.

Doe v. City of New York, 2020 WL 3816088 (2nd Dep't 2020). 16–year–old plaintiff, a student at a high school in Queens, was raped by another student in the school stairwell. Ten months after the rape, her mother served a (late) notice of claim, and soon thereafter sued the School District and the DOE. Soon thereafter, plaintiff filed an amended complaint and moved pursuant to GML 50-e(5) for leave to deem the late notice of claim timely served nunc pro tunc. The amended complaint asserted, in relevant part, causes of action alleging negligent supervision, negligent infliction of emotional distress, and sex discrimination and retaliation in violation of Title IX of the Education Amendments. The defendants cross-moved to dismiss the amended complaint. Appellate Division found that Supreme Court improvidently exercised its discretion in denying those branches of the plaintiff's motion to deem the late notice of claim timely served nunc pro tunc on the DOE with respect to the claims alleging negligent supervision and negligent infliction of emotional distress. The DOE had actual knowledge, within the statutory period or a reasonable time thereafter, of the facts constituting those claims, which arose as a result of the alleged rape. Furthermore, in light of the DOE's actual knowledge of the essential facts constituting the claims of negligent supervision and negligent infliction of emotional distress, the plaintiff met her initial burden of establishing a lack of substantial prejudice to the DOE in maintaining a defense with respect to those claims. In opposition, the DOE failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice with respect to those claims. However, The A.D. agreed with the Supreme Court's determination to deny those branches of the plaintiff's motion with respect to the claims alleging sex discrimination and retaliation in violation of Title IX inasmuch as the plaintiff failed to demonstrate that the DOE acquired timely, actual knowledge of the essential facts constituting those claims.

6. Actual Knowledge from 911 Calls

Adbelghany v. City of New York, 2020 WL 4495791 (2nd Dep't 2020). Plaintiff sought leave to serve a late notice of claim against the City and its Fire Department. The proposed notice of claim alleged that, more than one year earlier, the appellants had been negligent in responding to a call to the 911 emergency number that was made after the petitioner's daughter was discovered drowning in a swimming pool. Court here found defendants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter by virtue of their possession of a portion of the relevant 911 call. The calls are initially answered by a representative of the New York Police Department (hereinafter NYPD) and are transferred to the FDNY's Emergency Medical Dispatch Center if, as here, the reported emergency is of a medical nature. But the NYPD portion of the call was deleted in the normal course of business after 180 days, while the FDNY portion was retained. The FDNY portion of the call and other communications maintained by the appellants revealed that the arrival on the scene of an Advanced Life Support ambulance was delayed because the ambulance was initially directed to an

incorrect address, but did not reveal whether the defendants' employees or the 911 caller was the source of the error. Rather, it was the deleted NYPD portion of the call that would likely have contained that information. Thus, defendants had no knowledge that a claim would be brought alleging the wrong address was their mistake. Furthermore, the plaintiff's daughter's pulse and breathing were restored in the ambulance, and nothing in the records maintained by the appellants revealed the extensive injuries that the plaintiff's daughter allegedly suffered. Further, even assuming that plaintiff demonstrated an absence of prejudice, in response, the appellants made a particularized evidentiary showing that they would be substantially prejudiced by the more than one year delay in serving the notice of claim by showing that the NYPD portion of the call, which would likely have revealed the source of the erroneous residential address, had been deleted.

7. Actual Knowledge from Surveillance Video

Matter of Sproule v New York Convention Ctr. Operating Corp., 180 A.D.3d 496, 120 N.Y.S.3d 5 (1st Dep't 2020). Plaintiff was struck by a scissor lift that was being operated by an employee of New York Convention Center Operating Corp. Approximately six months after the accident, plaintiff applied to late-serve a notice of claim. Although petitioners failed to offer any reasonable excuse for their failure to timely serve a notice of claim, this failure is not, standing alone, fatal. Plaintiff demonstrated that defendant acquired actual notice of the event within a reasonable time thereafter, and that defendant would not be substantially prejudiced in their defense by the delay. Specifically, there was a surveillance video of the accident. Further, correspondence between the insurance carrier and the defendant suggested that only one month after plaintiff's accident, the carrier was aware that the claims administrator anticipated that plaintiff would be asserting a claim based on the incident. Application to late-serve granted.

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

Matter of Diaz v Rochester-Genesee Regional Transp. Auth. (RGRTA), 175 A.D.3d 1821, 109 N.Y.S.3d 806 (4th Dep't 2019). Claimant was operating a garbage truck when the truck was involved in a collision with a bus owned and operated by defendant. Shortly thereafter, an employee of defendant went to the scene of the collision and spoke to claimant as part of an investigation. Claimant stated that she was unhurt. Nearly 90 days after the incident, claimant retained the services of a law firm, which prepared a notice of claim, but the notice of claim was not timely served. An application for leave to serve a late notice of claim was served three months later. It was undisputed that defendant lacked actual knowledge of claimant's alleged injuries within the 90-day statutory period. Moreover, claimant's attorneys did not promptly notify defendant of the essential facts of the claim upon discovering their failure to serve a notice of claim in a timely manner. Instead, for reasons that are not explained in the record, claimant's attorneys waited until 180 days had passed since the accident to serve the application. Although defendant failed to establish substantial prejudice resulting from the delay, claimant failed to provide a reasonable excuse. Therefore, Supreme Court did not abuse its broad discretion in denying claimant's application.

Matter of Nunez v Village of Rockville Ctr., 176 A.D.3d 1211, 111 N.Y.S.3d 71 (2nd Dep't 2019). The petitioner was charged with, *inter alia,* assault in the second degree (by driving his motorcycle into a police officer seeking to arrest him). The office allegedly then made a brutal and threatening arrest of the

petitioner. The petitioner was held in custody for approximately one week. A year later, the charges were dismissed. Soon thereafter, the petitioner sought leave to serve a late notice of claim upon the Village and its police department for discrimination, false arrest, malicious prosecution, abuse of process, excessive force, failure to intervene, denial of access to the courts, intimidation, and intentional infliction of emotional distress, as well as violations of federal civil and constitutional rights. The 42 USC § 1983 and other federal claims survived because a notice of claim is not required for those. As to the state law claim of malicious prosecution against the Village, it did not accrue until the charges against the petitioner were dismissed, and thus the notice of claim (filed a month after he was released) was timely with respect to that claim. Leave to late-serve as to the other state law claims, however, was denied. His assertion that he knowingly delayed commencing any action against the Village while the criminal charges were pending due to unsubstantiated claims of fear and intimidation did not constitute a reasonable excuse according to the majority. A dissenting justice accepted this excuse because the police officer allegedly threatened plaintiff at the time of his arrest. As for the Village's timely knowledge of the essential facts of the claim, majority held that even if the Village police officer who arrested plaintiff had know the facts of the claim, this knowledge was not imputable to the Village itself. Nor did the contents of a police accident report prepared by a County Police Department police officer, which indicated that the petitioner's motorcycle struck the Village police officer while the officer was effectuating an arrest, provide the Village with actual notice of the petitioner's state law claims, *inter alia*, of false arrest. The reports and other documentation prepared by County law enforcement for the DA could not be imputed to the Village. While the petitioner satisfied his initial burden of showing a lack of substantial prejudice to the Village as a result of his late notice, and the Village failed to make a "particularized evidentiary showing" of substantial prejudice in response, the majority nevertheless rejected the petition to late-serve, noting that the most important of the factors is whether the municipality or public corporation acquired actual knowledge of the essential facts and here, the Village did not. Dissent, on the other hand, claimed petitioner established that the Village had actual knowledge of the claims through the County DA and its law enforcement, and that in any event, the officer who engaged in the execution of the alleged false arrest which gave rise to the claim had knowledge of his falsely arresting petitioner, and that was enough. Dissent agreed with the majority that there was no substantial prejudice to the defendant, and since dissent found there was actual knowledge, it would have granted leave to late-serve.

E.R. v. Windham, 181 A.D.3d 736, 122 N.Y.S.3d 106 (2nd Dep't 2019). Plaintiff's mother's motion for leave to late-file a notice of claim in her individual capacity as infant's mother (who was victim of foster care sexual abuse) was denied, as the statute of limitations for her derivative cause of action had expired at the time the motion was made. The infancy toll of CPLR 208 is personal to the infant and does not extend to a parent's derivative cause of action. Motion to late-serve on behalf of infant was also denied. The motion was brought 1 year and 4 months after the 90-day statutory period expired, and 1 year and 1 month after the action was commenced. The plaintiffs did not demonstrate a reasonable excuse for the failure to serve a timely notice of claim or explain the delay between the time that they commenced this action and the filing of the motion. In addition, plaintiffs failed to offer any evidence to show that the City acquired actual knowledge of the essential facts constituting the claim within the 90-day statutory period or a reasonable time thereafter. The plaintiffs' mere allegations of the existence of records prepared by criminal investigators, without evidence of their content, were insufficient to impute actual knowledge to the City. Finally, plaintiffs failed to present "some evidence or plausible argument" supporting a finding

that the City, which did not receive notice of the plaintiffs' claim until it was served with a late notice of claim more than two years after the claim accrued, would not be substantially prejudiced by the plaintiffs' substantial delay in seeking leave to serve a late notice of claim.

Matter of Perez v. City of New York, 175 A.D.3d 1534, 109 N.Y.S.3d 153 (2nd Dep't 2019). Plaintiff tripped and fell on a defect in an asphalt pathway near the entrance of a restaurant on Staten Island. Approximately one year and three months later, she applied for leave to serve a late notice of claim upon the City of New York and the New York City Parks Department. Two undated photographs of the alleged defect were annexed to the petition. Court here held that the evidence was insufficient to establish that the City acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. Although the photographs may have demonstrated that the City had prior knowledge of the defect in the asphalt, "actual knowledge of the defect is not tantamount to actual knowledge of the facts constituting the claim, since the City was not aware of the petitioner's accident, her injuries, and the facts underlying her theory of liability". A lack of due diligence in determining the identity of the owner of the property upon which the subject accident occurred was not a reasonable excuse for the failure to serve a timely notice of claim. Plaintiff failed to demonstrate that either she or her counsel made any effort to investigate or research what entity owned the subject premises. In addition, the plaintiff failed to satisfy her initial burden of showing that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay. Leave to late-serve denied.

v. The Newcomb Standard: Substantial Prejudice to Defense

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

Sanchez v Jericho Sch. Dist., 180 A.D.3d 828, 120 N.Y.S.3d 163, (2nd Dept' 2020). Plaintiff served notice of claim without leave of court after the 90-day time period had expired for injuries suffered while in wrestling practice at his high school. Plaintiff then filed suit, and when discovery was complete, defendants moved for SJ arguing plaintiff failed to serve a timely notice of claim, which motion was granted. Since a late notice of claim served without leave is a nullity, case dismissed for failure to comply with condition precedent. It was now too late to move for leave because the SOL had expired. The plaintiff had also argued defendant should be equitably estopped from asserting the plaintiff's failure to serve a timely notice of claim. But there was no evidence demonstrating that the defendants engaged in any misleading conduct. Defendants' participation in pretrial discovery did not preclude them from raising the untimeliness of the notice of claim.

Matter of Lockwood v City of Yonkers, 179 A.D.3d 688, 116 N.Y.S.3d 383 (2nd Dep't 2020). Plaintiff firefighter was injured during a training exercise and filed a motion to late-serve a notice of claim about four months later. The petition was rejected by the court several months later. Plaintiff did not file a notice of appeal. Plaintiff's attorney then waited almost three years to move to "renew" the original petition, apparently adding new evidence to support leave to late-serve, and claiming that this motion to renew was timely, despite being made after the one-year-90-day SOL had expired, because it "related back" to the original timely filed petition. Supreme Court agreed, granted the petition, vacated the prior order, and granted the renewed petition for leave to serve a late notice of claim. Appellate Division

reversed because "a motion to renew a prior timely petition for leave to serve a late notice of claim, which renewal motion is made after the statute of limitations has expired, is untimely and does not relate back to the original petition"

IV. 50-H ISSUES

Colon v. Martin, 2020 WL 2200410 (**Court of Appeals** 2020)**.** Municipal vehicle rear-ended car, injuring driver and passenger. The driver and passenger both served notices of claim through the same lawyer. Defendants served separate 50-h notices upon each plaintiff. The notices contained unique claim numbers, assigned by the municipal defendants, and stated that the hearings would occur consecutively on a specified day. Plaintiffs appeared for their section 50–h hearings together and their attorney who refused to let the hearings proceed unless each plaintiff could be present while the other testified because they were both plaintiffs in the same case. Defendants rejected plaintiffs' demanded procedure, asserting that plaintiffs' refusal to appear at separate hearings violated the General Municipal Law and the City's policy. Defendants explained that they were "not waiving any right to any hearing" and warned plaintiffs that their position "risk[ed] ... potential dismissal." Plaintiffs countered that defendants failed to identify any authority for their reading of the statute other than the City's internal policy. Plaintiffs maintained that they were "not refusing to proceed," but would not go forward unless they could observe each other's testimony. The parties failed to reach an accord, and no section 50–h hearings ever occurred. Plaintiffs sued defendants and later moved for summary judgment on the issue of liability. Defendants cross-moved for summary judgment based on plaintiffs' failure to submit to pre-action section 50–h hearings. Plaintiffs opposed defendants' cross motion, arguing that defendants "constructively waived" their right to the hearings by refusing to conduct them simultaneously. Plaintiffs did not seek, in the alternative, an opportunity to submit to separate hearings. Supreme Court granted defendants' cross motion and dismissed the action. The Appellate Division affirmed Supreme Court's order with two Justices dissenting. Court of Appeals here concludes that General Municipal Law § 50–h "does not expressly permit nor give the absolute right to a claimant involved in the same alleged incident to be present at or to observe another claimant's oral examination". Therefore, because plaintiffs failed to comply with a condition precedent to the lawsuit, the lawsuit is dismissed.

Cardella v. Suffolk County Police Dept., 176 A.D.3d 1029, 111 N.Y.S.3d 57 (2nd Dep't 2019). Defendants served a demand for a 50-h and plaintiff did not appear for the examination but thereafter commenced the action to recover damages for false arrest and false imprisonment. Defendants moved to dismiss the complaint for failure to comply with 50-h demand and plaintiff cross-moved to compel the defendants to conduct the 50-h. Plaintiff's commencement of the action without rescheduling the examination warranted dismissal of the complaint since plaintiff failed to offer any excuse for his noncompliance with the defendants' demand.

V. GOVERNMENTAL IMMUNITY

a. Governmental v. Proprietary functions

Musano v. City of New York, 182 A.D.3d 491, 122 N.Y.S.3d 626 (1st Dep't 2020). Plaintiff, a social worker, was menaced with a knife by a tenant while on the job at a facility owned and operated by nonprofit entities, and funded by the City defendants, to provide housing and services to individuals suffering from mental illness and/or chronic homelessness. Plaintiff sued the not-for-profits, but also the City, contending, among other things, that the City was negligent in funding this venture. The court concluded that the City defendants were acting in a governmental (not proprietary) capacity when they provided funding for the facility and its services. But plaintiff presented no evidence that would provide a basis for finding that a special duty was owed to her by the City defendants, and thus case dismissed.

b. Discretionary v. Ministerial Acts

Owens v. City of New York, 183 A.D.3d 903, 124 N.Y.S.3d 695 (2nd Dep't 2020). Decedent's mother brought wrongful death action against city, deputy inspector, and various sergeants, detectives, and police officers following fatal shooting of her 18-year-old son. Mother had called 911 requesting assistance at her Brooklyn apartment after a verbal dispute with the decedent. The decedent was shot 14 times during the ensuing encounter with the police. City established, prima facie, that it was entitled to the governmental immunity defense with evidence that the alleged negligent acts involved the exercise of discretionary authority and were not in violation of any clear Patrol Guide mandates. However, issue of fact existed as to whether certain officers were negligent in using deadly physical force. Specifically, there was an issue as to whether they had violated the police operational procedures set forth in their own Patrol Guides requiring that "police officers shall not use deadly physical force against another person unless they have probable cause to believe they must protect themselves or another person present from imminent death or serious physical injury." If the officers violated the Patrol Guide, then their actions were not discretionary but rather ministerial duties. Some of plaintiff's federal 1983 claim also survived summary judgment.

