Municipal Liability
2017-2018 Update

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TABLE OF CONTENTS

I. THE NOTICE OF CLAIM

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

1. *Whom To Name In the Notice of Claim*

Williams v. City of New York, 153 A.D.3d 1301, 62 N.Y.S.3d 401 (2nd Dep't 2017). Defendant contended that common-law causes of action asserted against a police detective individually had to be dismissed because the plaintiff failed to name him in the notice of claim. There is a split of authority on this issue, but the Second Department has held that a notice of claim need not name, as respondents, the individual officers who allegedly committed the wrongdoing. Thus, no claims were dismissed on those grounds. However, the causes of action for false arrest and false imprisonment were dismissed as time-barred because they accrued upon the plaintiff's release from confinement, which was more than one year and ninety days before the petition to late-serve was served. On the other hand, the malicious prosecution case was not time-barred because the statute of limitations for that cause of action did not begin to run until the favorable termination of the underlying criminal proceeding. Further, the cause of action alleging Federal 1983 violations was not time-barred because the statute of limitations is three years.

2. *Problems with Insufficient Specificity in the Notice of Claim*

Davis v City of New York, 153 A.D.3d 658, 61 N.Y.S.3d 551 (2nd Dep't 2017). The notice of claim was limited to allegations that the police officers involved in the decedent's arrest failed to obtain timely medical assistance for the decedent while he was in their custody, and that the hospital staff negligently treated the decedent. There were no allegations, either express or implied, that the police had assaulted the decedent, or that the defendants negligently hired, supervised, or retained the police officers who were involved in the decedent's arrest. Accordingly, defendant's motion to dismiss the causes of action alleging assault and battery and negligent hiring, retention, and supervision was granted.

Hone v City of Oneonta, 157 A.D.3d 1030, 69 N.Y.S.3d 136 (3rd Dep't 2018). More than four months after his arrest and brief encarceration, the City Court dismissed the charges against plaintiff. A few months after that, six months after the arrest, plaintiff, acting *pro se*, served an unsworn, handwritten document entitled "Notice of Claim" on defendant City by certified mail. Ten days later, counsel for the City sent plaintiff a letter acknowledging that the City had received plaintiff's document and stating that the document was legally insufficient to constitute a notice of claim. Plaintiff then obtained counsel, who commenced this action for false arrest and imprisonment, malicious prosecution, and other claims. Plaintiff's counsel also served an amended notice of claim, without obtaining consent from defendants or seeking leave of court. Defendants moved to dismiss the complaint and plaintiff cross-moved for an order disregarding his failure to have his signature sworn on the pro se notice of claim. Supreme Court granted plaintiff's cross motion by ordering that "any mistakes, omissions, irregularities or defects in [p]laintiff's pro se [n]otice of [c]laim" be disregarded. Defendants then appealed. Appellate Division held that defendants had not demonstrated that the lack of verification prejudiced them in any manner. Their counsel conceded at oral argument that the lack of verification could be disregarded in this case. But, as for lateness, plaintiff's claim for false arrest and imprisonment accrued when he was released from jail and his notice of claim was untimely because it was served nearly six months later. As for the claim for malicious prosecution, it accrued upon the favorable termination of the underlying criminal action and thus the notice of claim was timely in that regard. As for whether that claim was sufficiently laid out in the notice of claim, plaintiff's assertions that he was falsely arrested without legitimate cause, that no crime took place and that City employees acted maliciously, provided sufficient notice to defendants that plaintiff potentially had a claim for malicious prosecution, even though the notice of claim did not specifically mention this phrase. The receipt of a notice of claim alleging that defendant's agents acted maliciously in executing a false arrest when no crime had occurred provided the City with the opportunity to investigate all circumstances related to plaintiff's arrest, including whether he had been arrested pursuant to a warrant—which would have insulated defendants from liability for false

arrest, and whether plaintiff's arrest had resulted in him being charged with, or prosecuted for, a crime. Accordingly, plaintiff's notice of claim contained sufficient information to alert defendants of plaintiff's claim for malicious prosecution.

Rodriguez v County of Suffolk, 155 A.D.3d 915, 63 N.Y.S.3d 693 (2nd Dep't 2017). Court held that motion for leave to amend the complaint could not be denied based solely on the fact that the two new proposed causes of action to recover damages for civil rights violations were not delineated in the notice of claim since a *notice of claim is not a condition precedent to maintaining a cause of action pursuant to 42 U.S.C. § 1983*. Nevertheless, leave to amend was denied based on the palpable insufficiency of the proposed new causes of action.

Scollar v. City of New York, 160 A.D.3d 140, 74 N.Y.S.3d 173 (1st Dep't 2018). Adoptive mother and custodial parent brought action against police officer and city police department, claiming that officer filed numerous unfounded complaints with New York City Administration for Children's Services, repeatedly entered mother's home without a warrant and interrogated her, causing severe emotional distress and psychological damage. Supreme Court held that the notice of claim was too vague to provide defendants with notice of a claim for negligent training and supervision. Supreme Court further found that the complaint failed to state a claim for negligent infliction of emotional distress because the alleged conduct did not rise to the requisite level of outrageous behavior. Nor did the complaint state a claim for general negligence (or negligent investigation), which Supreme Court held was not cognizable in the absence of facts supporting a special duty. Appellate Division agreed with Supreme Court on all of the above, but disagreed with Supreme Court regarding whether the Notice of Claim and Complaint stated claims for the police officer's intentional infliction of emotional distress based on alleged malicious or reckless false reporting to ACS, and the 42 U.S.C. § 1983, and the negligent training and supervision claim against the City. Those three causes of action were reinstated.

Jenkins v. New York City Housing Authority, 162 A.D.3d 752 (2nd Dep't 2018). A home care attendant slipped and fell on a wet floor on premises belonging to defendant and served a notice of claim upon the defendant, incorrectly identifying the premises where the incident occurred. Sometime thereafter, defendant advised the plaintiff's attorney in writing that the defendant was not the owner of the address – "***1728*** East New York Avenue in Brooklyn", which had been alleged in the notice of claim. Plaintiff did not respond to this letter and defendant did not seek to conduct a General Municipal Law § 50–h hearing. Sometime later, plaintiff commenced the action against the defendant relating to an incident that she alleged occurred at "***728*** East New York Avenue in Brooklyn" (the correct address). The defendant answered the complaint, admitting that it owned the premises. More than two years after the plaintiff's claim accrued, the defendant moved to dismiss the complaint on the ground that the notice of claim did not comply with General Municipal Law § 50–e(2), in that it failed to correctly set forth the place where the claim arose. The plaintiff cross-moved for leave to amend her notice of claim, conceding that it contained the incorrect address. The Court here granted the defendant's motion to dismiss the complaint and denied the plaintiff's cross motion for leave to amend her notice of claim. Plaintiff failed to meet her initial burden of demonstrating the absence of prejudice to the defendant arising from the plaintiff's incorrect description of the accident location. The plaintiff relied solely on the transient nature of the condition that allegedly caused her to fall to support her contention that the defendant did not suffer prejudice. But plaintiff did not allege that there were any witnesses to the incident or to the condition complained of, that the plaintiff received any medical assistance at the site, or that the accident was reported to anyone so as to give the defendant actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter.

Rivera v. New York City Housing Authority, 160 A.D.3d 564, 75 N.Y.S.3d 167 (1st Dep't 2018). Plaintiff brought action against city housing authority, alleging that authority's negligent maintenance of premises caused accident. Case dismissed because plaintiff's inconsistency as to the accident location and failure to timely move to correct the amended notice of claim prejudiced defendant's ability to investigate the incident while the surrounding facts were still fresh. Plaintiff provides no explanation why he waited over one year

after receiving defendant's response to his combined demand stating that the accident location as set forth in the notice of claim and the amended notice did not exist. Defendant established that it had been prejudiced by submitting evidence that its investigators attempted to locate the accident location from the description provided in the notice of claim and amended notice and were unable to do so.

Burton v. Village of Greenport, 162 A.D.3d 968 (2nd Dep't 2018). Plaintiff injured when she slipped and fell on a patch of ice as she attempted to walk around a carousel within Defendant Village's park. Notice of Claim alleged only that plaintiff "was caused to trip and fall on ice on the walkway adjacent to the Carousel which constituted a hazardous condition and a trap and snare." However in Bill of Particulars, Plaintiff alleged that the Village "created a dangerous condition by undertaking to remove snow and ice and failing to ... remove the ice or apply any sand or salt to remove existing ice." Village moved for summary judgment demonstrating first it did not receive prior written notice of the alleged icy condition. Second, the Village contended that such allegations **went beyond the scope of the allegations made in the notice of claim**. The plaintiffs opposed the Village's motion and cross-moved for leave to amend the notice of claim to include details as to how the Village created the icy condition. The Court held the plaintiff did not allege the Village's creation of the icy condition in the Notice of Claim and would not allow plaintiff to assert a new theory of affirmative negligence several years after the expiration of the applicable limitations period. Summary Judgment properly granted.