Cabrera v. City of New York, 65 Misc.3d 1236, 119 N.Y.S.3d 824 (Kings Co. Sup. Ct. 2019). A man car-jacked a victim at gunpoint and stole his car, money and cell phone before fleeing. He then ran into an auto repair shop, dropped his jacket on the floor, and left. Police from K-9 unit go to the location where the perpetrator discarded his jacket in order to gather the perpetrator's scent. Cop placed a harness on dog with a fifteen-foot leash, and entered the auto repair shop with dog. Dog sniffed the jacket and began tracking the scent, which led them into the auto repair shop garage. Plaintiff, a construction worker who had been renovating the garage bathroom at the time, was in the garage. Dog bit him. Plaintiff sued City, claiming negligence. Among other things. Plaintiff claimed the police should have removed all non-suspects (including plaintiff) from the building before bringing the dog in. City moved for SJ, arguing governmental immunity. They argued their decision to use a K-9 dog to "track" perpetrator was discretionary and thus there was governmental immunity. Plaintiff argued that defendant failed to follow proper procedures for use of dog, and that following proper procedures was ministerial, not discretionary. Plaintiff specifically argued that officer failed to properly control the dog's movements, including holding him with an exceedingly long leash and giving dog too much free rein in an area where non-suspect civilians were present. As for violations of proper procedures, plaintiff argued the relevant portions of Procedure 212-93 of the New York City Police Department ("NYPD") Patrol Guide ("Patrol Guide") provide that authorized tactical uses of patrol canines include: (a) "*search[ing]* buildings where a possible

break-in is indicated or where a suspect may be hiding, *provided non-suspects are not present in the building*," and (b) "track[ing] suspects or missing persons." Although defendant argued it did not violate the Patrol Guide because officer and dog were "tracking" a suspect, which did not require that the building be cleared of non-suspects beforehand, as opposed to "searching" a building for a hiding suspect or possible break-in, this claim contradicted the NYPD Aided Report, which stated that the victim was bitten by the dog as the officer and dog were conducting a "search". Court held this inconsistency created a question of fact for the jury as to whether the actions of the police were "discretionary" or "ministerial".

Singh v. State of New York, 177 A.D.3d 662, 109 N.Y.S.3d 866 (2nd Dep't 2019). In this inadequate security case, claimant sustained personal injuries when, after a concert and while at the Queens College campus of the City University of New York, he was assaulted by an individual he knew. Court found that defendants' decision regarding the level of security to be provided at the concert was based on the exercise of their reasoned judgment, which entitled them to governmental immunity. Further, since there was no evidence of an affirmative undertaking by the defendants to act on behalf of the claimant, nor any evidence of the claimant's reliance upon such an undertaking, the claimant failed to establish that a special duty existed between him and the defendants.

Cansev v. City of New York, 2020 WL 4197163 (2nd Dep't 2020)**.** Back in 2003, plaintiff reported to the **police** that his 16–year–old son was missing, and the NYPD then commenced a missing person investigation. The decedent's body was found 10 days later but the Office of the City's medical examiner incorrectly determined the body was of a 25-30 year-old Asian man. Therefore, the body was not identified as that of the decedent. Because the decedent's body remained unidentified, it was buried in the City public cemetery known as "Potter's Field". **In 2009,** the plaintiff and his daughter, the decedent's sister, provided their DNA samples to the NYPD as part of the missing person investigation and in January 2001 informed the NYPD of the identification so that the NYPD could notify the next of kin. On January 10, 201, the City became aware of the true identity of the decedent. Approximately one month later, the NYPD notified the plaintiff of the identification, and further informed him that the decedent had drowned and that the body had been found back in 2003 and had been buried in Potter's field. However, the City failed to produce the exact location of the decedent's remains until 2015. Shortly thereafter, plaintiff sued the City under the common-law right of sepulcher, which affords the deceased's next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial ..., and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body". Court here holds that when a municipal defendant has all of the necessary identifying information, the obligation of informing the next of kin of the decedent's death is a ***ministerial function*** that creates a ***special duty*** running to the decedent's next of kin rather than to the public at large. The Court of Appeals in its *Shipley* case clarified the distinction between a ministerial function, which includes a duty to notify the next of kin of the whereabouts of the decedent's body, as opposed to a discretionary function, such as determining when an autopsy is necessary and whether to remove and retain an organ for further examination and testing, where no or limited liability may exist. Here, Thus, Court held there were triable issues of fact as to whether the delays in informing the plaintiff that the decedent had been identified and in informing the plaintiff of the location of the decedent's burial interfered with the plaintiff's right of sepulcher. However, Court noted that triable issues of fact exist only with respect to the City's delay in notifying the plaintiff about the identification, once they knew it in January of 2011, and the delay

in informing him of the location of the burial in 2015. The plaintiff was not entitled to damages with respect to the delay from the time the decedent was first reported missing in 2003 until the identity of the decedent's body was confirmed on January 10, 2011.

State Farm Fire & Casual. Ins. Co. v Brooklyn Union Gas Co., 2020 NY Slip Op 30876, 2020 N.Y. Misc. LEXIS 1347 (Richmond Co. Sup Ct 2020). Plaintiff sued the City and New York and other defendants, including National Grid, for injuries and damages from a gas explosion in a residential area. The NYFD had responded to complaints of the smell of gas in several houses, and ordered some of the residents to leave, but not others, depending on the circumstances. The first issue was whether a "special relationship" had been formed so as to get past the governmental function immunity defense. Court held no special duty existed between the plaintiffs and the municipal defendants beyond any obligation owed to the public at large. There was very little communication between the firefighters and the injured homeowner other than the firefighter asking him the location of the sewer trap and saying "let's go take a look." In addition, it was the injured plaintiff who led the firefighter down the stairs to the basement, not the other way around. Moreover, there were no assurances made by the firefighter to the injured plaintiff, or any actions that could be construed as suggesting that the firefighters were performing any tasks for plaintiff beyond the tasks they were performing for all of the homes in the neighborhood in accordance with policies and procedures to be followed under the circumstances. Even if plaintiff had satisfied his burden of establishing the existence of a special duty, the firefighters' actions were discretionary, i.e., the product of reasoned judgment. The firefighters were faced with varying circumstances as they inspected the neighborhood and each particular home. According to the guidelines and policies, every call regarding a fire or gas odor/leak is treated differently, depending on the presenting circumstances, and every emergency is treated on a case-by-case basis. Accordingly, the decision-making process of the firefighters required the exercise of discretion and judgment and, therefore, the City was entitled to immunity.

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

Green v. Iacovangelo, 184 A.D.3d 1198, 125 N.Y.S.3d 790 (4th Dep't 2020). Next-of-kin brought action against public administrator for county, among others, for interfering with right of sepulcher after next-of-kin were not promptly contacted about death of relative. The decedent was brought to the hospital while unresponsive but still alive, and attempts were made to identify her, but they all failed, even after she died. The public administrator thus arranged an indigent burial for decedent, and shortly thereafter, plaintiffs learned about decedent's death. Decedent's body was exhumed and a memorial service conducted for plaintiffs, at the PA's expense. The PA here successfully established, on SJ motion, its governmental immunity defense. Specifically, the County defendants established, as a matter of law, that the public administrator was engaged in a governmental function when he was attempting to locate decedent's next of kin and plaintiffs could not establish a "special relationship" with the public administrator since there was no "direct contact" or promises made to the decedent's family.

Motta v. State of New York, 63 Misc.3d 1232, 115 N.Y.S.3d 828 (2019). 2,000 motorcyclists participated in a tribute ride along the Thruway when a motor vehicle struck claimant, one of the bikers. Claimant alleged that the New York State Police was negligent in its failure to properly channel motor-vehicle traffic away from the motorcyclists participating in the tribute and failed to prevent the offending motorist

from entering the New York State Thruway at an entrance ramp should have been made inaccessible by the State Police. Court dismisses the Claim based on governmental immunity since the actions of the police were governmental in nature and Claimant did not even allege a "special duty" toward him.

Zurich Am. Ins. Co. v City of New York, 176 A.D.3d 1145, 111 N.Y.S.3d 38 (2nd Dep't 2019). New York City Fire Department responded to a fire alarm at a warehouse operated by the plaintiff. They saw a fire on storage shelves, which they concluded had been extinguished by the building's sprinkler system. They thus turned off the main water valve that controlled the flow of water to the entire sprinkler system, rendering it inoperable. After certifying to warehouse personnel that the building was safe to re-enter, FDNY personnel left the premises, whereupon the fire (which had not been totally extinguished) resumed and quickly and destroyed the entire building and its contents since there was no sprinkler system to put it out. The building's insurer and the owner separately sued the City for damages. City brought CPLR 3211 motion to dismiss based on plaintiffs' having no "special relationship" with the fire fighters. Court held that by certifying to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—plaintiff established at least an issue of fact as to a special relationship. Thus CPLR 3211 motion denied.

Halberstam v Port Auth. of N.Y. & N.J., 175 A.D.3d 1264, 109 N.Y.S.3d 111 (2nd Dep't 2019). Pregnant plaintiff, arriving to JFK via plane was having medical issues and notified flight attendant who called for help from the defendant, which provides emergency medical services at JFK airport. EMT's employed by the defendant arrived and brought her to an ambulance on the tarmac. The ambulance began to transport her to a hospital, but while it was en route, the ambulance began to malfunction. The EMT driving the ambulance called for an ambulance operated by the FDNY which then transported her to Jamaica Hospital, where she delivered the infant plaintiff. Before the infant plaintiff was delivered, plaintiff experienced a complete placental abruption. The infant plaintiff was born with brain damage and severe physical disabilities. Defendant brought motion for SJ claiming defendant was engaged in a governmental function as a provider of emergency medical services at JFK airport, so that the defendant could not be held liable to the plaintiffs unless it owed them a special duty. Clearly EMT services are a governmental, not a proprietary function (*see*, Ct of Appeals *Applewhite* case). Issue was special duty. Court held that defendant established, prima facie, that it did not owe a special duty to the plaintiffs (because the "reliance" element was lacking), and the plaintiffs failed to raise a triable issue of fact in opposition. There was nothing in the record to suggest that the defendant's agents lulled plaintiff into a false sense of security or induced her to forego other avenues of transportation to the hospital, and therefore placed the plaintiffs in a worse position than they would have been in had the defendant never assumed the duty. SJ to defendant

Marks-Barcia v. Village of Sleepy Hollow Ambulance Corps., 183 A.D.3d 883, 125 N.Y.S.3d 116 (2nd Dep't 2020). Widow brought negligence and wrongful death action against village, village ambulance corps, and village police department, alleging that their negligence in failing to provide ambulance in timely manner and failing to notify her of limited ambulance coverage led to husband's death. Her husband had awoken gasping for air. She called the 911 emergency number and a Village police officer answered her call. Officer responded, "Okay, we'll have it right there." Officer dispatched two police officers, one of whom was a certified EMT to the plaintiff's home. The officers arrived within minutes, connected the

plaintiff's husband to a defribulator, and began performing CPR. Officer also radioed the defendant Village Ambulance Corps and requested that an ambulance respond to the plaintiff's home; however, he received a response that no EMT was available. Officer then called "60 Control" (or "mutual aid"), which is an outside agency which provides ambulances, to request an ambulance. During this time, the plaintiff called the 911 emergency number again to check on the ambulance, and was told the ambulance was coming. The plaintiff also called the telephone company operator in an effort to get an ambulance from a nearby hospital, but was transferred to a neighboring village's police officer who advised her that an ambulance would be there shortly. An ambulance arrived at the plaintiff's home 20 minutes after the initial 911 call and approximately 7–8 minutes after the second 911 call. Despite the efforts of the police officers to revive the plaintiff's husband using the automated external defribulator, he died in his home. Plaintiff alleged that the defendants were negligent in failing to provide an ambulance to her home in a timely manner and in failing to notify her that there was limited ambulance coverage available. The defendants moved for summary judgment dismissing the complaint. First issue was whether defendants were engaged in a governmental function as a provider of emergency medical services pursuant to a municipal emergency response 911 system, which because of the recent Court of Appeals Applewhite decision, was easily decided in defendants' favor. The next issue was whether plaintiff had established a "special relationship". Plaintiff had trouble with the "justifiable reliance" element which is critical because it provides the essential causative link between the special duty assumed by the municipality and the alleged injury. Nothing in the record suggested that the 911 officer or any of the defendants' agents lulled the plaintiff into a false sense of security, or induced her to forego other avenues to transport her husband to the hospital, and therefore placed the plaintiff in a worse position than she would have been had the defendants never assumed the duty. On the contrary, the evidence established that while the plaintiff was waiting for the ambulance to arrive, she continued to seek help to get an ambulance to her home by calling the telephone company operator and then speaking to the neighboring village's police officer. SJ to defendants.

Grasso v. Nassau County, 180 A.D.3d 1008, 121 N.Y.S.3d 66 (2nd Dep't 2020). Car accident victim was brought into hospital emergency room by County ambulance and was attended to by the trauma team. After attempts to save his life failed, Estate sued County for negligence of EMT personnel. Issue was whether plaintiff could establish special relationship. County defendants established on SJ motion that the first element, i.e., direct contact with plaintiff making some kind of promise he might rely on, was not present in that they did not assume an affirmative duty to act on behalf of the decedent through promises or actions. In opposition, plaintiff failed to raise a triable issue of fact. Motion to dismiss granted.

Flynn v. Town of Southampton, 177 A.D.3d 855, 111 N.Y.S.3d 350 (2nd Dep't 2019). Decedent made two cell phone calls to the 911 emergency number that were routed to the police department of the defendant Town. The decedent indicated that he needed assistance and was on Highway Road 39 "off the highway at Shinnecock Hills." The 911 dispatcher called the decedent's cell phone number to try to determine his location, but was unsuccessful. Later, his body was found in another location. The estate (by wife) sued the Town, which moved for SJ alleging the plaintiff could not show a special relationship. The evidence submitted by the Town demonstrated that its officers and dispatchers, in responding to an emergency call, made no promises to the decedent, in word or action, to establish a special relationship. SJ granted to defendant.

Perez v. City of New York, 182 A.D.3d 425, 119 N.Y.S.3d 851 (1st Dep't 2020). In order to state a claim that defendants were negligent in failing to provide an ambulance in a timely fashion, plaintiff was required to show a special relationship. However, plaintiff did not allege a special duty or the factual predicate for finding a special duty in her notice of claim or the complaint, precluding her from asserting it for the first time in opposition to summary judgment. In any event, the record established that plaintiff could not prove all of the elements necessary to show a special relationship. There was no direct contact between defendants and decedent or an immediate family member, and there is no indication that more efficacious alternatives to waiting for the ambulance to arrive were available.

Estate of Kyle A. v New York City Hous. Auth., 181 A.D.3d 492, 122 N.Y.S.3d 5 (1st Dep't 2020). Infant died after suffering a severe asthma attack. Plaintiffs alleged that inoperable elevators in the NYCHA building where the infant lived delayed emergency medical workers in reaching him, and that the City defendants were negligent in treatment. Court found that the City defendants were entitled to summary judgment as they demonstrated they owed no special duty to plaintiffs. The City's employees, who responded to the 911 call regarding the infant's asthma attack, made no promises to the infant or to Bethsaid, nor did they give any assurances or advice that would create a special relationship.

Rosa A. v D&E Equities, Inc., 178 A.D.3d 554, 112 N.Y.S.3d 492 (1st Dep't 2019). At issue on these related appeals was whether the complaint in each of the actions alleged defendant City had a special relationship with plaintiffs such that it might be held liable for negligence in failing to inspect or correct safety violations, failure to ensure a fire hydrant was operable, failing to investigate or remove the child who allegedly started the fire, and/or failing to properly combat the fire. Court found the complaints alleged no facts sufficient to show a special duty owed by the City defendants, requiring dismissal such claims.

VI. DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Design - Qualified Immunity

Heins v. Vanbourgondien, 180 A.D.3d 1019, 119 N.Y.S.3d 158 (2d. Dep't 2020), 17 year old plaintiff was driving a vehicle (after consuming alcohol) when it swerved into a median on County Road. The vehicle entered the median which sloped downward and hit the opposite slope and rolled over. Plaintiff sued, inter alia, Suffolk county for negligent road design. Suffolk County moved for summary judgment asserting qualified immunity. While a municipality has a non-delegable duty to keep its roadways in a reasonably safe condition, it is accorded a qualified immunity from liability arising out of a highway planning decision. A municipality will invoke qualified immunity "only where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" Here, the County failed to proffer evidence establishing that any County body had engaged in a deliberate decision-making process regarding the design of the County Road or that such body had "passed on the *very same* question of risk as would ordinarily go to the jury." Therefore, the County was not entitled to summary judgment based upon a defense of qualified immunity. As to the Municipality's motion for summary judgment, where the plaintiff alleges that the subject accident was caused by a dangerous condition, liability will not attach unless the municipality "had actual or constructive notice of

the dangerous condition and subsequently failed to take reasonable measures to correct the dangerous condition." Here, plaintiffs' claim was based upon the theory that the median had been constructed with a "non-recoverable slope" and that the County therefore had a duty to provide safety equipment to assist the driver of an "errant vehicle" in regaining control. The County failed to meet its prima facie burden of demonstrating that it constructed or maintained the County Road in a reasonably safe condition since its witness was unable to state whether the median at the accident location had a "recoverable" or "non-recoverable" slope or whether the grade of the slope complied with industry standards. In contrast, the plaintiffs submitted evidence that the median between the eastbound and westbound lanes on the County Road was V-shaped with a steep slope. In addition, they submitted the deposition testimony of the police officer who responded to the scene, who testified that he had responded to other accidents in the same area such that the County was or should have been aware of the potential danger. Summary judgment was denied

Schneider v Hanasab, 177 A.D.3d 923, 110 N.Y.S.3d 561 (2d. Dep't 2019) Plaintiff's decedent, riding a motorized scooter was struck and killed by a vehicle being driven by the defendant on Town road. Plaintiff alleged that the Town was negligent in failing to maintain the vegetation in the median island on Shore Park Road, and in placing a stop sign and stop line in such a position that it created a dangerous condition. Town moved for summary judgment. Second Department held that the Town's submissions failed to eliminate all triable issues of fact as to whether its maintenance of the vegetation in the median island and in its placement of the stop sign and stop line, was a proximate cause of the accident. It also failed to establish its prima facie its qualified governmental immunity because its submissions, "failed to establish that it undertook a study which entertained and passed on the question of risk that is at issue in this case." Summary judgment was properly denied.