B. Suing employee of municipality Who Was within Scope of Employment Means Shorter SOL.

Collins v. Davirro, 160 A.D.3d 1343, 76 N.Y.S.3d 277 (4th Dept. 2018). Plaintiff sued defendant for negligence in MVA apparently unaware that defendant was an employee of BOCES, which is a public corporation, and may have been driving within the scope of her employment. Education Law § 3023 requires BOCES to indemnify its employees if they are sued for negligence while acting in the scope of employment. Defendant moved for summary judgment on the grounds that the action was started beyond one-year and 90–day statute of limitations for suing public corporations. Court held that if public corporation employee was acting within the scope of her employment, and thus BOCES must indemnify her, then BOCES was the real party in interest and the time limitations, etc., set forth in General Municipal Law § 50 applied to the cause of action. In this case, however, the Court found an issue of fact as to whether the employee was acting in the scope of employment. The Court also held that there was a a triable question of fact as to whether defendant was barred by the doctrine of equitable estoppel from raising a statute of limitations defense, i.e., whether defendant was estopped from pleading a statute of limitations defense if plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action and the plaintiff's reliance on the fraud, misrepresentations or deception was reasonable.

II Amending the Notice of Claim

Thomas v City of New York, 154 A.D.3d 417, 62 N.Y.S.3d 97 (1st Dep't 2017). In civil rights complaint against City alleging only false arrest, but not malicious prosecution, the arrestee moved to amend complaint to substitute name of arresting officer for that of the City and to add § 1983 claim. Motion to add the new claim was denied because the three-year statute of limitations on that claim had expired. Application of the relation back doctrine was not warranted since plaintiff failed to comply with the condition precedent to suit by serving a timely notice of claim regarding that new claim, and therefore there was no "valid preexisting action" to which to relate the amendment back. Whether this condition precedent would have been met had the original complaint included a claim for malicious prosecution in addition to the false-arrest-related claims was irrelevant, since no such claim was asserted. Substitution of the police officer via the relation back doctrine was also improper because the officer was not "united in interest" with the City of New York, the original defendant (CPLR 203[b]). The City cannot be held vicariously liable for

its employees' violations of 42 U.S.C. § 1983, and there was no unity of interest in the absence of a relationship giving rise to such vicarious liability.

Burton v. Village of Greenport, 162 A.D.3d 968 (2nd Dep't 2018). Village established entitlement to judgment by demonstrating that it had no prior written notice of the alleged icy condition complained of by the plaintiffs, as required by Village Law § 6–628. The Village also established that the notice of claim failed to allege that the icy condition on which plaintiff slipped and fell was created by the Village's snow removal operations, or existed by virtue of the Village's negligence.Contrary to the plaintiffs' contention, their proposed amendment to the notice of claim was not to correct a technical mistake, defect, or omission within the meaning of General Municipal Law § 50–(e)(6), but rather to assert a new theory of affirmative negligence several years after the expiration of the applicable limitations period.

III. Late Service of the Notice of Claim

A. The "Capacity Rule" Bars Public Corporations and Public Authorities from Challenging Legislature's Extension of time to serve notice of claim.

Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig., 30 N.Y.3d 377, 67 N.Y.S.3d 547 (2018). Workers brought action against a public benefit corporation, the Battery Park City Authority (BPCA) seeking to recover damages for injuries they sustained during cleanup operations following terrorist attacks of September 11, 2001. Plaintiffs developed a host of illnesses as a result of their exposure to harmful toxins at BPCA-owned properties in the course of their cleanup duties. However, in July 2009, the District Court dismissed plaintiffs' claims, together with hundreds of other similar claims against BPCA, on the grounds that the plaintiffs did not serve BPCA with timely notices of claim. The legislature responded to these dismissals by enacting a law allowing those injured to file a notice of claim within one year of the date of the new law. The effect of the law was to revive the plaintiffs' time-barred causes of action for one year after its enactment. The BPCA challenged the constitutionality of the law, but were here barred from doing so by something called the "capacity rule", which essentially states that municipalities and public corporations, as mere subdivisions of the State, have no "right to contest the actions of their principal or creator", i.e., the State. Specifically, the Court held that under the "capacity rule", a public benefit corporation has no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities (although the Court stated there are exceptions to the rule that do not apply here).

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

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

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

Matter of Mangino v Town of Mamaroneck, 160 A.D.3d 864, 75 N.Y.S.3d 81 (2nd Dep't 2018). Petitioner's decedent was transported by ambulance from the nursing home in which he resided to a hospital where he was treated and pronounced dead on the same day. The application to late-serve the notice of claim was served more than 1 month after the 90–day statutory period applicable to the wrongful death claim had elapsed and 11 months after the 90–day statutory period applicable to the remaining claims had elapsed. Court held that even one month late was too late to provide timely actual knowledge of the essential facts constituting the claims. Further, petitioner failed to provide a reasonable excuse for her failure to serve a timely notice of claim. The failure of her attorneys to review the medical records and ascertain a claim in a timely manner is not an acceptable excuse. Leave to late-serve denied.

b. Med Mal Cases: Test Is Whether Med Mal Was Apparent in the Med Records.

Harris v. New York City Health and Hospitals Corporation, 160 A.D.3d 441, 74 N.Y.S.3d 35 (1st Dep't 2018). Plaintiff's expert affidavit established that HHC obtained actual knowledge of the facts underlying plaintiff's theory of a departure from the accepted standard of care with regard to the diagnosis and treatment of her brain tumor and the existence of a causally related injury. The MRI in defendant's possession should have given it notice of this. Although HHC did not deny it had the MRI film in its possession, it failed to produce it or submit a medical expert's affidavit rebutting the opinion of plaintiff's medical expert that the MRI established that the hospital's staff failed to diagnose the mass on plaintiff's brain even though it was visible at the time she received the medical treatment. Further, plaintiff demonstrated a reasonable excuse for the delay in that the record showed that her tumor was not diagnosed for some time and then she required two surgeries to treat it. Even if this Court were to find that plaintiff failed to set forth a reasonable excuse for the delay, the lack of a reasonable excuse was not sufficient to deny her leave application because the record showed that HHC received timely actual notice of the essential facts underlying plaintiff's medical malpractice claim. In addition, HHC was not prejudiced by allowing plaintiff to file a late notice of claim.

Leon v. New York City Health & Hospitals Corporation, 2018 WL 3371526 (2nd Dep't 2018). Plaintiff went to the emergency room complaining of headaches, pain, swelling, and the formation of a mass on the left side of her face. She told the emergency room physician that, about one month earlier, she had a biopsy performed on a lesion located on her left cheek, and that it was determined to be cancerous. The emergency room physician determined that the plaintiff had an infection, drained the abscess found in her cheek, and released her the same day with antibiotics and instructions to return to the emergency room for a wound check in two days. When the plaintiff returned two days later, she was told to continue treating the infection, and was released with instructions to follow up with the hospital's dermatology department for another wound check. Several days later, plaintiff went to the hospital's dermatology department and a physician there told her that, according to the pathology report of her biopsy, the cancerous lesion had been completely removed. The physician noted in plaintiff's chart that her infection had not much improved despite two courses of antibiotics, referred her to the plastic surgery department for corrective scar revision if she so desired, and directed her to return to the dermatology department in six months. The physician noted in the plaintiff's chart that he had reviewed the biopsy report and that it indicated that the cancerous lesion had been completely excised. Plaintiff did not go to the plastic surgery department. Months later, when her wound still had not healed, she sought treatment at Long Island Jewish Medical Center, where she learned that she had a cancerous tumor in the area where the biopsy had been performed. She underwent surgery, an unsuccessful skin graft, reconstructive surgery, and radiation treatments. In support of her application to late-serve the notice of claim, plaintiff submitted medical records and an affirmation of a physician who reviewed the medical records and concluded, inter alia, that there had been a departure from accepted medical practice. The medical records showed that the hospital failed to confirm that the plaintiff's tumor had been completely removed, and thus they provided the defendant with actual knowledge of the essential facts constituting the claim. Further, plaintiff's extensive medical treatment during the time period at issue constituted a reasonable excuse for the delay.

Matter of Breslin v Nassau Health Care Corp., 153 A.D.3d 1256, 62 N.Y.S.3d 118 (2nd Dep't 2017). Plaintiff's decedent was diagnosed with invasive squamous cell carcinoma of the cervix. It was noted in NHCC's records that the size and depth of the decedent's tumor could not be determined. Following the surgery, it was not recommended that the decedent undergo radiation and/or chemotherapy. Four months later, the decedent was diagnosed with multiple metastases of her cervical cancer, and she was advised to undergo radiation and/or chemotherapy. In support of the petition to late-serve a notice of claim, the decedent's representative submitted medical records and an affidavit of a physician who reviewed the records and concluded that there had been a departure from accepted medical practice. Inasmuch as the medical records, upon independent review, suggested injury attributable to malpractice, they provided NHCC with actual knowledge of the essential facts constituting the claim. Furthermore, the petitioner made an initial showing that NHCC would not suffer any prejudice by the delay in serving a notice of claim, and

NHCC failed to rebut the petitioner's showing with particularized indicia of prejudice. The lack of a reasonable excuse is not dispositive where there is actual notice and absence of prejudice.

c. Actual Knowledge from Accident Reports

Matter of Cruz v Transdev Servs., Inc., 160 A.D.3d 729, 75 N.Y.S.3d 71 (2nd Dep't 2018). Municipal bus accident victim failed to establish that the County received timely, actual notice of the essential facts constituting the claim by reason of a police accident report filled out by an officer who responded to the scene of the accident. Generally, knowledge of a police officer or of a police department cannot be considered actual knowledge of the public corporation itself regarding the essential facts of a claim. The fact that the County police department had actual knowledge of the accident, without more, is not considered actual knowledge of the essential facts underlying the claim.

Akopyan v Metropolitan Transit Authority, 2018 WL 3559051 (2nd Dep't 2018). Plaintiff tripped and fell on a broken tile in a subway station. The police were called and a police report was created. Within 90 days after the accident, plaintiff served a notice of claim on the City. Approximately eight months after the accident, plaintiff sued not just the City, but also the Metropolitan Transportation Authority and the New York City Transit Authority seeking leave to serve a late notice of claim on the latter two. Plaintiff failed to demonstrate they had actual knowledge of the essential facts constituting the claim within 90 days after its accrual or a reasonable time thereafter. The preparation of a police report, in and of itself, does not constitute notice of a claim against those two entities. Moreover, the police report provided notice only that the plaintiff fell but did not provide notice that the cause was his tripping on a broken tile, which might be attributed to improper maintenance of the station. As for the "substantial prejudice" factor, plaintiff presented no "evidence or plausible argument" that its delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits (*Newcomb*). Nor did the plaintiff demonstrate a reasonable excuse for her failure to serve a timely notice of claim. Leave to late-serve denied.

Szymkowiak v. New York Power Authority, 162 A.D.3d 1652 (4th Dep't 2018). Laborer fell off a flatbed truck and injured his arm and shoulder and then, a month later, fell from a crane platform and injured his head and re-injured his shoulder. A year after the second accident he sought leave to late-serve a notice of claim for both accidents. He failed to show any reasonable excuse for the delay. The Court granted the petition, but only regarding the second accident. The reason for this disparity was that defendant had timely actual knowledge of the second accident, but not the first. Claimant was unable to provide any evidence that his employer's incident report related to the first accident was ever transmitted to defendant, and there was no mention of the first accident in the construction closeout report submitted to defendant. On the other hand, plaintiff established that defendant received timely actual knowledge of the second accident because that incident report was submitted to defendant's safety consultant, and the details and nature of the second accident were included in the construction closeout report. Addressing next the issue of prejudice, Court found that defendant would not be substantially prejudiced by any delay in serving the notice of claim as to the second accident because it was highly unlikely that the conditions existing at the time of the accident would still have existed had the notice of claim been timely filed.

Matter of Naar v City of New York, 161 A.D.3d 1081, 77 N.Y.S.3d 706 (2nd Dep't 2018). Plaintiff's vehicle was struck by a fire truck owned by the Fire Department. The police accident report indicated that there were no injuries reported at the scene and did not include information regarding the FDNY's vehicle, which left the scene of the accident. One month after the accident, plaintiff's counsel addressed a letter (not a notice of claim) to the FDNY, advising that counsel was representing the petitioner "for all claims resulting from injuries and/or damages as a result of" the subject accident and requested that the letter be forwarded to the FDNY's insurance company. The FDNY responded to plaintiff's counsel by advising him to file a notice of claim with "the Office of the Comptroller of the City of New York at the Municipal Building" at "1 Centre Street" in New York City. Plaintiff's counsel then mailed another letter (not a notice of claim)

two months later to the "City of New York" at "1 Center Street, New York, New York," which was returned by the United States Postal Service for "insufficient address." Two months later (two months beyond the 90-day statutory period for serving a notice of claim) counsel mailed another letter addressed to "the Comptroller of the City of New York" at the 1 Center Street address. Thereafter the City informed plaintiff's lawyer that the claim was disallowed because no notice of claim had been filed within 90 days of the date of the occurrence. Plaintiff then applied to late-serve a notice of claim. Court held that the police accident report and the first letter (which defendant never received) were inadequate to provide the City with actual knowledge of the facts constituting the claim against it. Plaintiff's contention that the City had actual knowledge of her claim because its employee was directly involved in the accident was without merit. The Court noted that the second notice of claim served upon the City almost 2 months 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. Moreover, plaintiff failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim upon the City and for the subsequent delay in filing the petition for leave to late-serve. Petition denied.

Matter of Wilson v. City of New York, 160 A.D.3d 970, 75 N.Y.S.3d 84 (2nd Dep't 2018). Plaintiff injured on a construction site applied for leave to serve a late notice of claim about six months after his accident. In support of his petition, he submitted several incident reports from several of the contractors, and a copy of the proposed notice of claim which alleged that the defendants were negligent and violated Labor Law §§ 200, 240, and 24. But the incident reports were insufficient to provide the defendants with actual knowledge of the essential facts underlying the petitioner's claim. The reports merely indicated that the petitioner injured his shoulder when the temporary chain link fence was blown over by the wind or came down on him as he was working on the fence. The reports made no reference to the claims listed in the proposed notice of claim, inter alia, that the respondents were negligent in allowing a dangerous condition to exist, in failing to provide protective and safety devices, and in failing to properly secure or hoist the fence, and violated certain sections of the Labor Law and unspecified sections of the Industrial Code . Also, petitioner failed to proffer any excuse for the failure to serve a timely notice of claim. Moreover, the petitioner presented no "evidence or plausible argument" that his delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits. Plaintiff loses.

Murnane v. New York City School Construction Authority, 2018 WL 3637778 (2nd Dep't 2018). The plaintiff tripped and fell on a floor covering in the kitchen at a construction site. Six months later, she applied to late-serve a notice of claim. In support of his petition, he stated that a staff member of the defendant was present at the scene of the accident and prepared a document regarding the accident. The proposed notice of claim alleged that the defendants were negligent in the care, operation, and management of the construction site and that the plaintiff was caused to trip and fall as a result of the presence of unsecured floor covering in violation of Labor Law § 200 and, in effect, Labor Law § 241(6). In opposition, the defendants submitted the affidavit of the SCA's project officer, who stated that on the day of the accident someone told the project officer that plaintiff had "slipped and fallen" and a couple of days later the project officer received a workers' compensation form and a supervisor's report of injury indicating that the petitioner "tripped on piece of Masonite in kitchen extension cord under Masonite that raised corner of piece." This was not enough to establish actual knowledge of the claims alleged in the notice of claim. In addition, plaintiff failed to present evidence or plausible argument that his delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits. Further, ignorance of the requirement to serve the notice of claim within 90 days after the claim arose did not constitute a reasonable excuse. Finally, plaintiff failed to demonstrate through admissible medical evidence that he was incapacitated to such an extent that he could not have complied with the statutory requirement to serve a timely notice of claim.

d. Actual Knowledge from School Incident Reports

Matter of Quinones v City of New York, 160 A.D.3d 874, 74 N.Y.S.3d 602 (2nd Dep't 2018). Pre-kindergarten student fell and hit her head on a table in a classroom. Approximately one year after the

accident, the petitioner commenced a proceeding to serve a late notice of claim on the City. Petitioner failed to establish that the City acquired actual knowledge of the essential facts constituting the claim within 90 days after the child's accident or a reasonable time thereafter. Although a teacher prepared an accident report on the day of the incident, it merely indicated that the child ran into the classroom, "slipped," and hit her head on a table. This report did not provide the City with timely, actual knowledge of the essential facts underlying the claims later asserted—that the City was negligent in allowing clutter and debris to accumulate on the floor which caused the child to "trip," and that it was negligent in supervising the students by failing to have a sufficient number of teachers in the classroom. Furthermore, the petitioner failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The child's infancy alone, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse. Finally, the petitioner "presented no 'evidence or plausible argument that its delay in serving a notice of claim did not substantially prejudice" the City in defending on the merits.