Shimonova v. Santaella, 2020 NY Slip Op 30598(U) 2020 N.Y. Misc. LEXIS 1017 (Sup. Ct. Queens Cty. 2020)(Esposito, J.) plaintiff pedestrian was struck by a vehicle crossing the street mid block, outside the cross walks located at either end of the street. Plaintiff claimed that the City of New York failed to create a controlled mid-block cross-walk despite the existence of a shopping mall entrance across the street from the area of impact. Defendant City moved for summary judgment alleging qualified immunity. The City's witnesses testified that a study of the street area of the accident, was done and it was concluded that a mid-block crossing did not meet the requirements set forth in the federal MUTCD Warrant 4 for a controlled mid-block crossing, and therefore, one was not installed at that location. The Court held that when, as here, a municipality studies a dangerous condition and determines as part of a reasonable plan of governmental services that certain steps need not be taken, that decision may not form the basis of liability. The City demonstrated that its plan was neither plainly inadequate nor lacking in a reasonable basis and that it had no notice, either constructive or actual, of any dangerous condition on the particular stretch of road prior to the instant accident which would have given rise to a duty to review either that plan. Furthermore, there were no prior similar accidents at the vicinity and the City did in fact provide two safe places for pedestrians to cross within a reasonable distance from where plaintiff was struck. Plaintiff's expert affidavit that a midblock traffic signal should have been installed is insufficient to overcome the qualified immunity. Summary judgment was granted.

Khojasteh v State of New York, 66 Misc. 3d 1217, 120 N.Y.S.3d 705 (Ct. Claims 2019). Claimant injured when driving on state road when it collided with a large boulder that fell from a rock slope adjacent to the parkway. Claimant claims State was negligent in failing to properly inspect and maintain the safety of the rock slope. The State moved for summary judgment maintaining that, due to a lack of any prior similar accidents, State did not have any notice that the subject rock slope presented a potentially dangerous condition. The State also maintains entitlement to qualified immunity for its planning decisions regarding the rock slope. In support of its motion, the state submitted various affidavits including a description of the State's and DOT's procedures for monitoring the safety and classifying the rock slopes that required attention. One such affidavit noted that the five-year history at the location in issue did not reveal any rock falls prior to claimant's accident. It also noted no evidence that the subject rock slope presented an unsafe condition prior to claimant's accident nor was the rock slope classified as a significant priority requiring remediation, that it was a sudden occurrence. In opposition, claimant submitted an affidavit of a geologist who opined that the State's maintenance and inspections of rock slopes was insufficient and that the rock slope required remediation. The State has a nondelegable duty to adequately design, construct and maintain its roadways in a reasonably safe condition and that duty encompasses the area adjacent to the roadways. While the State is not an insurer of the safety of its roadways and the mere happening of an accident does not render the State liable, for liability to attach, it must be established that the State had either actual or constructive notice of a potentially dangerous condition and failed to take reasonable measures to remedy such danger. The Court held that the record in this case is devoid of any prior, similar accidents at the location in issue. In light of the absence of any rock falls within five years prior to claimant's accident, the Court found that the State did not have either actual or constructive notice of a potentially dangerous condition at the site of claimant's accident. Additionally, in the field of traffic design engineering, a government entity is accorded a qualified immunity from liability arising out of a highway planning decision unless the study was plainly inadequate or there was no reasonable basis for its plan. Here, the record showed that the State had a system of ongoing inspections of rock slopes by DOT engineers and geologists who monitored the stability and safety of the rock slopes and classified them according to a relative risk factor. The State's plan was not shown to be plainly inadequate or without a reasonable basis. Thus, the Court found that the State sufficiently established entitlement to qualified immunity for its highway planning decisions regarding its inspections, maintenance and prioritization of rock slopes in need of remediation. Motion for summary judgment was granted.

Noorzi v State of New York, 179 A.D.3d 478, 113 N.Y.S.3d 879 (1st Dep't 2020). Claimants' decedents were killed when the vehicle in which they were driving was struck by a vehicle operated by a vehicle that had jumped the curb, penetrated the guide rail, and crossed into their lane of the state parkway. Claimants contend that the State was negligent in failing to exchange the median guide rails for a concrete barrier when it performed a signage improvement project in 2003. The Court held that the Court of Claims correctly found that the 2003 project, which did not include any changes to the roadway itself but required the replacement of approximately 250 feet of guide rails that had been removed to permit new sign installations, was not a significant repair or reconstruction of the parkway. The Court also held that the median was not a proximate cause of the accident. Lastly, the Court held that an additional reason for affirming the dismissal is that the State is entitled to qualified immunity for its 2003 highway safety planning decision.

B. Application to Mass Transit

Pedraza v New York City Tr. Auth., 2019 NY Slip Op 32742(U) (Sup. Ct. N.Y. Cty. 2019)(Nervo, J.). Plaintiff was struck by a subway car claiming it was due to the speed in which it entered the station. Case was tried, verdict was in plaintiff's favor. Defendant Transit Authority moved for a judgment notwithstanding the verdict. Transit Defendants argue that its speed policy decisions are entitled to qualified and governmental function immunity, and therefore the jury verdict must be set aside. The doctrine of qualified immunity applies when "a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" and in weighing safety and efficiency considerations the body has adopted a policy with a "reasonable basis." The municipality, however, has a continuing duty to review its plan "in light of its actual operation." Here, however, the Transit Defendants have failed to submit an affidavit that an authorized planning body has weighed concerns against the very same question of risk presented here — namely a subway train striking a person on the station tracks, as required. No evidence or testimony was elicited at trial that may have supported a qualified immunity defense and therefore the Transit Defendants were not entitled to it. The doctrine of governmental function immunity "shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions." However, the doctrine is available only when a municipality is acting in a governmental capacity. Where a municipality is acting in a proprietary capacity, it does not enjoy immunity and is subject to suit for negligence. A municipality undertakes a proprietary role when its actions "essentially substitute for or supplement traditionally private enterprises." Succinctly stated: When the government provides services traditionally rendered by the private sector, it is subject to the same tort liability as a private actor. Since providing transportation has, historically, been the province of common carriers — private actors — and cannot be described as a discretionary exercise of the State's Police Powers, which are immune from suit. Defendants are therefore subject to the same standards regarding liability as other common carriers. As such, the Court found that the Transit Defendants were engaged in a proprietary role and not entitled to governmental function immunity and the Transit Defendants cannot operate their trains at any speed they choose free from all negligence, based solely upon their status as a railroad/train operator.

C. Highway Law § 139

Perkins v County of Tompkins,179 A.D.3d 1334, 117 N.Y.S.3d 370 (3d Dep't 2020) Plaintiff was riding a motorcycle in Defendant County when another motorist was pulling out of his driveway Plaintiff veered away from the other motorist and collided with a telephone pole. Plaintiff sued the Defendant County for failing to maintain vegetation, arguing that it limited the sight distance of both motorists and caused the accident. County moved for summary judgment. The Defendant County was required to show on a defective highway claim that it received no prior written notice of the alleged defect and that it had no actual or constructive notice thereof pursuant to Highway Law § 139(2). While there is nothing in the record to show that the County received prior written notice of that condition, the defendant did not address constructive notice. Testimony that a representative from the County highway department came to the property a year before the accident in response to property owner's request to remove a tree impeding the view and that representative determined that the trees did not present a road hazard and that another County employee who worked as a crew supervisor with the highway department testified that he travelled

South Main Street twice a month and that the County's policy was to mow grass along its roads twice each summer was enough to create a question of fact. Summary judgment denied.

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

A. Prior Written Notice Required

Otto v Miller, 177 A.D.3d 895, 113 N.Y.S.3d 228 (2d. Dep't 2019). The plaintiff was injured when she tripped and fell on a defect in a sidewalk in the Defendant Town. The Town moved for summary judgment on the ground that it did not have prior written notice of the alleged defect. The Town failed to meet its initial burden because it did not establish that it conducted a search of the Town Clerk's records for prior written notice. In support of its motion for summary judgment, the Town submitted the deposition testimony of a project supervisor for the Town's Department of Public Works, who testified that he directed an administrative aide to perform a record search of "the Town's complaint database." The Town also submitted an affidavit from the administrative aide for the Department of Public Works who conducted the search. The administrative aide stated that her duties included "searching the official records of the Department of Public Works" to determine "whether the Department of Public Works ha[d] been provided with any prior written notice" of any defects in the area where the incident occurred. The administrative aide stated that her search revealed that "the Town was not in receipt of any written notice or written complaints." While this evidence established, prima facie, that the Town's *Department of Public Works* did not have prior written notice of the alleged defect in the sidewalk, neither the deposition testimony nor the affidavit state specifically that the *Town Clerk's* records were searched for prior written notice of the alleged defect. Summary judgment was denied.

Salitan v Town of Yorktown, 178 A.D.3d 979, 112 N.Y.S.3d 521 (2d. Dep't 2019). Plaintiff was injured on a storm drainage system. Defendant moved for summary judgment arguing that it was entitled to governmental immunity for the allegations that it negligently designed and permitted the installation of the storm drainage system at issue. The Court noted that a municipality is immune from liability arising out of claims that it negligently designed a sewerage system or storm drainage system. A municipality is not entitled to governmental immunity arising out of claims that it negligently maintained a sewerage or storm drainage system as those claims challenge conduct which is ministerial in nature. The defendant nevertheless met its prima facie burden for summary judgment by demonstrating that it received no prior written notice of any maintenance issues regarding those structures. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment granted.

Osman v Town of Smithtown, 175 A.D.3d 1313, 108 N.Y.S.3d 146 (2d. Dep't 2019) Plaintiff slipped and fell while walking on a pathway nature preserve and owned and operated by defendant Town. Plaintiff was walking to parking lot along the same pathway he had traversed approximately 30 minutes earlier. The Town moved for summary judgment dismissing the complaint. The Town argued that the injured plaintiff was unable to identify the cause of his fall and that the Town did not receive prior written notice of the condition. The Court held that the plaintiffs failed to allege in either the complaint or the bill of

particulars that the Town made a special use of the subject pathway or that the Town created the alleged dangerous condition through an affirmative act of negligence. At Deposition, the director of the Town parks department testified that the Town did not receive prior written notice of the alleged dangerous condition. Since plaintiffs failed to allege in their pleadings that the affirmative negligence exception applies, the Town was not required to show, prima facie, that the exception did not apply. Summary Judgment affirmed.

Rappa v Incorporated Vil. of Patchogue, 65 Misc.3d 1203, 118 N.Y.S.3d 377 (Sup. Ct. Suffolk Cty. 2019). Plaintiff tripped on a crack in a parking lot maintained by defendant Village. At a public comments village board meeting, the owner of a store in that parking log complained that the light behind the store goes out and that there are big holes in the parking lot. Additionally, the Village saw cut the asphalt with two parallel lines at either side of the pothole in anticipation of repaving it prior to plaintiff's fall. The village claimed it did not have prior written notice of the pothole nor did it create the condition. The Court held that the parking lot here serves the "functional purpose" of a "highway" and was owned and maintained by the Village and was accessible to the general public for vehicular travel. As a result, the Village was entitled to notice and an opportunity to correct any defect before being required to respond to any claim of negligence. Defendant here submitted an affidavit to stating that the Village had no prior written notice of the defect. The Court held that Village Board meeting minutes annexed to the affidavit constituted merely verbal complaints and did not constitute prior written notice. The Court held that the Village did not affirmatively create the condition through an affirmative act of negligence that immediately resulted in the dangerous condition. Nor did the saw cuts constitute affirmative acts of negligence.(This was not what caused plaintiff's fall). Summary judgment granted.

Pisiak v City of New York, 2020 NY Slip Op 04415 (2d. Dep't 2020). The plaintiff stepped from a sidewalk into a crosswalk and her foot became stuck in a three-to-four-inch-deep hole, causing her to fall and sustain injuries. The City moved for summary judgment. The Court held that the City failed to establish, prima facie, that it lacked prior written notice of the alleged defect. In support of its motion, the City submitted records from two of its agencies, the Department of Transportation ("DOT") and the Department of Environmental Protection ("DEP"), describing a hole or "cave in" in the pavement at the location. Among the DEP records were records indicating that DEP "MADE AREA SAFE. BROKE OUT SUNK HOLE . . . REBUILT 2 WALLS . . . BACKFILLED SINK AREA TAMPERED, REUSED BASIN. . . BACKFILLED AND BLACKTOPPED. JOB NEEDS HOT PATCH." There was no indication that a further repair was undertaken. Instead, DEP records contain a comment noting that a "[w]ork order has already been submitted for the repair." Since there is no record that the hot patch of the area was ever done, thus the City failed to eliminate triable issues of fact as to whether the repair was ever completed. Summary judgment was denied.

B. Lack of Prior Written Notice Must be Pleaded in Complaint

Howell v. City of New York, 2019 NY Slip Op 33778(U)(Sup. Ct. N.Y. Cty. 2019)(Rodriguez, J.). Plaintiff tripped and fell on a defective condition in the roadway. Defendant City moved for dismissal pursuant to CPLR 3211(a)(7) on the ground that plaintiff failed to plead prior written notice (a condition precedent

to maintaining this cause of action). Plaintiff cross-moved to add two paragraphs asserting prior written notice of the subject defect, arguing that there would be no prejudice to the City. Because the City has failed to show any prejudice or surprise, plaintiff was granted leave to amend her complaint to add an allegation that the City received prior written notice of the alleged defect.

C. **"Big Apple Map" in New York City**

Harrison v City of New York, 184 A.D.3d 742 (2d. Dep't 2020). Plaintiff was injured when she fell while walking along a defective sidewalk. Defendant City moved for summary judgment contending that it did not have prior written notice of the defect at issue. Plaintiff testified that her fall was caused by what was "like a crack" in the sidewalk that was approximately "16 inches," and submitted a Big Apple Map in support of its claim. Defendant City asserted that the Big Apple maps did not depict any defects located in front of the premises. The plaintiff argued that the Big Apple maps contained various symbols denoting sidewalk defects in front of the premises, including the defect that caused her to fall. The Supreme Court granted the motion. The Appellate Division held that since there are factual disputes regarding the precise location of the defect that allegedly caused a plaintiff's fall, and whether the alleged defect is designated on the Big Apple map, the question should be resolved by a jury. While the City relied upon the fact that the Big Apple map contains the designation "OK" in the area of the sidewalk in front of the premises, which designation, according to the map key, denotes "Block Satisfactory," the plaintiff correctly set forth that the map also contains a symbol that indicates a defect in the same area of the sidewalk. Exhibited on the map is a perpendicular line, designated as the symbol for a "[r]aised or uneven portion of sidewalk," that runs to the middle of the sidewalk in the area in front of the premises. Moreover, contrary to the City's contention, under these circumstances, whether the defective condition described by the plaintiff was the same as the "raised or uneven portion of sidewalk" indicated on the Big Apple map, of which the City may have received prior notice, was an issue of fact for the jury's resolution. Summary judgment should have been denied.

Flemming-Hamm v. Manhattan & Bronx Surface Tr. Operating Auth., 2020 N.Y. Slip Op. 30612(U) (Sup. Ct. N.Y.Cty. 2020)(Love, J.) Plaintiff disembarked from a bus and stepped into a crack in the roadway in Defendant City. Defendants moved for summary judgment on the ground that they did not receive prior written notice and included an affidavit affirming a search for prior written notice was done and no written notice was received. Plaintiff argued that the City had prior written notice of the defective condition by virtue of the Big Apple Map. However, the Court held that Plaintiff did not describe the symbol which provides notice in this case and that precise notice of the map is required to satisfy the prior written notice requirement. Additionally, a nearby defect is insufficient to constitute prior written notice of another defect.

Arutyunov v City of New York, 175 A.D.3d 1368, 108 N.Y.S.3d 173 (2d. Dep't 2019). Plaintiff tripped and fell on an uneven sidewalk condition in Defendant City. Plaintiffs moved for summary judgment on the issue of liability. The Court held that the plaintiffs failed to submit evidence sufficient to establish, prima facie, the precise location of the defective condition that allegedly caused the injured plaintiff to

fall, and whether the alleged defective condition was designated on a certain Big Apple map. Since the plaintiffs failed to meet their initial burden as the movants, summary judgment was denied.