Edge v. Beacon City School District, 2018 WL 3559045 (2nd Dep't 2018). Plaintiff petitioned to late-serve a notice of claim for a full scholastic year of bullying. Court held defendant acquired actual knowledge of the facts constituting the claim within 90 days of the occurrences or within a reasonable time thereafter. The defendant had knowledge of the acts complained of almost immediately, and from their documentation of those acts, could reconstruct the underlying circumstances.

Matter of Isabella McClancy v. Plainedge Union Free School District, 153 A.D.3d 1413, 62 N.Y.S.3d 126 (2nd Dep't 2017). First-grader fell while climbing up the steps of a playground slide during recess. More than five months after the accident, the child's mother applied to late-serve a notice of claim. Although the school nurse prepared a "Notification of Injury" form, which the mother signed nearly two months after the accident, this form merely indicated that the child received a laceration and contusion on the outer corner of his left eye when he fell on the steps of the large slide. Thus, the form did not provide the School District with timely, actual knowledge of the essential facts underlying the claims that it was negligent in supervising its students, and in the hiring and training of school personnel. As for reasonable excuse, none was offered. While plaintiff did satisfy her initial burden of showing a lack of substantial prejudice to the School District as a result of her late notice, and the School District failed to make a "particularized evidentiary showing" of substantial prejudice in response (*Matter of Newcomb v. Middle Country Cent. Sch. Dist.*), Appellate Court held that a balancing of the relevant factors demonstrated that the Supreme Court improvidently exercised its discretion in granting the petition. Petition to late-serve denied.

Sherb v. Monticello Central School District, 2018 WL 3275307 (3rd Dep't 2018). Plaintiff alleged that, for a period of over two years, she suffered bullying, intimidation and harassment as a student at one of defendant's schools. On application to late-serve a notice of claim, Court held that defendant had actual knowledge of the alleged harassment, intimidation and bullying within a reasonable time, as evidenced by a letter from plaintiff's counselor to defendant that detailed serious, harmful acts and continued harassment and bullying by the alleged perpetrator. The record further revealed that the principal of plaintiff's school completed and signed a document headed "Bullying, Harassment or Intimidation Reporting Form" based upon one of the incidents. The form indicated that at least one meeting had taken place with plaintiff, school officials and others as a result of the incident, that plaintiff's parents were notified, that plaintiff had been bullied for two years and that the most recent incident had resulted in her ongoing absence from school. Although the form included a finding that latter incident had not constituted bullying, intimidation or harassment, it also states that defendant responded by providing plaintiff with counseling, an escort and parking privileges, thus indicating its knowledge that she was in need of assistance. The record thus demonstrated that defendant had actual knowledge of at least some of the underlying acts constituting the claim within a reasonable time frame.

Matter of C.B. v. Carmel Central School District, 2018 WL 3863264 (2nd Dept 2018). The infant petitioner, an eighth grader, stopped attending school in November of 2013 after having complained to her guidance counselors on a regular basis since sixth grade that she was bullied by other students, both verbally and physically. A year and eight months later, petitioner (the mother) sought leave to serve a late notice of claim

upon the school district for negligence in failing to prevent or stop the bullying. Evidence submitted showed that child had made persistent complaints over a period of years to district employees that she had been verbally and physically harassed by a certain group of fellow students, and that the abuse continued despite the school district's intermittent corrective actions. She thus demonstrated that the district had actual notice of an alleged pattern of abuse. Thus, petitioner sufficiently demonstrated that the district had actual notice of the essential facts constituting the claim within 90 days of accrual or within a reasonable time and that the district was not substantially prejudiced by the delay in serving the notice of claim. The school district's contention that it would be prejudiced by the delay because two of the petitioner's three prior guidance counselors no longer work at the school was not sufficient to meet its burden of making a "particularized showing" of prejudice in maintaining a defense on the merits. Given the petitioner's infancy, the school district's actual notice, and the absence of prejudice, the lack of a reasonable excuse would not bar the granting of leave to serve a late notice of claim.

e. First-hand Actual Knowledge

Matter of D.D. v Village of Great Neck, 161 A.D.3d 861, 77 N.Y.S.3d 98 (2nd Dep't 2018). Six-year-old infant petitioner had fractured his left arm while taking a class at a private gym and needed assistance while going from the bus to class, while using stairs, and while carrying his backpack. While running down hall with his backpack on, he fell and reinjured arm. Afterwards, parent sent emails and spoke with various employees of School District about how the accident occurred and the extent of child's injuries. Parent also inquired about who was supervising child on behalf of the District at the time of the accident and why child was carrying his backpack. Thus, when petitioner eventually petitioned to late-serve a notice of claim, Court held that District had actual knowledge of the facts constituting the claim within the statutory period. (Note: Such knowledge almost guarantees a granting of leave to late-serve, even if the other factors are missing.) Petitioner also made an initial showing that the District would not suffer any substantial prejudice by the delay, and the District failed to rebut the petitioners' showing with particularized indicia of prejudice. Even if the petitioners' reason for failing to timely serve the District was not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and the absence of prejudice.

f. Actual Knowledge by One Defendant not Imputed to Another

Matter of Rodriguez v Metropolitan Transp. Auth., 155 A.D.3d 520, 65 N.Y.S.3d 44 (1st Dep't 2017). Worker injured while working on subway construction project brought action against city transit authority and its subsidiaries. Plaintiff argued that defendant MTA Capital's possession of an incident report prepared by the plaintiff's employer—the general contractor on the MTA Capital's project — established that it had actual knowledge of the essential facts constituting the claims within 90 days after they arose or a reasonable time thereafter. However, it was not clear from the record when MTA Capital came into possession of this report. As to the other municipal defendants, Court noted that knowledge of the incident by MTA Capital would not be imputed to them. Although MTA Capital is a subsidiary of the MTA, it is a distinct legal entity for purposes of suit, and its employees "shall not be deemed employees of [the MTA]". Petitioners did not demonstrate that the MTA exercised the level of control over MTA Capital necessary to create an agency relationship. MTA Capital's connection to New York City Transit Authority was even more remote. Petition to late-serve denied.

g. Actual Knowledge from One Plaintiff May Be Enough to Establish Actual Knowledge Regarding Another Plaintiff.

Matter of Tejada v. City of New York, 161 A.D.3d 876, 77 N.Y.S.3d 95 (2nd Dep't 2018). In this cross-over case, petitioner served a timely notice of claim alleging that "the left front tire of her vehicle went over a half open, half closed manhole cover which caused her [vehicle] to pitch wildly out of her control and

caused her to travel across the median and into oncoming traffic where her motor vehicle was permanently disabled across the roadway such that a car approaching from the rear 'T-boned' her vehicle." She filed a late notice of claim and then moved to have it deemed timely served nunc pro tunc. Court found that plaintiff demonstrated that the City acquired timely, actual knowledge of the essential facts constituting her claim by way of the timely notice of claim served upon it by another plaintiff who was injured in the other vehicle. The other plaintiff's notice of claim specifically described the nature of the accident between the two vehicles. The City failed to come forward with particularized evidence showing that the late notice had substantially prejudiced its ability to defend the claim on the merits (*Newcomb*).

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

Kelly v City of New York, 153 A.D.3d 1388, 63 N.Y.S.3d 385 (2nd Dep't 2017). Pedestrian brought personal injury action against city for injuries sustained in slip and fall accident on snow and ice on walkway within a housing complex owned by city. Plaintiff had served a notice of claim within the 90-day period alleging that the accident occurred on the "walkway in front of 12–50 35th Avenue." At the 50–h hearing plaintiff testified the fall actually took place on a walkway within the Rave[n]wood Housing Complex, a different location. It was determined soon thereafter that the correct department on which to serve a notice of claim was NYCHA, not the City. After suit was filed, plaintiff moved for leave to serve a late notice of claim upon NYCHA. The Supreme Court granted the motion. Appellate Division held that, although the application was improperly brought as a motion in an action pending against the City when the relief sought was against a nonparty (NYCHA), the application was properly treated as a special proceeding for leave to serve a late notice of claim upon NYCHA. However, plaintiff failed to provide a reasonable excuse for his failure to serve a timely notice of claim upon NYCHA. His excuse that he first discovered the identity of the owner of the subject walkway at the General Municipal Law § 50–h hearing arose from a lack of due diligence in investigating the matter, which is an unacceptable excuse. Even if he made an excusable error in identifying the public corporation upon which he was required to serve a notice of claim, he failed to proffer any explanation for the additional seven-month delay between the time that he discovered the error and the filing of his application for leave to serve a late notice of claim. Furthermore, NYCHA did not acquire timely, actual knowledge of the essential facts constituting plaintiff's claim. Although the City was served with a notice of claim within 90 days after the accident and conducted a General Municipal Law § 50–h hearing about 5 ½ months after the accident, notice to the City cannot be imputed to NYCHA. Moreover, the notice of claim, served together with the application upon NYCHA almost 10 months after the 90–day statutory period had elapsed was served too late to provide NYCHA with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90–day statutory period. Finally, plaintiff presented no "evidence or plausible argument" that his delay in serving a notice of claim upon NYCHA did not substantially prejudice NYCHA in defending on the merits. Application to late-serve a notice of claim denied.

3. The new Newcomb Standard: Substantial Prejudice to defense

Ruiz v. City of New York, 154 A.D.3d 945, 63 N.Y.S.3d 425 (2nd Dep't 2017). Plaintiff was arrested and jailed for 3 days, then released but with criminal charges against him remaining. Then six months later the charges against him were dropped. His petition to late-serve a notice of claim alleging false arrest, false imprisonment and malicious prosecution (against the City and the NYPD) was filed and served, along with a notice of claim, two months after the charges were dropped. Court held that the notices of claim served were timely with respect to the claim sounding in malicious prosecution, but untimely with respect to the claims sounding in false arrest and false imprisonment. City did not have actual knowledge of the facts constituting the claims of false arrest and false imprisonment within 90 days after the claims arose or a reasonable time thereafter. Plaintiff's assertion that he knowingly delayed service of a timely notice of claim while the criminal charges were pending due to an unsubstantiated fear of reprisal did not constitute a reasonable excuse. Furthermore, as to the issue of reasonable excuse, plaintiff failed to explain why, after the criminal charges were dismissed, he waited approximately two more months to apply to late-serve the

notice of claim.. As for the prejudice factor, applying the Newcomb standard, Court found plaintiff had met his threshold burden of demonstrating the absence of substantial prejudice to the City, and in opposition under the shifted burden, the City has failed to demonstrate that it has, in fact, been prejudiced. Nevertheless, the majority refused to reverse the motion court's decision to deny the petition. The motion court has broad discretion in this regard. The fact that the City did not have timely actual knowledge, and that there was no reasonabl excuse for the delay, could properly be seen to outweigh the fact that there was no prejudice to the City. Two dissenters, however, relying on *Newcomb*, would have reversed and granted permission to late-serve.

N.F. v City of New York, 161 A.D.3d 1046, 77 N.Y.S.3d 712 (2nd Dep't 2018). The infant plaintiff, a fifth-grader, was injured during lunch recess. The plaintiffs served a late notice of claim (late) upon the defendants four months after the incident. Then, five months later, the plaintiffs moved for leave to serve a late notice of claim. The plaintiffs submitted an affidavit from the infant plaintiff's father in which he averred that he received a call from school personnel informing him about his child's injury and requesting his presence at the school. When the father arrived at the school minutes later, he observed an assistant principal, two security guards, the school nurse, and New York City Fire Department personnel attending to the situation and the injuries of his daughter. At that time, the infant plaintiff's father was informed that his daughter was playing a game with other children wherein they were jumping on each other's backs. He also learned that this activity occurred under the supervision of three or four teachers, two of whom were named in his affidavit. The infant plaintiff was transported by ambulance from the school to the hospital. The infant plaintiff allegedly fractured the tibia and fibula of her right leg, and underwent surgery as a result of her injuries. Given the evidence of the number of school personnel attending to the situation, the reporting of the incident to the infant plaintiff's father, and the seriousness of the alleged injuries, the plaintiffs argued that a number of reports would likely have been prepared, and that such reports were in the possession of the defendants. Supreme Court held – pre-*Newcomb* – that plaintiff "failed to rebut the presumption that the more than 30–day delay in serving the notice of claim, and the 83–day delay in making the motion for leave to serve a late notice of claim would substantially prejudice the [defendants'] ability to conduct an investigation of the claim or to maintain a defense on the merits." But in light of *Newcomb,* Appellate Division here finds that, "applying the shifting burden of proof standard set forth in *Matter of Newcomb*, the plaintiffs met their initial burden by making a plausible argument that the defendants will not be substantially prejudiced. Under certain circumstances, this Court has recognized that the "existence of reports in [a defendant's] own files concerning ... facts and circumstances' " of an incident may be "the functional equivalent of an investigation". The Court further stated that, "given that *Matter of Newcomb* was decided during the pendency of this appeal, and since the Supreme Court relied upon this Court's prior authority, which had placed the sole burden on the plaintiffs to show that the defendants were not substantially prejudiced by the delay in filing, the defendants did not have an opportunity to submit evidence to make their particularized evidentiary showing in the manner set forth in Matter of Newcomb. The motion court, therefore, did not have the opportunity to weigh such evidence in consideration of the plaintiffs' motion." Accordingly, the appellate division here remitted the matter to the Supreme Court to allow the defendants the opportunity to submit evidence, if any, to support their claim of substantial prejudice, and, thereafter, for the Supreme Court's reconsideration of the plaintiffs' motion in light of *Matter of Newcomb*.

Matter of Townson v New York City Health & Hosps. Corp., 158 A.D.3d 401, 70 N.Y.S.3d 200 (1st Dep't 2001). After suffering a deep laceration in his thumb area, plaintiff went to defendant's ER. The ER docs treated him but did not check for or notice a torn flexor tendon below his thumb from the deep laceration. They apparently did not even consider this possibility. The failure to treat the torn tendon (which neither plaintiff nor the ER docs realized he had) led to permanent injuries. Plaintiff found out that his tendon was torn 12 weeks after the accident because PT had failed to give his thumb any more mobility. As soon as he learned he had a torn tendon, he hired a lawyer who promptly sent a request to HHC for the medical records to discern the viability of plaintiff's malpractice claim, but HHC failed to respond on multiple occasions. Plaintiff's attorney waited for a reply from HHC and then applied for leave to file a late notice of claim

against hospital significantly after the statutory time-limit for doing so had expired. Court here held that motion court properly exercised its discretion in allowing service of a late notice of claim, even though not all factors weighed in plaintiff's favor. **As for actual knowledge**, the Court pointed out that a hospital's actual knowledge of a potential malpractice claim may be imputed where it possesses medical records that evince that the medical staff, by its acts or omissions, inflicted an injury on plaintiff. The claim of malpractice here was premised upon a theory that the emergency room failed to evaluate whether internal, connective soft tissue damage resulted from the deep laceration. The medical records indicated malpractice in that the doctors failed to look for a torn tendon. Therefore, there was arguably "actual knowledge". However, since the medical records did not contain any indication of plaintiff's torn tendon, the defendant arguably did not have actual knowledge of the claim within 90 days of the incdent or a reasonable time thereafeter. The Court nevertheless deferred to Supreme Court's discretion in granting the application because it was clear that plaintiff had shown at least two other factors: a reasonable excuse for the delay and that the defendant would suffer no substantial hardship from the delay. As for "reasonable excuse for the delay", plaintiff made out a "reasonable excuse" for the delay by emphasising the hospital's failure to send requested medical records in a timely manner to plaintiff's attorney. Plaintiff's lawyer needed to fully review the medical records to determine whether HHC failed to examine the soft tissues supporting the thumb. Court held that an attorney and client should not be penalized for waiting for medical records to complete and serve an accurate notice of claim. **As for the "substantial prejudice" factor**, plaintiff met his initial burden under *Newcomb* of showing lack of prejudice from the delay and defendant failed to make any particularized evidentiary showing of prejudice. Defendant's own delay in responding to plaintiff's attorney's multiple requests for medical records was responsible for much of the delay in filing the notice of claim, and any resultant prejudice. Further, the nature of the serious wound, the photographic evidence of the wound, and the issue of whether the medical records reflected a negligent omission to fully evaluate the extent of his injuries, involved circumstances where the likliehood of "faded memories" (which defendant claimed as evidence of prejudice) were less likely to be an issue, and less likely to compromise a defense against the negligent "omission" malpractice claim.