Nebel v City of New York, 2020 NY Slip Op 30573(U)(Sup. Ct. Richmond Cty. 2020)(Aliotta, J.) Plaintiff tripped and fell over an elevated sidewalk flag, raised approximately an 1 ½ inches from an adjacent flag. Defendant City moved for summary judgment on the ground that plaintiff failed to establish prior written notice. Plaintiff argued that a Big Apple Map served as a prior written notice, which depicted a solid horizontal line in front of the premises. The City maintained that the same solid horizontal line, located within the street rather than the sidewalk in front of the subject premises actually represents the location of a water pipe since that line is accompanied by the markings "5' WP," the legend for "Water pipes and size in inches." Defendant City also points to the "OK" marking on the subject premises side of the street as proof that the sidewalk along the block was satisfactory. The Court agreed with the Defendant City holding that the subject line referred to a water pipe and not a defect in the sidewalk. Summary judgment granted.

Sanchez v City of New York, 176 A.D.3d 490, 107 N.Y.S.3d 855 (2nd Dep't 2019) Plaintiff tripped and fell on a defect in the sidewalk. Defendant moved for summary judgment on the ground that it did not receive prior written notice, however, the Court held that the evidence submitted by the City fails to definitively show that it had no prior written notice of the defect that caused plaintiff's fall. Additionally, the Court held that even if it found that the City met its prima facie burden, plaintiff raised a triable issue of fact as to whether the City had prior written notice of the defective condition through the affidavit of his expert, and of the Big Apple Map, showing an area of "[r]aised or uneven portion of sidewalk" in the vicinity of the fall. Contrary to the City's argument, the Big Apple Map does not provide any information as to the length or distance of a defect and thus, the defect depicted in the Map may extend to where plaintiff was injured. The Court emphasized that since factual issues as to the precise location of the defect and whether the defect is designated on the map should be resolved by a jury, summary judgment was granted.

D. "**Affirmatively Created" Exception to the Prior Written Notice Rule**

Kabia v Town of Yorktown, 175 A.D.3d 1395, 108 N.Y.S.3d 178 (2d. Dep't 2019) Plaintiff slipped and fell on ice while walking on a Field and Track in the defendant Town. There was a pile of snow in the grassy area adjacent to the area where the accident occurred. Plaintiff alleged that the defendant "caus[ed] and creat[ed] the hazardous condition" in her notice of claim and bill of particulars. Defendants moved for summary judgment on the ground that they did not have prior written notice of the alleged ice condition. The plaintiff opposed the motion, contending that the defendants failed to address—and thus failed to establish, prima facie—that they did not affirmatively create the ice condition. The lower court granted the motion notwithstanding. The Second Department held that based on the allegations contained in the plaintiff's notice of claim, complaint, and bill of particulars, the defendants were required to demonstrate, prima facie, that they did not receive prior written notice of the condition and that they did not create the condition through an affirmative act of negligence. Since the defendants established only that they did not have prior written notice of the ice condition, and made no attempt to refute the plaintiff's

allegations that the defendants had affirmatively created the alleged ice condition, summary judgment was reversed.

Creutzberger v County of Suffolk, 180 A.D.3d 991, 121 N.Y.S.3d 72 (2d. Dep't 2020) Plaintiff bicyclist was riding on a grass path owned by Defendant County when he struck the edge of the elevated boardwalk (elevated approximately 5 inches), throwing him to the ground. The matter went to trial and the jury found defendants partially at fault. Defendants moved for judgment as a matter of law on liability, asserting that the complaint as was predicated upon an affirmative creation theory that the defendants created a dangerous condition through an affirmative act of negligence by cutting the grass to the same level as the boardwalk, thereby concealing the height differential between the boardwalk and the path. However, at trial, the plaintiff failed to proffer any evidence that the defendants mowed the grass abutting the boardwalk to the same level of the boardwalk- to the contrary, the plaintiff presented the testimony of a County park supervisor who testified that the grass was not cut to make it even with the boardwalk, but rather, the grass was cut "[d]own to the ground." Thus, there was no rational process by which the jury could base a finding in favor of the plaintiff on the theory that the defendants created a dangerous or defective condition through an affirmative act of negligence. The Court held that since a general verdict sheet was submitted to the jury, it could not ascertain whether the jury's verdict was predicated on a finding in the plaintiff's favor on the theory that the defendants breached their duty to adequately illuminate the area where the accident occurred (a separate theory), or on the affirmative negligence theory, which should not have been submitted to the jury therefore the matter was remitted to the Supreme Court for a new trial on the issue of liability.

Murphy v Brown, 178 A.D.3d 832, 111 N.Y.S.3d 869 (2d. Dep't 2019). Plaintiff fell on a sidewalk in the defendant Town. The Town moved for summary judgment demonstrating that it did not have prior written notice of the defect and also demonstrated, through deposition testimony, that it had not performed any repairs or maintenance at that location for five (5) years before the plaintiff's accident. The Appellate Division held that since the Town demonstrated that they had no prior written notice of the defect and that it did not affirmatively create the allegedly dangerous condition through improper repairs or resurfacing it established its prima facia entitlement to summary judgment. Since, in opposition, the plaintiff failed to raise a triable issue of fact, summary judgment should have been granted.

O'Connor v, Tishman Constr. Corp., 182 A.D.3d 502, 123 N.Y.S.3d 91 (2d. Dep't 2020). Plaintiff tripped and fell on a "mound of concrete with a piece of metal" on a defendant City sidewalk. Plaintiff sued the City and construction company, alleging that defendants were on notice of the alleged defect because they either created or allowed it to remain on the sidewalk, and that their negligence in maintaining the area was a proximate cause of her accident. It is undisputed that the piece of metal in the mound of concrete was the remnant of a street sign. Nor is it disputed that the City was not provided with prior written notice of the condition within the 15-day grace period to make the repair pursuant to the Administrative Code. The City defendants moved for summary judgment, contending that its employees did not cause or create the alleged sidewalk defect. DOT's records show that the City did not perform work at the location for two (2) years prior to the date of the accident, and that it did not have notice of the alleged sidewalk defect. The City defendants claimed that a DOT sign search shows that no signs were installed, repaired, or removed from the sidewalk for approximately 20 years before the accident. In support of these contentions, the City submitted an affidavit from DOT's Supervising Superintendent. The construction

defendants cross-moved for summary judgment arguing that the City created the defect. The construction defendants rely deposition testimony given in another case brought against the City, where the same record custodian testified that DOT earlier performed "Meter and sign work, reinstall parking meters" and "drive rail installed" at the subject location. He also testified that the City maintained the DOT signs and repaired them, that there was a record of a repair to the subject location, but not the drive rail, in 2006, and that there was no record of any permits by contractors or others to remove the relevant sign. Additionally, he stated that if the sign and sidewalk were not flush, the sign was improperly installed by the City. Plaintiff opposed both motions, primarily contending that the record custodian's deposition transcript from the earlier action conflicted with his affidavit in this case and creates triable issues of fact as to whether the City defendants caused or created the defect. The lower court granted summary judgment. The Appellate Division held that the City defendants' motion for summary judgment should have been denied. The City defendants fail to demonstrate that their employees did not cause or create the alleged defect. The record custodian provided an affidavit in the case at bar, stating that a DOT record search "revealed no records of maintenance, repair, installation, or removal of drive rails or sign supports by DOT for the aforementioned location and timeframe." This timeframe constituted "20 years prior to and including February 16, 2011" the date of the incident. The Record Custodian's 2012 affidavit and 2014 deposition appear to be in direct conflict. Neither the affidavit nor the deposition conclusively establishes the work, if any, the City performed in the subject location and whether the City defendants affirmatively created the defect which resulted in an alleged dangerous condition. Accordingly, the City defendants may be held responsible for their alleged negligence without prior written notice. Summary Judgment reversed.

Mohamed v. City of Buffalo, 2020 NY Slip Op 31783(U)(Sup. Ct. Buffalo, 2020)(Walker, J.) Plaintiff tripped and fell on a sidewalk defect in defendant City, "caused by the remainder of a former parking meter post." Defendant moved for summary judgment. As to prior notice, defendant demonstrated prima facie entitlement to summary judgment. The burden shifted to Plaintiff to raise a triable issue of fact as to whether there was an exception to the prior written notice rule. Plaintiff contends that Defendant allegedly created the defective condition that caused Plaintiff to trip and fall. Plaintiff relies on the deposition testimony of a meter mechanic supervisor for Defendant, who repairs and removes parking meters. The supervisor identified the metal pole protruding from the sidewalk in the area of the incident as a pole that previously supported a coin-operated parking meter owned by Defendant. He further testified that Defendant removed the parking meter from the metal pole approximately eight (8) years prior to the incident. Importantly, the supervisor testified that at the time the meter was removed, the sidewalk in the vicinity of the pole and Incident was not in a state of disrepair. Since the work done did not immediately result in the alleged defective condition, defendant demonstrated its prima facie entitlement to summary judgment, in opposition plaintiff was unable to raise a triable issue of fact. Summary judgment granted.

Rocco v County of Suffolk, 2019 NY Slip Op 32493(U)(Sup. Ct. N.Y. Cty. 2019)(Reilly, J.). Plaintiff tripped on a sprinkler head located near the sidewalk in Defendant Town. Defendant Town moved for summary judgment alleging it lacked prior written notice of the allegedly defective sidewalk. Defendant demonstrated, by affidavits of its employees, that it did not receive prior written notice. Plaintiff, however, raised a triable issue of fact as to whether the Town affirmatively created the condition by offering evidence that the Town had replaced the sidewalk adjacent to the subject sprinkler head approximately a week before plaintiff's accident. Summary judgment denied.

Beagle v City of Buffalo, 178 A.D.3d 1363, 116 N.Y.S.3d 122 (4th Dep't 2019). Plaintiff tripped and fell on a defective sidewalk in defendant City that abutted property owned by private defendants. Two sidewalk slabs were elevated by the roots of a nearby City tree. Some time before the accident, a "cold patch" repair was performed, covering the area between the two sidewalk slabs with asphalt. Nevertheless, on the day of plaintiff's accident, the sidewalk slabs remained elevated. Private defendants moved for summary judgment. The Court held that an abutting landowner/occupant is not liable for injuries sustained as the result of a defective sidewalk unless the special use doctrine applies or it affirmatively created the defective condition or negligently constructed or repaired the sidewalk or there is a local ordinance charging them with the duty to maintain and repair the sidewalk and imposing liability for injuries resulting from their failure to do so. The fact that a different section of the Charter prohibits anyone but the City from performing asphalt repairs does not absolve the property defendants from liability since the Charter does permit landowners to reconstruct sidewalks after obtaining the appropriate permit from the City. The City also moved for summary judgment contending that plaintiff failed to plead that the City had prior written notice of the sidewalk defect is fatal to her action. The City's motion was denied since plaintiff invoked the affirmative negligence exception by alleging in her complaint that the City "creat[ed]" the dangerous condition. The Court held that the evidence submitted by the private defendants in support of their motion, which was incorporated into the City's cross motion, raised triable issues of fact whether the City performed the "cold patch" repair to the area sometime before plaintiff's accident and whether the condition of the sidewalk on the day of plaintiff's accident was the same as when the "cold patch" was first applied. Summary judgment was denied.

Calvacca v Town of Babylon, 2019 NY Slip Op 33661(U)(Sup. Ct. Suffolk Cty. 2019). Plaintiff tripped and fell on a raised screw in a boardwalk located in Defendant Town's Park. Plaintiff alleged that the Town was negligent in maintaining and repairing the subject boardwalk. The Town claimed it never received prior written notice, nor did it derive a special use or affirmatively create the defect. Plaintiff argued that there are triable issues of fact as to whether the Town affirmatively created the alleged defect, contending, among other things, that the subject screw was inappropriate for outdoor use. Plaintiff submitted an expert affidavit to bolster this claim. While the Town's Code does not specifically include "boardwalks" as a defect for which it requires prior written notice, Courts have recognized that boardwalks constitute sidewalks and thus require prior written notice. While the Defendant Town demonstrated that it did not receive prior written notice by affidavits from its employees, the Defendant Town failed to establish that it did not create the dangerous condition through an affirmative act of negligence. Specifically, the Town's submissions were devoid of evidence as to whether it repaired the subject portion of the boardwalk prior to plaintiff's accident, and if such a repair immediately left the subject screw in a dangerous condition. Summary judgment denied.

Guzman v City of New York, 2019 NY Slip Op 32591(U) (Sup. Ct. N.Y. Cty. 2019)(Lebovits, J.) Plaintiff tripped and fell on a roadway which was "milled" by a private contractor hired by the defendant City. The City moved for summary judgment on the grounds that it did not have prior written notice of the defect, did not derive a special use of the roadway and did not affirmatively create the defect. The plaintiff argued that the Defendant City affirmatively created the defect by milling the roadway. The Court held that all of the milling on the roadway was performed by a contractor working for City prior to the accident and by employing the contractor as an independent contractor, the City is not liable to plaintiff or other third parties for the contractor's acts or omissions during the course of its performance. Summary judgment was granted for the City.

E. Exception to Prior Written Notice Statute Must be alleged in the Notice of Claim

Weinstein v County of Nassau, 180 A.D.3d 730, 115 N.Y.S.3d 698 (2nd Dep't 2020). The plaintiff injured when he tripped and fell after stepping into a hole which was located where the concrete surface of a roadway maintained by the defendant City met the asphalt surface of a roadway maintained by the defendant Town. Defendants Town and City moved to dismiss arguing that they did not have prior written notice of the alleged condition and that no recognized exception to the prior written notice requirement applied. Defendant City established its prima facie entitlement to summary judgment by submitting evidence that it did not receive prior written notice of the alleged condition, and that it did not create the condition through an affirmative act of negligence. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the City received prior written notice of the alleged condition, or whether it created the alleged condition through an affirmative act of negligence which immediately resulted in the existence of the defect. Although plaintiff argued that the City was negligent in failing to provide adequate lighting in the subject area, this theory was raised for the first time in his bill of particulars nearly three years after the accident and was not asserted in the notice of claim or the complaint, and the plaintiff never sought leave to amend the notice of claim pursuant to General Municipal Law § 50-e. Summary judgment granted as to the City. The defendant Town, however, submitted the affidavit of a records access officer for the Town's Highway Department, specifically averring that she searched the Highway Department records, but did not state that she searched the Town Clerk's records. Thus, the Town failed to establish its prima facie case that neither the Town Clerk nor the Commissioner of Highways received prior written notice of the alleged condition. Summary judgment denied as to Defendant Town.

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

Gray v City of New York, 2019 NY Slip Op 33325(U)(Sup. Ct. N.Y. Cty. 2019)(Frank, J.) Plaintiff tripped and fell on a manhole cover in Defendant City. Defendant moved for summary judgment on the ground that it did not receive prior written notice of the defect, that it did not cause or create the defect nor did the use of the manhole cover confer a special use on the City. Plaintiff claimed the City caused and created the subject defect and that the manhole cover constitutes a special use. In support of its argument, plaintiff cited to the testimony a City employee stating that he does not think that a manhole cover could be raised any other way than improper installation. Plaintiff does not provide any other admissible evidence to support its argument that the manhole cover was negligently installed or repaired. The Court held that this testimony is speculative and insufficient to raise an issue of fact. Even if the employee testified

unequivocally that this defect can only be caused by a negligent installation, there has been no showing that such defect would have been immediately apparent at the time of the installation. The Court also rejected plaintiff's argument that this manhole cover (which grants access to a water shutoff valve) constituted special use by the City since it cannot be said that the subject manhole cover furnished any special benefit upon the City that is unrelated to a benefit and use by the public in general. Summary judgment granted.

G. **New York City Sidewalk Law**

Moses v City of New York, 2019 N.Y. NY Slip Op 33628(U)(Sup. Ct. NY. Cty)(Saunders, J.) Plaintiff tripped and fell due to an allegedly defective condition on the sidewalk in front of a Deli in Defendant City. Defendant City moved for summary judgment on the grounds that the City is not the owner of the abutting property, that it never received prior written notice of the defect, and that it did not cause or create the condition. Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. In order to hold the City liable for injuries resulting from sidewalk defects, a plaintiff must demonstrate that the City received prior written notice of the subject condition. Here, the City Defendant maintains that it is not the owner of the subject premises and the property is not exempt. The City relied upon the affirmation of a record searcher who averred that the City is not the owner of the property. The search also revealed that the property is not a one-, two-, or three-family solely residential property and that the City did not perform work on the sidewalk at the subject location for two years prior to and including the date of the alleged accident. The City also argues it did not receive prior written notice of the defect nor caused or created same. The City asserted that nothing in the record search establish that the City had prior written notice of the defect alleged or that they created the defect. Plaintiff argued that the City erroneously asserts it is only required to produce two years of records and thus, this motion is premature in that the City has failed to provide discovery as ordered. However, plaintiff maintains that the City received prior written notice of the defect, specifically through the Big Apple Maps submitted by the City, which depict symbols for a raised or uneven portion of sidewalk, a cracked sidewalk, and the existence of cobblestones near the accident location which plaintiff argues establishes that the City received notice of the defect in 2003, prior to the plaintiff's accident, and failed to correct the condition. Plaintiff also relied upon the deposition testimony of a manager for the abutting building who testified that he made several complaints to the City and that City personnel responded and explained that the condition was caused by water leaking from the nearby fire hydrant. The Court found that the City has met its burden in demonstrating entitlement to summary judgment. The Court found the arguments in opposition unavailing as the City is not the abutting landowner; there are no written records of the complaints purportedly made by the abutting building manager to afford the City prior written notice. No issue of fact is raised as to whether the City caused the condition through affirmative negligence which immediately resulted in a defective condition.