Heredia v. New York City Health & Hospitals Corporation, 159 A.D.3d 663, 70 N.Y.S.3d 832 (1st Dep't 2018). Petitioner, claimant's guardian ad litem, set forth a reasonable excuse for the failure to serve a timely notice of claim, since claimant was in a coma and, when she awoke, had severe brain injury stemming from the alleged malpractice provided at respondent HHC's facility. Petitinioner submitted the affirmation of a physician who opined that the hospital had actual knowledge of the pertinent facts constituting the claimed malpractice, through its medical records. In opposition, HHC submitted the affirmation of a physician who opined that the records did not demonstrate malpractice at all, and argued that "mere assertions that a different course of treatment could have been followed do not address whether HHC had actual knowledge of the essential facts necessary to properly defend itself in the underlying action". Court held that, regardless of whether HHC had actual notice of the claim within 90 days of its accrual, its possession of the relevant medical records belied HHC's contention that it would be substantially prejudiced by the delay. Petition to late-serve notice of claim granted.

Ramos v. New York City Housing Authority, 162 A.D.3d 884 (2nd Dep't 2018). Plaintiff fell on a broken, raised, and uneven portion of a sidewalk. Her lawyer initially believed the abutting property was owned by the City of New York and served a timely notice of claim upon the City. Approximately two weeks after the expiration of the 90–day notice period, upon learning that the property might be owned by NYCHA, plaintiff filed a notice of motion requesting leave to serve a late notice of claim upon NYCHA. Based, inter alia, on the affidavit of an individual familiar with the location, who averred that the alleged dangerous condition was unchanged from the time of the accident, plaintiff argued that NYCHA was not substantially prejudiced as a result of the delay. Court held that the error concerning the identity of the responsible public corporation did not provide a reasonable excuse for the delay in giving notice, but that the absence of a reasonable excuse is not, standing alone, fatal to the petitioner's application. Plaintiff's application was made approximately two weeks after the expiration of the 90–day period, and thus NYCHA acquired actual knowledge of the essential facts constituting the claim within a "reasonable time" after the expiration of the

90–day period. Moreover, the petitioner met her initial burden of showing that the late notice would not substantially prejudice NYCHA, thereby requiring NYCHA to rebut that showing with particularized evidence, which it failed to do. Leave to late serve granted.

Matter of Vega v. Incorporated Village of Freeport, 2018 WL 3637670 (2nd Dept 2018). Plaintiff was attempting to park a vehicle in a parking lot when the vehicle collided with a dump truck that was plowing snow. The dump truck was owned by defendant Village and operated by a Village employee. About six months later, plaintiff sought leave to serve a late notice of claim on the Village. Court found plaintiff failed to demonstrate that the Village obtained timely, actual knowledge of the essential facts constituting the claim. The late notice of claim served upon the Village approximately three months after the 90–day statutory period had elapsed did not provide the Village with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period. Furthermore, the police accident report alone, without any evidence of further investigation by the Village, could not be considered actual knowledge of the essential facts underlying the claim against the Village. Plaintiff's assertions that he was unfamiliar with the statutory requirement for serving a late notice of claim and that he did not speak English were not acceptable excuses for his failure to timely serve a notice of claim. On the issue of prejudice, the petitioner met his initial burden of showing that the late notice of claim would not substantially prejudice the Village, and the Village failed to respond with "a particularized evidentiary showing" that it would be substantially prejudiced if late notice were allowed (*Newcomb*). However, Court found that, under the circumstances of this case, the other factors weighed enough in defendant's favor so that the lower court did not improvidently exercise its discretion in denying leave to serve a late notice of claim.

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

Zayed v New York City Dept. of Design & Constr., 157 A.D.3d 410, 66 N.Y.S.3d 124 (1st Dep't 2018). Although plaintiff successfully sought leave to file a late notice of claim before expiration of the statute of limitations, and was granted a 30–day extension of time to do so, he did not avail himself of that opportunity and, by any calculation, the one-year and 90–day statute of limitations then expired. The motion court was not permitted to grant an extension after the statute of limitations had run since (GML § 50–e[5]).

Lozano v New York City Hous. Auth., 153 A.D.3d 1173, 62 N.Y.S.3d 46 (1st Dep't 2017). Application for leave to late-serve notice of claim failed because it was brought more than one year and 90–days after the event complained of. Defendant was not estopped from asserting a statute of limitations defense simply because it engaged in litigation including conducting a 50–h hearing regarding plaintiff's claim, and did not raise plaintiff's failure to properly serve a timely notice of claim as an affirmative defense in its answer. Further, plaintiff failed to preserve his contention that the savings provision of General Municipal Law § 50–e(3)(c) should be applied due to the fact that he allegedly timely served a notice of claim via regular mail, because he never raised that argument in his cross motion for leave to file a late notice of claim, and he could not do so for the first time on appeal. In any event the savings provision did not apply because plaintiff failed to submit an affidavit of service or any other proof of mail service that establishes that the notice of claim was actually served.

Flores v. Fraser, 159 A.D.3d 499, 69 N.Y.S.3d 804 (1st Dep't 2018). The medical malpractice complaint against HHC was properly dismissed because plaintiff could not establish that a notice of claim was served as required by a prior Court Order granting her leave to file a late notice of claim, and the one-year and 90–day statute of limitations had expired so the notice of claim could no longer be timely served. The fact that plaintiff had previously served a notice on HHC before the statute of limitations expired did not matter because she had not obtained leave of the court to serve that untimely notice. Although a General Municipal Law § 50–h hearing was conducted and HHC litigated the matter, this does not establish that HHC waived the statute of limitations defense. Finally, there was no basis for estoppel given the clear

language of the Order directing plaintiff to serve a notice of claim upon HHC within 30 days of its entry and her awareness that the late notice of claim previously served was a nullity.

Dougherty v. Greene, 161 A.D.3d 1253, 76 N.Y.S.3d 648 (3rd Dep't 2018). Roughly 10 months after her claim accrued, petitioner—a pro-se inmate in the custody of the Department of Corrections and Community Supervision—sent a letter to the Greene County Courthouse stating that she was filing a notice of motion to file a late claim "for [an] incident that took place in the Greene County Jail on Nov 18, 2012 between 10:45–11:30 pm by one of your officer[ ]s." She included with the letter a "notice of motion to file a late claim" and an affidavit in support of that motion, in which she alleged that she had been assaulted by a particular county correction officer. The dispositive issue on appeal was whether this letter with submissions to the Greene County Courthouse constituted an "application" to serve a late notice of claim, such that the statute of limitations period was tolled during its pendency. Court points out the petitioner's papers were promptly ***rejected*** by the Chief Clerk of the Supreme and County Courts in Greene County and returned to petitioner with a letter identifying several deficiencies with her papers. Petitioner's failure to file her application with the proper clerk amounts to a ***nonwaivable jurisdictional defect***, rendering the proceeding a nullity. Given that petitioner did not file a valid application with the Greene County Clerk prior to the expiration of the one year and 90–day statute of limitations, which expired in February 2014, Supreme Court was statutorily prohibited from extending the time in which petitioner had to serve her notice of claim upon respondent. Case dismissed.

IV 50-H ISSUES

Mourato v. Suffolk County Water Authority, 159 A.D.3d 890, 70 N.Y.S.3d 71 (2nd Dep't 2018). The SOL was not tolled during the period between the defendant's demand for a hearing pursuant to General Municipal Law § 50–h and that hearing. Complaint dismissed as time-barred.