Caban v Akinsanmi, 2020 NY Slip Op. 30578(U) (Sup. Ct. Richmond Cty. 2020)(Aliotta, J.) Plaintiff tripped and fell over an elevated sidewalk flag which abutted a home out of which a daycare center was run. It is undisputed that the subject property is classified as a one-family home owned exclusively by the homeowners. Defendant City moves for summary judgment arguing that the abutting premises is actually a business and therefore the exceptions for owner occupied "one, two or three-family residential real properties" not used *exclusively* for residential purposes does not apply. Plaintiff argues that the day care business is "merely incidental" to the owner's use of the property. The Court found that the City established through the private owner's deposition testimony that the residence was not "exclusively used for residential purposes," but "actually used" to operate a day care facility and that the private owners were therefore liable for the allegedly defective condition of the sidewalk. Summary judgment was granted as to the defendant City.

H. Snow/Storm in Progress

Acocal v City of Yonkers, 179 A.D.3d 630, 116 N.Y.S.3d 342 (2d. Dep't 2020). Plaintiff slipped and fell on snow in a parking lot owned by the Defendant City. Defendant moved for summary judgment on the ground that the storm in progress doctrine precluded recovery. Under the storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. Here, defendant established its prima facie entitlement to summary judgment by submitting evidence that approximately two inches of snow fell in the two hours preceding plaintiff's fall, and that snow continued to fall at the time at which the plaintiff fell. The defendants also submitted the plaintiff's deposition testimony where he admitted that snow was falling as he drove his son to school. This evidence demonstrated, as a matter of law, that a reasonable time had not elapsed for the defendants to remove the subject snow and/or ice. Plaintiff's affidavit in opposition asserted that there was no snow falling when he reached the school, did not raise a triable issue of fact. The plaintiff failed to show that his travel to the school was of such a long duration that a reasonable time could have elapsed from the time snow was falling during his drive to the school to the time that he contends it stopped before his arrival at the school. Summary judgment granted.

Minardo v City of New York, 2019 N.Y. Slip Op. 33489(U)(Sup. Ct. N.Y. Cty. 2019)(Frank, J.). Plaintiff slipped and fell due to snow and/or ice on the crosswalk. Defendant moves for summary judgment on the grounds that the City did not have reasonable amount of time to remedy the snow/ice condition following the cessation of storm. Plaintiff opposed the motion on the grounds that the City's attempt to clear the snow and ice was insufficient. For the City to be held liable for injuries resulting from a failure to remove snow and ice, a reasonable amount of time must have elapsed to allow the City sufficient time to remedy the condition. The City established its prima facie entitlement to summary judgment. The City argues that because only 15 hours had elapsed from the cessation of the storm until plaintiff's accident, the City's time to remedy the condition had not yet expired therefore it cannot be held liable for plaintiff's injuries. Plaintiff argued that 15 hours is a sufficient amount of time for the City to have remedied the condition, since there is evidence that the Department of Sanitation plowed snow at the accident location. Alternatively, plaintiff argued that the plowing done by the Department of Sanitation caused and created

the condition. The First Department previously held that 30 hours between the storm's cessation and plaintiff's fall was insufficient as a matter of law to hold the City liable. In this case, 9.4 inches of snow fell only 15 hours before plaintiff's accident. The City's time to remedy the snow and ice condition still had not expired, and simply because the Department of Sanitation was "ahead of the curve" with its snow removal efforts to the area in question does not automatically accelerate the "reasonable time" the City had following the snow storm to remedy the condition. Summary judgment was granted.

Daniel v East Williston Union Free Sch. Dist., 180 A.D.3d 750, 118 N.Y.S.3d 715 (2d. Dep't 2020). Plaintiff slipped and fell on a clear sheet of ice on a sidewalk located on school premises. Defendant School District moved for summary judgment on the grounds that the storm in progress rule applied and it lacked actual or constructive notice of the alleged dangerous condition. Under the storm in progress rule, a property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter. Defendant School District submitted the report of a meteorologist with attached climatological data, which established that two days prior to the injured plaintiff's fall, on January 24, 2015, approximately 3.7 inches of snow and sleet fell, and that on the morning of the accident, a certain amount of snow and ice cover was present from that prior storm. The report further established that light snow fell on the morning of January 26, 2015, and that later in the day, approximately 8 inches of snow fell. The School District's meteorologist opined that at 1:00 p.m. on January 26, 2015, approximately 0.5 to 1.5 inches of snow and ice was present on untreated, undisturbed, and exposed outdoor surfaces as a result of the storm that was then in progress and the precipitation that had fallen on January 24, 2015. The Court held that although the Defendant School District established, prima facie, that a storm was ongoing at the time of the injured plaintiff's fall, that same evidence raised a triable issue of fact as to whether the ice upon which the injured plaintiff fell was a result of the storm that had occurred two days prior, rather than the storm that was then in progress. Summary judgment was denied.

Brower v County of Suffolk, 2020 N.Y. Slip Op. 03889 (2d. Dep't 2020) Plaintiff slipped and fell while walking on a street near her home in the defendant Incorporated Village. She claimed the street was unplowed and covered in snow at the time of her accident. Defendant moved for summary judgment. The Court held that Defendant established its prima facie entitlement to judgment by submitting affidavits of two employees demonstrating that it did not receive the requisite prior written notice of the alleged snow and ice condition. In opposition to the Town's prima facie showing, the plaintiffs failed to raise a triable issue of fact. Summary judgment affirmed.

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

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

Wong v City of New York, 183 A.D.3d 635, 121 N.Y.S.3d 610 (2d. Dep't 2020). Plaintiff police officer, passenger in a police vehicle driven by his partner when it car came into contact with another. The driver of the police vehicle was attempting to left turn to pursue a vehicle that had made a left turn after the turn

signal had changed to red. The City moved for summary judgment claiming it did not operate the emergency vehicle in reckless disregard for the safety of others. The manner in which an authorized emergency vehicle is operated in an emergency situation (which violated one of the rules of VTL 1104(b)) may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others. The municipal defendants established their entitlement to judgment as a matter of law by demonstrating, prima facie, that the operator of the police vehicle did not engage in conduct rising to the level of reckless disregard for the safety of others. In opposition, plaintiff failed to raise a triable issue of fact. Summary judgment affirmed.

Cioffi v S.M. Foods, Inc., 178 A.D.3d 1006, 116 N.Y.S.3d 306 (2d. Dep't 2019). Plaintiff, a police officer, was conducting a traffic stop on foot when he was struck by a tractor trailer. Prior to the accident, another police officer ("Officer Pinto") stopped his vehicle on the roadway in order to ask the plaintiff if he wanted assistance with traffic. Tractor trailer driver testified that he was focused on avoiding Officer Pinto's police vehicle while attempting to execute a turn, and did not see the plaintiff. Plaintiff brought this action pursuant to GML § 205-e. Tractor trailer commenced a third party action against Police Officer Pinto's employer. Generally, an employer's liability for an on-the-job injury is limited to workers' compensation benefits, but when an employee suffers a "grave injury" the Court found there was an issue of fact as to whether the plaintiff suffered a "grave injury." However, the police department asserted that Officer Pinto was entitled to the privilege under VTL § 1104, and therefore can only be liable under a reckless disregard standard of care. Here, when Officer Pinto parked his vehicle on the roadway, the injured plaintiff was conducting a seatbelt traffic checkpoint. Since Officer Pinto testified that he had stopped in order to ask the injured plaintiff whether he needed assistance and to assist with a traffic delay that was developing, he was not engaged in an emergency operation at the subject time, Officer Pinto's conduct is subject to ordinary negligence rather than the reckless disregard standard. Nevertheless, even if the manner in which Officer Pinto parked his vehicle on the road was negligent, it merely furnished the condition for the subsequent collision and was not a proximate cause of the accident. Third-party defendants were entitled to summary judgment.

Martinez v Incorporated Vil. of Freeport, 181 A.D.3d 947, 119 N.Y.S.3d 892 (2d. Dep't 2020). Defendant police vehicle struck plaintiff's vehicle in the rear. Defendant moved for summary judgment contending that defendant police officer's conduct did not rise to the level of reckless disregard. The Court emphasized that the reckless disregard standard of care in VTL § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by VTL § 1104(b) and that any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence. Since defendant was unable to establish that it engaged in one of the exempted maneuvers of VTL § 1104(b), summary judgment was denied.

Jobson v SM Livery, Inc., 175 A.D.3d 1510, 109 N.Y.S.3d 376 (2d. Dep't 2019). Plaintiff, a passenger in a livery car was struck by a Defendant City fire truck at an intersection. Defendant moved for summary judgment arguing that it could not be held liable because the fire truck operators did not engage in reckless conduct. The City defendants established entitlement to summary judgment by demonstrating that the fire truck operator was engaged in an emergency operation, that the fire truck's emergency lights and siren

were activated and the operator stopped or slowed sufficiently before entering the intersection . Plaintiff failed to raise a triable issue of fact in opposition. Summary judgment granted.

Fuchs v City of New York, 2020 NY Slip Op 04382 (2d. Dep't 2020). The plaintiff injured when the vehicle she was operating was struck by another vehicle that was being pursued by defendant police. The street where the accident occurred was a one-way street, and the vehicle that was being pursued by the police struck the plaintiff's vehicle when it turned the wrong way onto the one-way street. Defendants moved for summary judgment. Defendants established their prima facie entitlement to summary judgment by demonstrating that the police officers involved in the pursuit of the vehicle, which pursuit involved exceeding the speed limit and disregarding regulations governing the direction of movement or turning in specified directions, did not act with reckless disregard for the safety of others. In addition, the proximate cause of the accident was the independent recklessness of the driver of the vehicle that was being pursued, and not the police officers' conduct in initiating the pursuit. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment was properly granted.

Durham v Village of Phila., 2020 NY Slip Op 04248 (4th Dep't 2020). A pregnant woman called 911 asking for assistance because she was experiencing hemorrhaging. Volunteer firefighters from defendant Fire Department responded in an ambulance. When the firefighters arrived at the scene, they requested emergency assistance from a paramedic on duty in a nearby town who was riding in a United States Army ambulance. The two ambulances met on opposite sides of a road and each pulled to the shoulder, engaging their emergency lights. The Army ambulance intended to execute a U-turn and park on the shoulder behind defendants' ambulance so that the paramedic could get into defendants' ambulance. While the Army ambulance was attempting to execute the U-turn, it was broadsided by a truck driven by plaintiff. The Court held that defendant was operating an "authorized emergency vehicle" and "involved in an emergency operation" (§ 1104 [a]). Furthermore, defendant was engaged in specific conduct exempted from the rules of the road, i.e., he was parked on the shoulder of the road (see § 1104 [b] [1]). Summary judgment was properly granted.

B. Must be an "Emergency Operation"

Peterkin v City of Mount Vernon, 64 Misc.3d 1237, 118 N.Y.S.3d 370 (Sup. Ct. Westchester Cty. 2019)(Ecker, J.), Police officers observed an individual operating his truck on the wrong side of the road. Officers followed the vehicle and during the course of the pursuit, the truck struck plaintiff's right passenger side causing it to flip over, injuring him. Plaintiff claimed that he was injured due to defendants' ordinary negligence. Defendant City argued they were entitled to summary judgment since they were subject to reckless standard, and City did not act recklessly. Plaintiff counters that the reckless standard is inapplicable inasmuch as officers were not engaged in an "emergency operation" at commencement of the police pursuit. Court held that Defendant City established its prima facie entitlement to judgment as a matter of law as there were no material issues of fact in regard to reckless disregard, but in any event, the proximate cause of the accident was the pursued vehicle's erratic and improper operation of his vehicle, and not the manner in which the police officers conducted their pursuit of a fleeing motorist. Defendants made a prima facie showing that the officers were engaged in an emergency operation at the time of the

underlying accident, and that their conduct did not rise to the level of reckless disregard for the safety of others.

Anderson v Suffolk County Police Dept., 181 A.D.3d 765, 121 N.Y.S.3d 304 (2d. Dep't 2020). Plaintiff was injured after collision between her vehicle and a police vehicle. The police vehicle made an "exaggerated u-turn" in an attempt to conduct a traffic stop of an unrelated vehicle - for an expired inspection sticker - when it spun in wet pavement and contacted plaintiff's vehicle. Plaintiff moved for summary judgment. Defendant contended that the reckless disregard standard applied pursuant to VTL § 1104. Trial court granted summary judgment holding that plaintiff established defendant was not responding to an emergency which would qualify the defendant driver for the reckless disregard standard. Appellate Division disagreed, holding that the plaintiff's submissions, including the police accident report and officer's deposition testimony, failed to demonstrate that the officer was not engaged in an emergency operation at the time of the collision for purposes of applying the reckless disregard standard of care. The finding of summary judgment in favor of the plaintiff was reversed.

Proce v Town of Stony Point, 2020 NY Slip Op 04195 (2d. Dep't 2020) Defendant police officer was operating a police vehicle responding to a call from a woman who believed a person was on her back porch. The policer officer responded with lights and sirens when a suspect was identified, but turned off the lights and sirens when the suspect claimed he was merely out looking for his dog. The officer, at the time, admitted the call was no longer "high priority." The officer made a left turn from the northbound lane of an intersection controlled by a stop sign. The officer's vehicle collided with a vehicle operated by the plaintiff, which was stopped at a stop sign. Defendants moved for summary judgment. The defendants met their prima facie burden for summary judgment dismissing the amended complaint by establishing that Hurley was engaged in an emergency operation, that he was engaged in privileged conduct pursuant to Vehicle and Traffic Law § 1104(b)(4), and that, as a matter of law, Hurley's conduct did not rise to the level of reckless disregard for the safety of others. The Court held that despite the fact that Hurley believed the call was no longer a "high" priority and had deactivated the lights and siren on his vehicle does not, as the plaintiffs contend, mean that the officer was no longer engaged in an emergency operation and therefore he is held to the higher "reckless disregard" standard. The defendants established that the officer did not act with reckless disregard for the safety of others. In opposition the plaintiffs failed to raise a triable issue of fact. Summary judgment was affirmed.

C. "Reckless Disregard"

Murray v. County of Suffolk, 66 Misc.3d 1216, 120 N.Y.S.3d 725 (Sup. Ct. Suffolk Cty. 2020)(Berland, J.) . Plaintiff was driving his vehicle when he struck a Defendant County Police patrol car that had been left - unoccupied and unattended - in the roadway's left travel lane. The light bar on the patrol car was with the light bar on. The officer exited in order to chase an individual on foot who had earlier rammed his vehicle into a patrol car that had been pursuing him. Plaintiff testified that he was distracted by the flashing lights of the approximately 5 patrol cars stopped in the shoulder on his side of the parkway that had all of its emergency lights on and by the glare from the headlights of oncoming traffic, and that he did not see the parked police car in the left lane until — less than a second before the impact, and therefore

too late to avoid the collision. Defendants moved for summary judgment claiming plaintiff's conduct was the sole proximate cause of the parkway collision and that they are immune from liability for Plaintiff's injuries absent a showing that the police car struck was operated recklessly. The Court held that while there can be little doubt of the reasonableness of defendant police officer's use of the patrol car to slow traffic in order to allow the police officers who were then pursuing the fleeing suspect to cross the eastbound lanes of the parkway more safely, whether he and other officers were, and continued to be, engaged in an "emergency operation" that justified leaving the patrol car stopped in the left lane of a busy parkway for as long as they did after both officers joined in the pursuit of the suspect, and whether doing so constituted "reckless disregard for the safety of others" cannot be resolved on the current record. Likewise, whether Plaintiff was negligent in failing to see and to avoid colliding with the stopped patrol car and, if so, whether such negligence on plaintiff's part was the sole proximate or intervening cause of the collision involve issues of fact that cannot be resolved on the current record. Summary Judgment denied.

Cable v State of New York, 182 A.D.3d 569, 120 N.Y.S.3d 822 (2d. Dep't 2020). Defendant State Trooper was operating an emergency vehicle and was making a U-turn to respond to a radio dispatch regarding a trooper in need of assistance. Before pulling out from the shoulder, he observed the traffic conditions and believed that the approaching northbound vehicles were sufficiently behind him and that it was safe for him to execute a U-turn. The claimant, a motorcyclist was traveling on his motorcycle when he saw the defendant's vehicle pull out from the shoulder. Fearing an impact, claimant applied his brake, lost control of his motorcycle, and fell off. There was no contact between the two vehicles. Claimant moved for summary judgment on the ground that the State Police operator's conduct should be evaluated by the ordinary negligence standard and not the reckless disregard standard. Defendant cross-moved for summary judgment on the grounds that the State Police's emergency vehicle is entitled to quailed immunity and held to the reckless disregard standard as it was engaged in one of the four maneuvers enumerated in VTL § 1104(b) (disregarding regulations governing the direction of movement or turning in specified directions). The Court held that the defendant's attempt to execute the U-Turn qualified under VTL 1104(b) and the defendant established, prima facie, that the vehicle was not operated in reckless disregard for the safety of others. In opposition, the claimant failed to raise an issue of fact. Summary judgment was granted.

Khalique v City of New York, 2019 NY Slip Op 33874(U)(Sup. Ct. Queens Cty. 2019) (Kerrigan, J.). Plaintiff injured in car accident when vehicle he was operating collided by a police vehicle. The police vehicle, responding to an assault with a gun call, made a left turn around a stopped bus at the intersection and collided with the plaintiff's vehicle. The Court noted it was undisputed that the police car was involved in an emergency operation. The Court found that VTL 1104(b)(4) allows the driver of an emergency vehicle involved in an emergency operation to disregard the VTL regarding the making of turns, including left turns such as in the present case. Plaintiff argued that even if this case were to be analyzed under the recklessness standard of VTL 1104, there is an issue of fact as to whether the officer acted recklessly by making a left turn blindly without activating his emergency lights and siren. The Court noted There is no requirement under VTL 1104 that a police vehicle engaged in an emergency operation have its lights and siren activated in order to be exempt from liability. Since the officer testified that he stopped at the intersection so as to allow pedestrians to clear the intersection, before inching his

way forward around the bus did not rise to the level of recklessness. The Court held that the evidence presented did not raise any issue of fact as to whether the officer operated his vehicle with reckless disregard. Summary Judgment was granted.

Hubbard v Robinson, 2020 NY Slip Op 03308 (4th Dep't 2020). Plaintiff injured when her parked vehicle (from which she was removing a child) was struck by a private vehicle. The private vehicle was just pulled over by Defendant police vehicle for a seatbelt violation and fled during the stop. The police officers pursued the private vehicle until the private vehicle struck plaintiff's vehicle. Plaintiff commenced an action against defendant police department. Defendant police department subsequently moved for summary judgment on the grounds that the officers' conduct and their operation of the police vehicle was not reckless pursuant to Vehicle and Traffic Law § 1104 as a matter of law and, in the alternative, that the actions of the private vehicle was the sole proximate cause of the accident. Defendants' submissions on included the officers' dashboard camera video, which recorded the initial stop and subsequent pursuit of the private vehicle, and the deposition testimony of the officers and the private vehicle's operator. The Court concluded that the officers acted "swiftly and resolutely" but prudently in pursuing the private vehicle at reasonable speeds under the circumstances and their actions did not rise to the level of recklessness as a matter of law.

Alexander v City of New York, 176 A.D.3d 659, 107 N.Y.S.3d 688 (2d. Dep't 2019). Plaintiff injured when she was struck by a vehicle that was attempting to drive between the vehicle from which the plaintiff was alighting and other parked vehicles. Prior to the accident, the vehicle had been pursued for a number of blocks by the police, who were attempting to effectuate a vehicle stop based upon excessively tinted windows. The Court held that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured third party unless the officer acted with reckless disregard for the safety of others. The Court held that the City defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the police officers involved in the pursuit of the vehicle did not act with reckless disregard for the safety of others and that the proximate cause of the accident was the independent recklessness of the driver of the vehicle, and not the police officers' conduct in initiating the pursuit. Moreover, one of the officers involved testified at her deposition that the officers had terminated the pursuit prior to the accident and had lost sight of the vehicle, which had turned down another street, before the vehicle struck the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment was granted.

Wonderly v City of Poughkeepsie, 125 N.Y.S.3d 734, 2020 N.Y. Slip Op. 03690 (2d. Dep't 2020). Defendant police officers attempted to pull over a vehicle driven which sped away. The police followed the vehicle, which struck another vehicle at a high rate of speed when the driver went through a red light. The collision killed plaintiff's decedents, and injured their two children. Defendant City moved for summary judgment on the ground that the Defendant City did not engage in reckless disregard for the safety of others. The Court held that the municipal defendants, in moving for summary judgment, established, prima facie, that the police officers did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate their pursuit of the driver's vehicle prior to that driver's decision to abruptly accelerate his vehicle to an excessive speed and run through a red light. Since the police officers attempted nothing more dangerous than to activate their emergency lights and siren in an

attempt to bring the driver's speeding vehicle to a safe stop at a red light intersection, and such actions created no known or obvious risks to other motorists, such actions were not "of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and was done so with conscious indifference to the outcome." In opposition, the plaintiffs failed to raise a triable issue of fact. Summary judgment affirmed.

Rodriguez-Garcia v Southampton Police Dept., 124 N.Y.S.3d 870, 2020 NY Slip Op 03813 (2d. Dep't 2020) Defendant police officer was responding to a radio call. The officer was passing a line of cars by straddling the double-yellow line in the middle of the road when his vehicle collided with the lead vehicle, which had begun to make a left-hand turn. The plaintiff, who was the driver of the lead vehicle, sued. Defendants moved for summary judgment. The defendants established that the reckless disregard standard of Vehicle and Traffic Law § 1104 was applicable to the officer's conduct because he was responding to a radio call of a motor vehicle accident with unknown injuries. However, the defendants failed to establish their prima facie entitlement to judgment as a matter of law because their moving papers presented a triable issue of fact regarding whether the officer was reckless in straddling the double-yellow line to pass a row of vehicles without using his warning siren or lights when he collided with the plaintiff's vehicle. Summary judgment denied.

D. Vehicle & Traffic Law Section 1103(b) Municipal Highway Maintenance Vehicles

Ventura v County of Nassau, 175 A.D.3d 620, 107 N.Y.S.3d 369 (2d. Dep't 2019). Plaintiff's vehicle collided with a snowplow, operated by defendant County employee. A snowplow operator "actually engaged in work on a highway" is exempt from the rules of the road and my only be held liable for damages caused by an act done "in reckless disregard for the safety of others" pursuant to VTL § 1103(b). Defendant established that there was heavy snow, his plow was down and he was plowing the subject intersection at the time of the accident, thereby establishing it was actually engaged in work on a highway. Defendant also established it did not act in reckless disregard of safety. Plaintiff's claim that Defendant was not engaged in highway work at the time of the accident since the plow was not lowered at the time of the accident contradicted his 50-h testimony that he did not remember whether the plow was lowered. This only raised a feigned factual issue, insufficient to defeat the defendant's prima facie showing. The Court held that while plaintiff's mother testified that the snowplow was not plowing at the time of the accident, she contradicted her 50-h hearing where she testified she did not see the snowplow prior to the accident and had an eye patch over her left eye and blurred vision in her right. Summary judgment affirmed.

IX. SCHOOL LIABILITY

A. Student on Student Assaults

M.P. v Central Islip Union Free Sch. Dist., 174 A.D.3d 636, 101 N.Y.S.3d 868 (2d. Dep't 2019). The infant plaintiff, a kindergarten student was injured when she was pushed into a wall by a fellow kindergarten student while they were lining up outside their classroom before the afternoon

session. The Court noted that where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause of the injury. The Court held that the School District established, prima facie, that the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's alleged injuries. Summary judgment granted.

Charles D.J. v City of Buffalo, 2020 N.Y. Slip Op 04243 (4th Dep't 2020). Plaintiff's son, a five year old was sexually assaulted at School in Defendant City by a fifth-grade student whose identity has not been determined, it occurred in the boys' bathroom, across the hall from the infant's kindergarten classroom. Plaintiffs allege that their son, given his age, should not have been allowed by his substitute teacher to go to the bathroom alone and unsupervised. Defendants moved for summary judgment arguing that they lacked notice of any prior sexual misconduct involving students at the school and, thus, they could not have foreseen the sexual assault of plaintiffs' son. The Court held that defendants failed to meet their prima facie burden. In support of their motion defendants submitted the deposition testimony of the person who was the assistant principal at the school when plaintiffs' son was assaulted. When asked whether she was aware of any other student who was sexually assaulted in a Buffalo public school, the former assistant principal testified that no "specific instance comes to mind." The assistant principal further testified, however, "things were kept very quiet" and that teachers and staff would not necessarily have been informed of sexual assaults. Defendants also submitted the deposition testimony of the substitute teacher who allowed plaintiffs' son to go to the bathroom alone. Although the substitute teacher testified that she was not aware of any prior sexual assaults at the school, the day that plaintiffs' son was assaulted was the first day the substitute teacher worked at the school. Thus, she was not in a position to know whether school authorities were aware of prior sexual assaults upon students. Summary judgment denied.

B. **Bullying/Suicide**

C.T. v Board of Educ. of S. Glens Falls Cent. Sch. Dist., 179 A.D.3d 1198, 116 N.Y.S.3d 765 (3d. Dep't 2020). Plaintiffs' son was 13 years old when he committed suicide at the family residence. A suicide note was found several weeks later that suggested decedent killed himself because he could no longer deal with bullying by other children. Plaintiffs came to believe that this bullying had occurred while decedent was attending school in the defendant school district, whom they sued for negligent supervision and wrongful death. At trial, a jury found that defendant was negligent but that its negligence was not a substantial factor in causing decedent's injuries. Plaintiffs moved, unsuccessfully, to set aside the verdict as inconsistent and against the weight of the evidence. Plaintiffs appeal from the order denying that motion and from the judgment entered upon the jury verdict. Plaintiffs argue that the verdict was inconsistent in that the jury found defendant to be negligent while not finding that negligence to be a proximate cause of decedent's pain, suffering and death. The Court emphasized that a jury's finding that a party was at fault but that such fault was not a proximate cause of decedent's injuries is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause. At trial, plaintiffs testified that decedent's mood had darkened in the months before his suicide and that, during that period, he had experienced unpleasant incidents with children outside of school and was worried about academic issues. They also acknowledged that decedent had just returned to school from a

family vacation on the day of his suicide, appeared to be in good spirits and had not indicated that he was being bullied at school. Several of decedent's classmates testified and gave varying accounts as to whether they saw decedent being bullied at school in the period leading up to his death, as well as whether they alerted school officials to the bullying. In contrast, defendant's employees denied knowing that decedent was being bullied at school and further noted that he had not appeared upset and had not raised any concerns about bullying when he met with a school counselor on another issue in 2014. The conduct of defendant's employees was not blameless during this period— indeed, it appears that several minor incidents involving decedent provided missed opportunities for them to uncover what was going on — but the trial proof neither established the degree of the bullying that decedent received at school nor showed that defendant could have anticipated its impact upon him. Therefore, the jury could logically find that defendant was negligent by failing "to adequately supervise" decedent in some respects, but that the pain, suffering and suicide of decedent were not foreseeable consequences of that negligence. The motion to set aside the verdict was denied.

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

Krzenski v Southampton Union Free Sch. Dist. 173 A.D.3d 725, 102 N.Y.S.3d 693 (2d. Dep't 2019) Plaintiff was injured while playing floor hockey during an after-school event in Defendant School's gymnasium. Two sets of fully extended bleachers were being used as the sideline boundaries for the floor hockey playing area. The plaintiff alleged that an opposing team member hit her in the back, causing her to hit her head and shoulder on the unpadded metal railing of the bleacher stairs. The plaintiff 's action was based on premises liability and negligent supervision. The defendant moved for summary judgment dismissing the complaint, arguing, among other things, that the action was barred by the doctrine of primary assumption of risk. Under the doctrine of primary assumption of risk, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." The defendant established its prima facie entitlement to judgment as a matter of law based upon the doctrine of primary assumption of risk. In support of its motion, the defendant submitted the plaintiff's 50-H and deposition testimony where plaintiff testified that she volunteered to play floor hockey at the "class night" event during which she allegedly was injured, and that she had previously played floor hockey in the school's gymnasium during physical education classes. In addition, she had played floor hockey during similar class night events in her freshman and sophomore years. Additionally, a gym teacher at the school, who witnessed the accident, testified at his deposition that the bleachers were not fully extended during floor hockey games in physical education classes, he also testified that the bleachers were used as boundaries in physical education classes. Consequently, the proximity of the bleachers to the playing area was open and obvious, and the risk of collision with the bleachers was an inherent risk in playing indoor floor hockey in the subject gymnasium. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the failure to pad the metal railings on the bleacher stairs or to use a buffer zone between the bleachers and the playing area created a risk beyond the risks inherent in the sport of indoor floor hockey. The defendant also established, prima facie, that it was not negligent in supervising the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact in support of her allegation that the defendant failed to properly supervise her to prevent her from suffering a concussion. Summary judgment granted.

Ninivaggi v County of Nassau, 177 A.D.3d 981, 113 N.Y.S.3d 178 (2d. Dep't 2019). The infant plaintiff was injured when he and a friend were playing catch with a football on a multipurpose athletic field on the premises of an elementary school owned by the defendant School District when the infant plaintiff stepped into a "depression" or "hole" on the grassy field, lost his balance, and fell. The depth of the depression was variously described by the plaintiffs as being two-to-three inches, three-to-four inches, and five inches. The infant plaintiff, who was 14 years old when he was injured, was an experienced football player, had previously played on the field, and admitted that he was familiar with the condition of the field. The School District moved for summary judgment on the ground that the claim was barred by the doctrine of primary assumption of risk. The school district established its prima facie entitlement to judgment as a matter of law on the basis of primary assumption of the risk. The plaintiffs described the grass field on which the accident occurred as "choppy," "wavy," and "bumpy," with several depressions. In other words, the topography of the grass field on which the infant plaintiff was playing was irregular. The risks posed by playing on that irregular surface were inherent in the activity of playing football on a grass field. The Court further noted that the infant plaintiff's testimony demonstrated that he was aware of and appreciated the inherent risks, and that the irregular condition of the field was not concealed. Plaintiff failed to raise an issue of fact in opposition. Summary judgment denied. The dissent in this matter argued that while the doctrine of primary assumption of risk is a defense to personal injury causes of action based upon participation in sporting or recreational activities, it is not an absolute bar to recovery where the property owner may have some liability for failure to maintain the premises in a reasonably safe condition and fails to warn users of those defects. The dissent argued, essentially, that the poor condition of the field was not *de minimus* and was significant enough to raise issues of fact as to whether the property owner properly maintained the premises.

D. **Negligent Supervision**

C.Q. v Farmingdale Union Free Sch. Dist., 183 A.D.3d 850, 122 N.Y.S.3d 530 (2d. Dep't 2020) Infant plaintiff allegedly was injured when he jumped or fell off the top step of a mock rock climbing wall on the school playground. Plaintiff brought cause of action for negligent supervision. The School District moved for summary judgment. The School District failed to establish, prima facie, that the infant plaintiff was adequately supervised at the time of the accident, or that the incident occurred in such a short span of time that it could not have been prevented. Summary judgment denied.

E.W. v City of New York, 179 A.D.3d 747, 117 N.Y.S.3d 79 (2d. Dep't 2020). Plaintiff, third grade student stopped while walking between classes to talk with a friend. He testified that a door that he was holding as he talked with his friend closed "automatically on its own" "really, really, really, really, fast," severing the tip of his index finger, which had become caught between the door and the doorjamb near the hinges. Defendants moved for summary judgment. The defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence that the subject door was not defective. The deposition testimony of the building's custodial engineer established that he inspected the door at least twice per week before the accident. Moreover, the school principal provided evidence that a search of the school's records revealed no "indication of any maintenance, repairs, work orders, or other issues reported" with respect to

the door during the two-year time period prior to the accident. This evidence, together with evidence that the subject door was in regular use, including regular use by the infant plaintiff, was sufficient to establish, prima facie, that the door was not defective. Plaintiff was unable to raise an issue of fact. Additionally, defendants' motion which for summary judgment on the cause of action alleging negligent supervision was also granted since the defendants established, prima facie, that any alleged inadequacy in the level of supervision was not a proximate cause of the accident, and in opposition, the plaintiffs failed to raise a triable issue of fact. Summary judgment granted.