V GOVERNMENTAL IMMUNITY

A. Governmental v. Proprietary functions

Connolly v Long Is. Power Auth., 30 N.Y.3d 719, 70 N.Y.S.3d 909 (2018). Plaintiffs alleged their real and personal property was destroyed by fire as a result of defendant's – a publicly owned utility company - negligent failure to preemptively de-energize the Rockaway Peninsula prior to or after Hurricane Sandy made landfall. Defendant did not shut down power to the area, even though Consolidated Edison—a private utility company supplying most of the electricity to the five boroughs of New York City—preemptively did so in its service area in order to avoid salt water from the surge coming into contact with its electrical systems, which can cause fires (and in this case did). As a result, fire destroyed plaintiffs' property. Defendants moved to dismiss the complaints pursuant to CPLR 3211 on the ground that they were immune from liability based on the doctrine of governmental function immunity. Specifically, they argued that they were acting in exercise of a governmental – as opposed to proprietary -- capacity, and that plaintiffs had failed to allege a special duty. Plaintiffs opposed the motions on the ground that defendants' actions were proprietary, not governmental, and that special duty rules thus did not apply. The plaintiff's position had prevailed both with Supreme Court and the Appellate Division. Thus, defendants motion to dismiss based on the governmental immunity defense had been denied. Specifically, it was held there that the provision of energy and responding to a hurricane was part of the proprietary core functions of electric utilities. The Court of Appeals here modifies, finding that on a CPLR 3211 motion, it was too early to decide the issue of whether the actions were governmental or proprietary. The Court could not determine, as a matter of law, based only on the allegations in the complaints, whether defendants were acting in a governmental or a proprietary capacity when engaged in the conduct claimed to have caused plaintiffs' injuries. The Court rejected, however, defendants' claim that the magnitude of the disaster, without any reference to the

circumstances and nature of the specific act or omission alleged—i.e., the failure to de-energize—rendered defendants' conduct governmental as a matter of law. The lower courts' decisions to deny defendant's motion to dismiss the complaint based on the governmental immunity defense was affirmed, but now the defendant will have the opportunity to reapply for said relief after discovery.

Brady v. City of North Tonawanda, 161 A.D.3d 1526, 76 N.Y.S.3d 718 (4th Dep't 2018). Pedestrians brought action against driver and city when driver, who was intoxicated, drove his vehicle up paved driveway connecting street to paved path in City park where pedestrians had been walking their dogs. Plaintiffs alleged that the City was negligent in "creating driveway access" to the park path without "install [ing] any type of barricade, bollard, or like device to prevent or deter vehicles from entering the bike path on which pedestrian and bicycle traffic was expected. First, the City's argument for governmental immunity was rejected because City had a proprietary duty to maintain its roads and its park and playground facilities in a reasonably safe condition. As for the negligence claim itself, the Court noted that the City never disputed in its motion papers that it had paved the driveway during its development of the park, thereby creating the condition of which plaintiffs complained. Questions of fact existed as to liability.

Agness v. State of New York, 159 A.D.3d 1395, 72 N.Y.S.3d 698 (4th Dep't 2018). Park patron brought action against State after he was bitten by a rabid fox while camping at a state park. Claimant's injuries allegedly resulted from defendant's negligent failure to take adequate steps to protect park patrons from reasonably foreseeable danger, despite having actual notice of a potentially rabid animal on the park premises hours before the incident. Claimants' allegations that defendant failed to minimize the risk posed with a relevant warning and effective notification to the park police implicated defendant's proprietary, not governmental, duties, and thus summary judgment to defendant was denied. Further, partial summary judgment on the issue of liablity granted to plaintiff.

Washington v City of Rochester, 156 A.D.3d 1463, 68 N.Y.S.3d 243 (4th Dep't 2017). Tenant brought negligence action against city and property owner, alleging that she sustained injuries as a result of exposure to lead paint while residing at a residence owned by city and owner. The City failed to meet its initial burden of establishing that its allegedly negligent acts were undertaken in a governmental rather than a proprietary capacity.

Grasso v New York State Thruway Auth., 159 A.D.3d 674, 71 N.Y.S.3d 604 (2nd Dep't 2018). Employees of a general contractor on a New York State Thruway Association (NYSTA) highway construction project filed claims against, among others, the NYSTA, alleging Labor Law 240, 241, etc. Subsequently, employees commenced a separate action in the Supreme Court, against an engineering firm and an environmental consulting firm that worked on the project, involving similar allegations based on the same set of facts. NYSTA claimed governmental immunity. Court found that NYSTA, as the owner of real property, including a landfill requiring remediation, engaging in a highway construction project, was acting within a proprietary capacity and was thus subject to tort liability.

Granata v. City of White Plains, 162 A.D.3d 641 (2nd Dep't 2018). Plaintiffs' decedent died after being stabbed in a parking garage owned, operated, and maintained by the defendant City. The jury apportioned 100% of the fault in the happening of the incident to the City and 0% of the fault to the nonparty tortfeasor. Court here finds defendent City was not entitled to governmental immunity for these claims, which arose out of the performance of proprietary functions. In that respect, the plaintiffs offered proof that the City failed in its capacity as a commercial owner of a public parking garage to meet the basic proprietary obligation of providing minimal security for its garage property. Contrary to the City's further contentions, the plaintiffs made out a prima facie case of negligence at trial, and the jury's finding in this regard was not against the weight of the evidence.

Waterman v City of Rochester, 154 A.D.3d 1297, 60 N.Y.S.3d 924 (4th Dep't 2017). Defendant's motion for summary judgment dismissing the complaint based on governmental immunity defense denied since governmental immunity does not apply when a public employee, acting in the course of his or her

employment, commits an ordinary tort that anyone else might commit. for example, when the employee is negligent in driving a vehicle. Governmental immunity only applies where governmental actor acts in a governmental capacity.

B. Discretionary v. Ministerial Acts

Normanskill Cr., LLC v Town of Bethlehem, 160 A.D.3d 1249, 74 N.Y.S.3d 813 (3rd Dep't 2018). This case, though not a personal injury case, is a great lesson on the "public duty" rule and its cousin, with which it is often confused, the "governmental immunity" rule. Facts: Plaintiff, a golf course, began placing fill on a portion of its property with no Town permit to do so. Following complaints from the public, defendant Town advised plaintiff that a fill permit was needed, but that they were not required to submit a "full application". After submission of a truncated application, defendant issued plaintiff a fill permit. A few weeks later, after additional fill had been placed on the bank, a landslide occurred, causing property damage. Plaintiff golf course sued defendant Town for negligently issuing it the permit. Plaintiff alleged that the Town Engineer directly stated to them that he could "override" the requirements of the Town Code "if [he] is confident that the fill will 'increase stability' of the slope" and that, on this basis, he did not require plaintiffs to submit all of the mandated components of a fill permit application. The complaint also alleged that defendant was aware of prior landslides. Plaintiff claimed to have "justifiably relied upon [defendant's] statements that placing fill on the bank would not cause damage [,] ... the Town Engineer's statement that the placement of fill would increase stability of the slope ... [and defendant's] affirmative undertaking of deeming its work safe" by issuing the permit. **PUBLIC DUTY RULE:** Court held that, assuming these allegations were true, they were sufficient to establish that defendant voluntarily assumed a duty to plaintiff thereby creating a special relationship. The duty was not to the public generally, but specifically to this plaintiff., and plaintiff may have justifyably relied on defendant's granting of a permit to feel that adding fill was safe. Alternatively, the Court held that the plaintiff had shown defendant had assumed a "special duty" in another way permitted by case law: Plaintiffs had alleged sufficient facts to show a question of fact as to whether a special relationship had formed because defendant had assumed "positive direction and control in the face of a known, blatant and dangerous safety violation". Accepting the complaint's allegations as true, plaintiffs established a special relationship because defendant knew that a blatant and dangerous safety violation existed on plaintiffs' property and, notwithstanding this knowledge, affirmatively indicated that the fill activities were safe, and plaintiffs justifiably relied on these representations when they continued to deposit the fill. **GOVERNMENTAL IMMUNITY RULE:** The Court found that there was a question of fact as to whether defendant had "discretion" to issue a permit under these circumstances. The issuing of the permit might have been *ministerial*, i.e., the government *had to* issue a permit. Governmental immunity only protects government for *discretionary* acts, but if the governmental action is *ministerial*, there is no governmental immunity defense available. Here, the Town arguably had no discretion to issue the permit, i.e., it was ministerially required, because the Town Code *required* that a *full* permit application be submitted for the fill permit, and the Town Code mandated that the Town Engineer require that all application components be submitted and, as regards plaintiff, the Town Engineer did not require submission of a completed application (though he may have had no discretion to do so). Motion to dismiss based on governmental immunity defense denied.

Szydlowski v. Town of Bethlehem, 162 A.D.3d 1188 (3rd Dep't 2018). Same facts as above, but this time plaintiff was a neighbor whose property was damaged by the landslide. These plaintiffs were unaware of, and had no contact with any of the parties involved in, the permitting or landside. The allegations in the Complaint provided no indication of how plaintiff could have been induced by the Town to embark on any course of action, let alone a dangerous one that they would otherwise have avoided. Thus, the complaint did not allege a special relationship between the Town and plaintiffs. Because plaintiffs did not allege facts establishing that the Town owed them a duty, the complaint failed to state a negligence cause of action against the Town.