B.T. v Bethpage Union Free Sch. Dist., 173 A.D.3d 806, 103 N.Y.S.3d 99 (2d. Dep't 2019). Infant plaintiff and her classmates, who were then in the eighth grade, were instructed by their gym teacher to run around the perimeter of their school building. The infant plaintiff was injured, when, while running, she attempted to jump over a chain suspended between two poles, and she tripped and fell. The infant plaintiff testified at her deposition that the gym teacher did not instruct her not to jump over anything, and that approximately 20 students jumped over the chain before she attempted to do so. She initially did not know what the other students were jumping over, and she realized that they were jumping over the chain when she was approximately five feet away from it. She did not see the chain until she was very close to it because the chain "blend[ed] in." The school district moved for summary judgment contending, that its supervision of the infant plaintiff was adequate and proper, and that any alleged inadequacy in supervision was not a proximate cause of the infant plaintiff's injuries because the accident occurred in such a short span of time that even the most intense supervision could not have prevented it. The Court noted that while a school district is not an insurer of the safety of its students, since it cannot reasonably be expected to continuously supervise and control all of their movements and activities, it has a duty to adequately supervise the students in its charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. The Court affirmed the denial of the motion holding that the school district failed to demonstrate, prima facie, that it provided adequate supervision, or that a lack of adequate supervision was not a proximate cause of the infant plaintiff's injuries. Summary judgment denied.

E. Premises Liability on School Grounds

V.W. v Middle Country Cent. Sch. Dist. at Centereach, 175 A.D.3d 638, 175 A.D.3d 638 (2d. Dep't 2019). The infant plaintiff was injured when she fell from monkey bars in the defendant's school playground during recess. Plaintiff alleged negligent supervision and negligent maintenance of its premises. The defendant moved for summary judgment. Defendant established its prima facie entitlement to judgment by submitting evidence which demonstrated that it provided adequate playground supervision at the time of the plaintiff's accident. The defendant further established that, in any event, the accident occurred in such a manner that it could not reasonably have been prevented by closer monitoring, and thus the defendant's alleged negligent supervision was not a proximate cause of the accident. In opposition, the plaintiff failed to raise a triable issue of fact. However, the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent maintenance of its premises. The affidavit of an expert witness who opined that the subject monkey bars, and the ground cover beneath them, complied with the guidelines promulgated by the Consumer Product Safety

Commission and the standards issued by American Society for Testing and Materials was insufficient because the expert also indicated that when she went to inspect the playground, the monkey bars at issue had been removed and no evidence was submitted about the height of the monkey bars on the date of the accident or what the surface condition was like at the time of the accident. Thus, the expert's affidavit was speculative, conclusory, and insufficient to establish, prima facie, that the defendant maintained its premises in a reasonably safe condition. Since the defendant failed to meet its prima facie burden, summary judgment was granted.

J.F. v Brentwood Union Free Sch. Dist., 184 A.D.3d 806, 124 N.Y.S.3d 564 (2d. Dep't 2020). Plaintiff, a kindergarten student at a school operated by the defendant, allegedly fell from a playground slide when another child pushed him from behind as he was starting to go down the slide, causing him to fall off the side of the slide. The plaintiff alleged negligent supervision. Defendant moved for summary judgment. The plaintiff offered no evidence in opposition, but argued only that the defendant had failed to establish its prima facie entitlement to judgment as a matter of law. The defendant established, prima facie, that the level of supervision afforded to the plaintiff and the other students was adequate and that the accident, as described by the plaintiff, occurred in such a manner that it could not reasonably have been prevented by more intense supervision. Summary judgment granted.

G. A. v Garden City Union Free Sch. Dist., 178 A.D.3d 762, 111 N.Y.S.3d 893 (2d. Dep't 2019). Plaintiff student was injured when her hair became caught in a gap between a hand dryer and a wall, upon which the dryer had been installed. Action was based on negligence in its maintenance of the premises and in its supervision of the infant plaintiff. Defendant moved for summary judgment. Defendant established, prima facie, that it did not create or have actual or constructive notice of the alleged dangerous condition of the subject hand dryer. In opposition, the plaintiffs raised a triable issue of fact as to whether the defendant created the alleged dangerous condition through the installation of the hand dryer. Summary judgment denied as to the premises liability, however, summary judgment should have granted that branch of the defendant's motion which was for summary judgment dismissing the negligent supervision cause of action. The defendant established its prima facie entitlement to judgment as a matter of law dismissing that cause of action by demonstrating that it adequately supervised the infant plaintiff and, in any event, that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries. The defendant's submissions established that the incident occurred so quickly that it could not have been prevented by even the most intense supervision. In opposition, the plaintiffs failed to raise a triable issue of fact.

I.S. v City of New York, 175 A.D.3d 1450, 106 N.Y.S.3d 603 (2d. Dep't 2019). The infant plaintiff was injured when she fell from the monkey bars at her school playground. The defendants moved for summary judgment. The defendants demonstrated, prima facie, that the monkey bars and the ground covering below them were not defective and were maintained in a reasonably safe condition on the date of the accident. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the defendants were negligent in their maintenance of the playground equipment. The defendants also demonstrated, prima facie, that they provided adequate supervision to the infant plaintiff at the time of the accident and, in any event, that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries. In opposition,

the plaintiffs failed to raise a triable issue of fact as to whether the defendants were negligent in their supervision of the infant plaintiff. Summary judgment was granted.

Wilson v. New York City Housing Authority, 2020 WL 4495421 (2nd Dep't 2020). Infant plaintiff slipped and fell off of wet playground equipment on a playground owned by Defendant. The infant plaintiff slipped and fell when he climbed on the second step of a ladder which led to monkey bars. The plaintiffs allege that a built-in sprinkler, which shot water into the air for children to play in, was located in too close a proximity to the monkey bars and that this proximity caused the wind to blow water from the sprinkler onto the equipment. Defendant moved for summary judgment, establishing, prima facie, that it did not create the alleged dangerous condition. The infant plaintiff testified at a § 50–h hearing and his deposition that the wind was pushing water from the sprinkler to the monkey bars. However, the infant plaintiff also testified at his deposition that, immediately before he went on the ladder to the monkey bars, two children who were wet from playing in the sprinkler climbed on the ladder. Given the wet children who preceded the infant plaintiff on the ladder, the Court held that it would require impermissible speculation to conclude that the water on which the infant plaintiff slipped was caused by the proximity of the sprinkler to the monkey bars. In opposition, the plaintiffs failed to raise a triable issue of fact. The Court held that the affidavit of the infant plaintiff to the effect that the ladder was wet before the wet children climbed on it presented what appears to be a feigned issue of fact, designed to avoid the consequences of his earlier deposition testimony that he did not see that the ladder was wet before he climbed on it. Defendant also established, prima facie, that it lacked actual or constructive notice of the wet condition of the playground equipment. In opposition, the plaintiffs failed to raise a triable issue of fact. Since there is no nonspeculative basis to find that the accident was caused by water from the sprinkler, the evidence that Defendant had actual knowledge of such a recurring dangerous condition was insufficient to raise an issue of fact as to NYCHA's constructive notice of the specific water upon which the infant plaintiff slipped. Summary judgment granted.

X. CLAIMS BROUGHT BY ON-DUTY POLICE OFFICERS AND FIREFIGHTERS

A. General Municipal Law 205-a and 205-e

Cioffi v. S.M. Foods, Inc., 178 A.D.3d 1006, 116 N.Y.S.3d 306 (2nd Dep't 2019) Plaintiff police officer was injured while conducting a traffic stop on foot when he was struck by a tractor trailer. At the time of the accident, the plaintiff was standing in the southbound lane on the driver's side of a car which he had stopped at the intersection. When the light changed, the defendant began his left turn. Although he believed he could make the turn safely, the rear of his trailer hit plaintiff. The complaint alleged that Burke's negligence and violation of General Municipal Law § 205-e caused the accident. Plaintiff also alleging common-law negligence pursuant to General Obligations Law § 11-106, which allows a police officer to bring a tort claim for injuries suffered in the line of duty as the result of, inter alia, the negligence of any person other than the police officer's employer or co-employee. Court granted summary judgment to plaintiff on the negligence claim. As for the GML 205-e claim, plaintiff was required to show a statutory predicate to the claim, which plaintiff did by alleging V&T law 1146(a), which requires a driver to "exercise due care to avoid colliding with any . . . pedestrian." Summary judgment granted on that cause of action as well.

Schiavone v. Seaman Arms, LLC, 178 A.D.3d 529, 114 N.Y.S.3d 332 (1st Dep't 2019). Plaintiff firefighter was injured while responding to a fire at a residential building owned by defendant. Plaintiff testified that he was on the building's roof and as he was attempting to remove a piece of the roof that a fellow firefighter had cut open to allow for ventilation, his momentum carried him backwards and he stepped on something that caused him to fall. Although he did not initially see what caused his fall, he stated that when he stood up, he noticed that there was debris, including roofing materials and pieces of wood, which appeared to be from prior repair work on the roof. The court denied defendant summary judgment, since defendant failed to satisfy its prima facie burden of showing that it did not have constructive notice of the debris on the roof. Defendant did not offer evidence as to when the roof was last inspected or cleaned prior to plaintiff's fall, even though its resident manager testified that he would routinely inspect the roof about once a month. Since defendant was unable to satisfy its prima facie burden as to plaintiffs' common-law negligence claim, it was not entitled to dismissal of plaintiffs' claims pursuant under GOL 11-106 and GML 205-a.

Maher v. White, 184 A.D.3d 630, 125 N.Y.S.3d 445 (2nd Dep't 2020). Police officer, was in the process of executing a parole arrest warrant, which required him to enter certain property, and was injured when, while walking down a flight of stairs, the front edge of one step broke and he fell down the remaining stairs. At the time of the incident, the defendant had defaulted on his mortgage loan payments, and apparently the owner had no insurance. Plaintiff attempted to sue the mortgage holder. Plaintiff asserted causes of action alleging common-law negligence as codified by General Obligations Law § 11–106, and alleging a violation of General Municipal Law § 205–e against the owner and the bank. Defendants established entitlement to judgment dismissing the cause of action alleging a violation of General Municipal Law § 205–e insofar as asserted against each of them by demonstrating that the cited provisions of the Code of the Village of Hempstead did not apply, since defendant owned, occupied, operated, or controlled the property at the time of the incident. Defendant established its entitlement to summary judgment dismissing the negligence cause of action by demonstrating that it did not own or control the subject premises, or assume any duty to the plaintiff, which might serve as a predicate for liability.

B. **General Obligations Law §11-106**

Diliberto v New York Presbyterian Hosp.--Weill Cornell Campus, 2020 NY Slip Op 31029(U)(Sup. Ct. N.Y. Cty 2020)(Bannon, J.). Plaintiff police officers were guarding a prisoner at defendant hospital. The prisoner was under arrest for assault, violating an order of protection, and resisting arrest. Medical records from prior to the altercation show that the prisoner was bi-polar, not taking his medication, had used ecstasy prior to his arrest, and was being treated for a burn injury after he set fire to his left leg. The medical records further note that the prisoner suffered from "fits of rage." The prisoner's arms and legs were shackled to a hospital gurney. The prisoner was shackled to the bed. Later, a nurse came to the room and asked the plaintiffs to unshackle one of the prisoner's hands so that she could treat the burn injury. Diliberto uncuffed the prisoner's right hand. The nurse then asked the officers to step outside while she examined the prisoner. The officers complied. After her examination, the nurse came outside and informed the officers that the prisoner was making a call on the landline telephone in the burn unit. The nurse said, "I let him make a phone call, is that alright?" The officers immediately went into the room and told the prisoner to get off the telephone. A struggle ensued between the prisoner and the plaintiffs. The plaintiffs

claim that during the struggle, plaintiffs were injured when the prisoner struck them with the phone. Plaintiffs brought an action was brought pursuant to GOL §11-106, which provides a police officer the right to bring a common law negligence action against a private party for the officer's injuries suffered in the line of duty. Defendant hospital moved for summary judgment arguing that it did not owe a duty to the plaintiffs since the prisoner was under their sole custody and control. Plaintiffs argued that the hospital had a duty to ensure that the obviously dangerous patient who was unshackled at Defendant Hospital's request did not gain access to an unsafe object during treatment. The Court held that there was a triable issue of fact as to whether the Defendant Hospital assumed custody and control of the prisoner following the plaintiffs unshackling the prisoner's arm and leaving the room, such that the Defendant Hospital was under a duty to prevent the prisoner from accessing an unsafe or dangerous object during treatment. Summary judgment denied.

XI. FALSE ARREST, MALICIOUS PROSECUTION AND EXCESSIVE FORCE

A. Malicious Prosecution

Roberts v City of New York, 34 N.Y.3d 991, 137 N.E.3d 497, 114 N.Y.S.3d 42 (2020) In a very brief opinion, the Court of Appeals held that the plaintiff failed to raise any material, triable issue of fact with respect to whether probable cause for his arrest and prosecution was lacking, or as to whether the police acted with actual malice. Judge Rivera dissented. Judge Rivera noted that, in a criminal trial, a jury acquitted plaintiff of murder in the second degree and related charges. He then sued the City of New York, the City Police Department and various police officers for, amongst other claims, false arrest and malicious prosecution. Plaintiff asserted that he was wrongfully accused and imprisoned for two and half years, and maliciously prosecuted despite the lack of probable cause to arrest and legal justification to pursue his criminal prosecution. He claimed defendants acted with malice and in bad faith, in deliberate indifference to his rights. Defendants moved for summary judgment and plaintiff opposed the motion, arguing there are triable issues of fact. While Defendants submitted and relied on police testimony to support the argument that police had probable cause to arrest plaintiff and that his prosecution was justified, the various witnesses gave deposition testimony that conflicted with police accounts of events and that, if believed by a jury, could have supported a verdict in plaintiff's favor on both causes of action. Judge Rivera stated that summary judgment should have been denied.

B. False Arrest

Smith v Village of Freeport Police Dept., 181 A.D.3d 625, 121 N.Y.S.3d 274 (2d Dep't 2020) Defendant Police Officer observed a minivan with Pennsylvania license plates in a parking lot reserved for employees of the Village. He stopped his vehicle behind the minivan and obtained the license and registration documents from plaintiff, the sole occupant of the minivan. Based upon a computer search of those documents, Defendant learned that plaintiff had a suspended New York license and that the minivan was not registered. Defendant issued traffic tickets to Plaintiff and impounded the minivan. Plaintiff sued for false arrest, malicious prosecution, and violation of 42 USC § 1983. Following discovery, the defendants moved for summary judgment dismissing the complaint. Defendant moved for summary judgment. In

this case, defendant performed a computer search using the license and registration provided by Smith, which revealed that Smith had a suspended New York license and that the vehicle was unregistered in Pennsylvania. Accordingly, the defendants established, prima facie, that Hassell had probable cause to impound the vehicle and issue traffic citations for violations of, inter alia, Vehicle and Traffic Law § 511. In opposition, the plaintiffs failed to raise a triable issue of fact. Summary judgment granted.

C. Excessive Force

Owens v City of New York, 183 A.D.3d 903, 124 N.Y.S.3d 695 (2d. Dep't 2020) This action involves the fatal shooting of 18-year-old decedent by members of the NYPD. The plaintiff, who is the decedent's mother, called 911 requesting assistance at her Brooklyn apartment after a verbal dispute with the decedent. The decedent was shot 14 times during the ensuing encounter with the police. The plaintiff seeks to recover damages for wrongful death, violations of the decedent's constitutional and civil rights pursuant to 42 USC § 1983 based on the alleged use of excessive force, and violation of the plaintiff's constitutional rights pursuant to 42 USC § 1983 based on the deprivation of her right to family association. The defendants moved for summary judgment. The trial court held that the defendant failed to follow the City's Police Department Patrol Guide for the apprehension of barricaded and emotionally disturbed persons. The City established, prima facie, that it was not in violation of any clear Patrol Guide mandate. In opposition, the plaintiff failed to raise a triable issue of fact. However, the Appellate Division reversed the dismissal of the wrongful death act as against the City as alleged that the defendant officers were negligent in using deadly physical force. Contrary to the defendants' contention, the testimonies of the individual officers demonstrate the existence of triable issues of fact as to whether, inter alia, the decedent posed a threat of imminent death or serious physical injury to the defendant officers or others sufficient to justify the officers' use of deadly physical force against the decedent. The Appellate Division also reversed summary judgment dismissing so much of the section 1983 cause of action because the defendants failed to demonstrate, prima facie, the absence of triable issues of fact as to whether the defendant officers' use of deadly physical force against the decedent was objectively reasonable under the circumstances.

XII. CLAIMS BY INMATES

A. Excessive Force

Rivera v State of New York, 34 N.Y.3d 383, 142 N.E.3d 641, 119 N.Y.S.3d 749 (2019) This case involves the State Department of Corrections and the doctrine of respondeat superior. Plaintiff inmate entered the prison dining hall when a corrections officer mocked his medically-issued protective helmet, which he was required to wear due to a seizure disorder. Claimant asked the officer not to make fun of his helmet, fearing harassment by other inmates, and walked towards the food serving line. The Officer called claimant back to the doorway of the mess hall. When claimant obliged, the Officer grabbed claimant's jacket, pulled him outside the mess hall and began punching him on the face and head. Claimant was forced to his knees while the Officer hit and stomped on him, at which point two other correction officers pushed claimant down and applied handcuffs. The Officer removed claimant's helmet and continued the assault, yelling expletives and saying, in substance, "I hope you die." The Officer struck claimant in the head with his radio with such force that the battery became dislodged and hit the wall. Eventually, claimant

lost consciousness. During the prolonged, brutal attack, claimant did not resist or fight back and sustained serious injuries. When claimant was eventually brought to the facility emergency room, medical staff were falsely told that his injuries were the result of a seizure. No mention was made that force had been used on him. Claimant brought an action against the State for excessive force, assault and battery and other related claims. Claimant moved for summary judgment contending that DOCCS' dismissal of its employees for use of excessive force and providing false or misleading information to the Inspector General was an admission demonstrating the absence of material issues of fact. With respect to the State's vicarious liability for the acts of the correction officers, claimant argued, in summary fashion, that they acted within the scope of employment because they "were on duty, in uniform, supervising inmates" at the time of the assault. However, addressing the excessive force cause of action, claimant also asserted that there was "no justification whatsoever" for the attack on him. In support of the motion, claimant submitted, among other things, the Inspector General's report and an affidavit describing the assault in terms consistent with the description set forth above. The State opposed claimant's summary judgment motion, contending, among other things, that there was no basis on which it could be held vicariously liable for assault and battery, citing claimant's descriptions of the incident, because the Officer's assault was outside the scope of employment emphasizing that the unjustified and unauthorized use of force was a clear departure from DOCCS policies and procedures governing use of force. The Court of Claims denied claimant's motion on procedural grounds but granted defendant's cross motion for summary judgment, holding that the Officer's attack was, as a matter of law, outside the scope of employment. After describing the elements of assault and battery, the court determined that, based on the undisputed facts, there was "no reasonable connection" between the assault and the duties normally performed by correction officers, deeming the attack a "substantial departure" from the normal methods of performance. Further, the court reasoned that the "abhorrent" and unprovoked attack was wholly attributable to personal motive, reflected by the lack of any plausible justification for such vicious force. The court held there was "no viable basis upon which the State of New York may be held liable" for assault and battery. The Appellate Division affirmed. The Court of Appeals affirmed, finding that no reasonable fact-finder could conclude that the assault constituted action taken within the scope of employment. Based on procedural issues, the only causes of action that remained pending—and which were the subject of the State's motion for summary judgment—were the intentional torts of assault and battery pleaded in the first claim. Thus, claimant sought to hold the State vicariously liable, on the basis of respondeat superior, for the intentional and offensive bodily contact perpetrated by its employees. In determining whether an employee acted within the scope of employment for purposes of vicarious liability, the factors considered are, "the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated." The Court held that, accepting the version of events articulated in claimant's summary judgment motion papers, the State met its burden of demonstrating that there was no basis to conclude that the assault constituted conduct within the scope of employment. Although the officers were on duty and the assault occurred at the prison while the attacking Officer supervised inmates in the mess hall — satisfying the time, place and occasion factor — the other factors do not support respondeat superior liability. The brutal beating can be characterized neither as an "irregular" performance of duty nor a mere "disregard of instructions" the attack was not in furtherance of any employer-related goal whatsoever. Correction officers are authorized to use physical force against

inmates in limited circumstances not present here, such as in self-defense or to suppress a revolt, DOCCS regulations require correction officers to exercise "[t]he greatest caution and conservative judgment" in determining whether physical force against an inmate is necessary. To be sure, correction officers at times use excessive force. Such conduct will not fall outside the scope of employment merely because it violates department rules or policies or crosses the line of sanctioned conduct. Under our multi-factored common-law test for determining respondeat superior liability, an employee's deviation from directions or governing standards is only one consideration in the analysis. Here, the gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the duties of a correction officer as a matter of law. This was a malicious attack completely divorced from the employer's interests. The Court of Appeals the appeared to address the uniqueness of the claim, "Although claimant is unable to recover here based on the narrow theory pursued in the first claim, inmates who are unlawfully assaulted by correction officers are not without legal recourse. Even in the absence of respondeat superior liability for assault and battery, they may seek redress against the State in the Court of Claims on other tort theories, such as negligent hiring, training or supervision. Indeed, claimant here attempted to bring those causes of action in the Court of Claims when he filed the second claim, which was discontinued by stipulation of the parties. Moreover, correction officers who assault inmates may also be sued directly in Supreme Court (or federal court) under 42 USC § 1983 or on common law tort theories for acts occurring outside the scope of employment." This decision was met with a strong dissent by Judge Rivera arguing that the scope of employment issue should be submitted to a finder of fact essentially because she felt that there are material factual questions as to what the assisting corrections officers might have perceived to be the motivation and circumstances leading to the attack on claimant and thus whether they acted within the scope of their employment when they responded to the attack by restraining claimant, thereby enabling the attacking Officer to beat him. The Court of Appeals affirmed summary judgment dismissing the matter.

XXI. SUBWAY AND MUNICIPAL BUS PASSENGER CASES

Mayorga v Nassau Inter-County Express (Nice) Bus, 178 A.D.3d 1030, 112 N.Y.S.3d 547 (2d. Dep't 2019). The plaintiff was a passenger on a bus owned and operated by the defendants. While she was standing near the front of the bus in anticipation of getting off at the next stop, the plaintiff fell forward and landed on her back next to the driver after the driver applied the brakes. Defendants moved for summary judgment. Defendants defendants established their prima facie entitlement to summary judgment by submitting the transcripts of the plaintiff's hearing pursuant to General Municipal Law § 50-h and deposition testimony, as well as the transcript of the driver's deposition testimony and his sworn affidavit, which demonstrated that the stop of the bus was not unusual or violent or of a different class than the jerks and jolts commonly experienced in city bus travel. In opposition, the plaintiff failed to raise a triable issue of fact. Summary judgment was granted.

Dayan v MTA Bus Co., 2020 N.Y. Slip Op 31715(U)(Sup. Ct. N.Y. Cty. 2020)(Sokoloff, J.) Plaintiff was a passenger on the QM4 bus, owned and operated by MTA. While traveling on the bus, he alleges to have fallen and injured himself as a result of movement on the bus. Plaintiff testified that the bus came to a sudden stop, he fell backwards and his head slammed into the fare box. Defendant driver testified that he

stopped at a red light, began to proceed when a car came from the left and cut in front of the bus, causing the driver to stop short from only 5 miles per hour. Defendant moved for summary judgment. Defendant argued that the stop was not unusual or violent or of a different class than the jerks and jolts commonly experienced in city bus travel. Defendant also argues that it has established that the bus operator was faced with an emergency situation and is precluded from liability under these circumstances. The court found questions of fact as to the force involved in the incident. Additionally, the Court found a question of fact as to whether the bus operator was, in fact, faced with an emergency when the bus was cut off by another vehicle. Summary judgment denied.

XIII. COURT OF CLAIMS ISSUES

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

Hyatt v State of New York, 180 A.D.3d 764, 120 N.Y.S.3d 52 (2d. Dep't 2020). Claimant injured when the vehicle in which he was a passenger crossed over the center double-yellow line and collided head on with a vehicle traveling in the opposite direction on State Road. The police accident report stated that the accident occurred at a specific location. The claimant served a timely notice of intention to file a claim, which described the place where the claim arose as reported in the police report. Subsequently, in preparation for filing a claim, the claimant's newly retained attorney went to the location of the accident with a retained engineering consultant and decided that the location of the accident as described in the police report and notice of intention to file a claim prepared by the claimant's prior attorney was incorrect. The claimant served an amended notice of intention to file a claim, which described the place where the claim arose as a separate location. Accordingly, the claimant moved for leave to file a late claim pursuant to Court of Claims Act § 10(6). The Court noted that Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim. The Court noted that the claimant failed to demonstrate a potentially meritorious claim, did not proffer any evidence that tends to substantiate his conclusory allegations that the State was negligent, inter alia, in failing to properly design, maintain, repair, and inspect the roadway and he failed to substantiate how the State's alleged negligence contributed to the accident where the circumstances were such that a 17-year-old driver of the host car crossed over the double-yellow line and proceeded into oncoming traffic. In addition, the Court held that the claimant failed to demonstrate a reasonable excuse for the approximately 1 1/2-year delay in seeking leave to file a late claim. His attorney's failure to timely and properly investigate the claim in order to determine the location of the accident, constitutes law office failure, which is not a reasonable excuse. The claimant also failed to demonstrate that the State had timely notice of the essential facts constituting his proposed claim regarding the location of the accident, as the notice of intention to file a claim did not provide notice of the location of the accident that was subsequently alleged in the proposed claim. The police accident report described the place of the occurrence of the accident at a location significantly different from the location alleged in the proposed claim, was insufficient to provide the State with notice of the essential facts constituting the claim. Finally, the claimant has another remedy available to him because he may commence an action against the driver of the offending vehicle. Leave to file a late claim was denied.

Dorr v State of New York, 176 A.D.3d 1033, 108 N.Y.S.3d 872 (2d. Dep't 2019). Claimant, while residing at a state drug treatment facility, was injured when he jumped out of the facility's second-story window on March 5, 2012. The claimant filed a claim in the Court of Claims on May 31, 2012. However, the claim was not served on the Attorney General of the State of New York until June 6, 2012, 93 days after March 5, 2012. In October 2017, after the expiration of the three-year statute of limitations applicable to the claim, the defendant moved to dismiss the claim for failure to serve a timely claim. The claimant cross-moved for leave to file a late claim pursuant to Court of Claims Act § 10(6). The Court held that once the applicable limitations period expired in this case, the Court of Claims was without authority either to entertain a motion for leave to file a late claim, or, sua sponte, to grant such relief . The matter was properly dismissed.

Phillips v State of New York, 179 A.D.3d 1497, 119 N.Y.S.3d 328 (4th Dep't 2020). Claimant was injured while working on a demolition project at a state Correctional Facility. Two days later, he filed an incident report with the former New York State Department of Correctional Services and, 92 days after the incident, he attempted to file a notice of intention to file a claim (notice of intent). Claimant filed an application seeking permission to file a late claim against defendant. The Court noted that a determination by the Court of Claims to grant or deny a motion for permission to file a late claim lies within the broad discretion of that court. The Court held that after considering the six factors outlined in Court of Claims Act § 10 (6), it concluded that the court below abused its discretion in denying claimant's application insofar as claimant sought to assert a cause of action under Labor Law § 240 (1). While the Court noted that several factors weigh against allowing a late claim, the most significant factor is "whether the claim appears to be meritorious" inasmuch as "it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request." The Court held that there is evidence to support claimant's 240(1) claim since his "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" The Court noted that even if the excuse for failing to file a timely claim is not compelling, the denial of the application with respect to the proposed section 240 (1) cause of action was an abuse of discretion because defendant was able to investigate the claims and thus suffered no prejudice and the proposed section 240 (1) cause of action appears to have merit. Claimant's motion was granted as to Labor Law 240(1).

Tucker v New York State Thruway Auth., 175 A.D.3d 632, 107 N.Y.S.3d 73 (2d. Dep't 2019). Claimant employed on a construction sustained injuries when he lost his footing after the ladder upon which he was descending suddenly shifted and his left arm became hooked on a rung or railing. Claimant moved pursuant to Court of Claims Act § 10(6) for leave to file a late claim alleging violations of Labor Law §§ 240(1) and 241(6) for the failure to properly secure the ladder. The Court held that the claimants failed to demonstrate a reasonable excuse for their failure to file timely claims, failed to demonstrate that the NYSTA had notice of the essential facts constituting the claims, failed to demonstrate that the NYSTA had an opportunity to investigate their claims, and failed to sustain their initial burden of demonstrating that the NYSTA would not be substantially prejudiced by the filing of the untimely claim. The claim was denied.

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

Gang v State of New York, 177 A.D.3d 1300, 113 N.Y.S. 423 (4th Dep't 2019). Claimant injured as a result of defendant's alleged medical malpractice while claimant was an inmate in a correctional facility. In his notice of intention to file a claim (notice of intent) which was filed and served on August 22, 2014, claimant alleged that he sustained an injury to his "left hip" as a result of numerous acts of medical malpractice "on or about May 28, 2014." Claimant alleged that, following hip replacement surgery, he developed a severe infection at the location of the incision site and that defendant's agents committed malpractice in failing to treat his infection properly while monitoring that incision site during follow-up appointments. In his claim, filed and served on May 12, 2016, claimant reiterated the various allegations of malpractice but instead stated that the malpractice "occurred commencing on or about May 20, 2014 . . . and continued for several days and/or weeks thereafter." He also alleged that the malpractice involved his "right hip." Defendant answered, raising affirmative defenses that the Court of Claims lacked personal and subject matter jurisdiction since the claim contained different dates and different injuries from the notice of intent. Claimant filed a motion seeking to dismiss these affirmative defenses and for leave to amend the claim to correct the location of the injury. Claimant also contended in his motion that defendant's medical records established that the malpractice occurred prior to May 21, 2014 and that, due to defendant's continuous treatment for the injuries, his "claims of malpractice would relate back to the first date of treatment" for the hip "or at the very latest, May 21, 2014." Alternatively, claimant sought leave to amend the claim to reflect the same onset date as the notice of intent. Defendant cross-moved for summary judgment contending that, if the accrual date was May 20 or May 21, 2014, then the notice of intent filed on August 22, 2014, was untimely and did not provide the Court of Claims with personal or subject matter jurisdiction. Defendant further contended that the notice of intent was jurisdictionally defective because it set forth an incorrect accrual date in violation of Court of Claims Act § 11 (b). The Court noted that the failure to comply with either Court of Claims Act § 10 (3), concerning the timing of a notice of intent or a claim, or section 11 (b), concerning the essential elements of a notice of intent or a claim, deprives a court of subject matter jurisdiction requiring dismissal of the claim. As to the timeliness of the notice of intent, the Court agreed with claimant that the notice of intent complied with Court of Claims Act § 10 (3), which provides that a notice of intent or claim must be filed and served "within ninety days after the accrual of such claim." Generally, a medical malpractice claim accrues on the date of the alleged malpractice, but the statute of limitations is tolled "until the end of the course of continuous treatment" The Court held that the toll likewise applies to the time periods contained in Court of Claims Act § 10 (3). Since the record establishes that claimant was receiving ongoing treatment for his left hip replacement during postoperative follow-up visits through June 12, 2014, the notice of intent, filed and served on August 22, 2014, was timely. As to the contents of the notice of intent and the claim, the Court held that the statements contained in those documents were made with sufficient definiteness to enable defendant to be able to investigate the claim promptly and to ascertain its liability under the circumstances. The Court noted that although there is a different date of the alleged injury and a slightly different alleged injury in the claim as opposed to the notice of intent, the allegations in each were sufficient to allow the State the opportunity to conduct a prompt investigation. The Court distinguished this case from those

where claimant failed to allege any date at all. Summary judgment should have been denied and Plaintiff's motion for leave to amend the claim should have been granted.

C. Failed Service of the Claim

Kimball Brooklands Corp. v State of New York, 180 A.D.3d 1031, 121 N.Y.S.3d 129 (2d. Dep't 2020). Claimant Corporation filed this claim against the State to recover damages to its property resulting from severe flooding when, due to a hurricane a brook overflowed and flooded the claimant's real property. Claimant moved for summary judgment on the issue of liability arguing, that the State had a duty to maintain a concrete flood protection wall that would prevent the flooding of the property, and that the State breached that duty by failing to prevent the property from flooding during the storm. The State cross-moved to dismiss for failure to comply with the pleading requirements of Court of Claims Act § 11(b). The Court granted the defendant's motion because the claimant's allegations of negligence in both the notice of intention to file a claim and the notice of claim were not sufficiently specific to satisfy the pleading requirements of Court of Claims Act § 11(b). Court of Claims Act § 11(b) requires a claim to specify "(1) the nature of [the claim]; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed." While absolute exactness is not required, the claim must provide a sufficiently detailed description of the particulars of the claim to enable the State to investigate and promptly ascertain the existence and extent of its liability. The Court held that here, the claimant failed to allege in either the notice of intention to file a claim or the notice of claim the particular manner in which the State was negligent, including, that the claimant's property was damaged as a result of the State's failure to repair and maintain the flood protection wall identified in the claimant's motion papers. Summary judgment was affirmed.

Flowers v State of New York, 175 A.D.3d 1724, 109 N.Y.S.3d 508 (3d. Dep't 2019). Claimant filed a notice of intention to file a claim and an unverified claim, asserting that he had sustained injuries after an unprovoked assault by correction officers on July 1, 2011 at the facility where he was confined. The Attorney General rejected the claim and returned it to claimant the day it was received, advising him that it was being treated as a nullity because it was not verified as required. Defendant filed an answer asserting, as an affirmative defense, that the claim was defective under Court of Claims Act § 11 (b) in that it was unverified and should be dismissed. After a trial commenced in 2017, defendant moved to dismiss the claim as jurisdictionally defective based upon the lack of verification. In response, claimant conceded that he had not verified his claim and attempted to serve a verified claim. The Court noted that defendant promptly rejected and returned the claim, notifying claimant that it was treating the claim as a nullity due to the lack of verification and that the Claimant's failure to verify the claim deprived the Court of Claims of subject matter jurisdiction. The Claim was dismissed.