Santaiti v. Town of Ramapo, 162 A.D.3d 921 (2nd Dep't 2018). Decedent was shot and killed by her husband and her estate sued police for failure to protect her. Town moved to dismiss complaint pursuant to

CPLR 3211. Motion was denied. Decedent had contacted the Town police right after husband physically assaulted her. Members of the Town police department responded to the couple's residence, where decedent told them she feared for her life and that her husband possessed a gun. Police failed to arrest husband but did confiscate the handgun. They later returned it to him, though, without telling the decedent. Husband later killed decedent with the handgun. Town's motion to dismiss was based on **public duty rule** and **governmental immunity** defense. As for the **public duty** rule, construing the complaint liberally and according the plaintiff the benefit of every possible favorable inference, Court held complaint was sufficient to allege the existence of a special relationship between the Town and decedent. The complaint adequately alleged "direct contact" between the agents of the Town and decedent and that the Town police department undertook "through promises or actions" an affirmative duty to safeguard the husband's handgun. In addition, the complaint adequately alleged circumstances indicating that the Town, through its agents, knew that the return of the handgun to husband could lead to harm (*Cuffy v. City of New York).* The complaint also sufficiently alleged decedent's "justifiable reliance" on the Town's affirmative undertaking to safeguard husband's handgun (*Cuffy*). As for the **governmental immunity defense,** the allegations contained in the complaint did not establish, as a matter of law, that the Town police department was engaged in a **discretionary** act when it returned the handgun to the husband. Rather, the complaint alleged that husband's possession of the handgun was illegal and that, under the circumstances of this case, the Town police department lacked the legal authority to return it to him (Penal Law § 400.05[1]). Although the Town contended that the release of the handgun was discretionary because husband was a former police officer entitled to possession of the handgun pursuant to 18 USC § 926C, that provision set forth several requirements before a retired law enforcement officer may be considered a "qualified retired law enforcement officer" within the meaning of that statute, and the question of whether husband satisfied those requirements was not addressed in the motion papers. Even assuming that the allegedly negligent act of returning the handgun was discretionary in nature, it could not be said, as a matter of law, that "the discretion possessed by [the Town] was in fact exercised", which is required in order for the governmental immunity defense to be applied.

Feeney v. State of New York, 154 A.D.3d 1112, 61 N.Y.S.3d 921 (3rd Dep't 2017). A man, under arrest, was transported by ambulance to a hospital following a violent domestic dispute with his girlfriend. Upon his arrival, the man, who was uncooperative and belligerent, was brought to an examination room and handcuffed to the hospital bed by a State Trooper. Once the man appeared to have calmed down, the trooper left the examination room while the plaintiff, a physician's assistant, began treating the arrestee. While doing so, the arrestee kicked plaintiff and knocked him to the ground. Plaintiff sued, arguing that the trooper should have restrained the arrestee's legs and further should not have left him alone with plaintiff. Defendant argued there was no special duty to plaintiff and, in any event, that the trooper's actions were immune from liability because his actions were discretionary in nature. The Court here found a question of fact as to whether defendant had a special duty to protect plaintiff, but found that defendant established as a matter of law that the trooper's actions of not restraining the arrestee's legs and of leaving the arrestee alonw with the plaintiff were discretionary rather than ministerial and thus protected by governmental immunity.

C. Special Duty (a/k/a Public Duty Rule)

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

Gonzalez v State of New York, 156 A.D.3d 764, 65 N.Y.S.3d 719 (2nd Dept 2017). Claimant's driver license was suspended due to an outstanding fine. ThAs a result, the claimant's license suspension was not voided, and the claimant was subsequently arrested, detained overnight, and charged with driving with a suspended license. The charge was withdrawn after the recordkeeping error was discovered. Claimant sued the State for negligence in a ministerial act that the MVA official failed to properly record payment of his fine. Defendant moved pursuant to CPLR 3211(a)(7) to dismiss the claim for failure to allege the existence of a special relationship that could give rise to the defendant's liability for the negligent performance of a

ministerial governmental function. Motion granted. An agency of government, such as the DMV, is not liable for the negligent performance of a governmental function absent a duty born of a special relationship between the claimant and the public entity. The allegations contained in the claimant's pleadings revealed nothing beyond what any member of the general public could expect from a routine interaction with DMV personnel to contest, and later settle, a fine.

Morgan-Word v New York City Dept. of Educ., 161 A.D.3d 1065, 77 N.Y.S.3d 709 (2nd Dep't 2018). Middle school assistant principal was injured when she attempted to stop a fight between two students inside a classroom on the fourth floor of the school where she worked shortly before the students were to be dismissed for the day. Students do not have to show a "special relationship" in order to prevail for such injuries because the school assumes a duty as substitute "parent" for the child while in school. But when a teacher is injured by other students, the teacher must show a "special duty", i.e., a special relationship. At trial, the injured plaintiff testified that approximately six weeks prior to the subject incident, she was punched in the eye by a student while trying to stop a fight. The following day, she met with the principal of the school to advise him that she was reluctant to continue working on the fourth floor due to concerns regarding her safety. Following that conversation, the injured plaintiff observed additional security personnel on the fourth floor. Over the next several weeks, however, she also observed, on "numerous occasions," that no additional security personnel were present, prompting her to complain to the principal on no fewer than 10, and perhaps as many as 13, separate occasions. On the day of the incident, approximately 20 minutes prior to dismissal of the students for the day, the injured plaintiff heard a commotion coming from a classroom on the fourth floor. She looked for the additional security personnel, did not see anyone, and then entered the classroom to investigate. As the injured plaintiff attempted to stop a fight, the fighting students fell on top of her. She sustained injuries, as a result of which she was unable to work. Although the jury found a "special duty" had been assumed, the Appellate Court disagreed. There was no rational process by which the jury could have found that the injured plaintiff *justifiably relied, on the date of the incident, upon assurances of increased security that had been made by the school's principal approximately six weeks earlier*. Case dismissed.

Preaster v. City of Syracuse, 160 A.D.3d 1423, 75 N.Y.S.3d 727 (4th Dep't 2018). Homeowners brought negligence action against city, alleging that city's failure to repair fire hydrant increased damages they sustained when their house caught on fire. Case dismissed because plaintiffs failed to show a special relationship. There were no promises or actions by defendant indicating an affirmative duty to act on plaintiffs' behalf.

Ivan D. v. Little Richie Bus Service, Inc., 162 A.D.3d 587 (1st Dep't 2018). Two school children were on their way to school and walking within the crosswalk when one was struck by a privately owned and operated school bus. Although the City had assigned a school crossing guard to assist children such as infant plaintiffs to cross the intersection, the person who was ordinarily assigned to the intersection called out sick that morning. The record showed that no special duty existed between the City and plaintiffs before the accident. There was no direct contact between the City's agents and plaintiffs, and the facts that the school crossing guard greeted infant plaintiffs and the children relied upon the crossing guard's instructions when the guard was at the intersection before the accident was insufficient to create a special duty.

Barnes v State of New York, 156 A.D.3d 975, 66 N.Y.S.3d 716 (3rd Dep't 2017). Decedent motorist's estate brought wrongful death action against State of New York, alleging state troopers' failure to arrest decedent for driving while intoxicated and their determination to allow motorist to retain control of vehicle resulted in his death. The trooper had stopped the decedent for following too closely to another vehicle, but ultimately declined to issue decedent a traffic ticket and left decedent—who had, according to the troopers, claimed to be tired—in his vehicle on the side of the road to await a ride home from his brother. Roughly 5 ½ hours later, decedent's body and vehicle were discovered off a road, down a hill, near his home. Decedent had a blood alcohol content of .173%. Police actions are governmental in nature, and thus plaintiff needed to show a "special duty" to the decedent or else the claim would fail. Defendant's submissions in support of its motion established that the troopers did not voluntarily assume a duty to decedent beyond what was owed to

the public generally. Trooper suggested that decedent get a cup of coffee, pull over for a nap or call someone for a ride. (Did trooper "assume a duty" with these words? No!) Trooper testified decedent asserted that he would call his brother to pick him up. At no point did trooper speak with decedent's brother or indicate to decedent—after declining to issue a traffic ticket—that he was not free to drive himself home. Proof established that the troopers did not assume, either through promises or actions, a duty to act on behalf of decedent. Further, even if such evidence established an affirmative undertaking, decedent's justifiable reliance on the undertaking could not be reasonably inferred, particularly given that, following the troopers' departure, decedent told his brother that he no longer wanted a ride and that he would drive himself home. In the absence of a special duty owed to decedent, defendant was immune from liability for any negligent action or inaction committed by the troopers in furtherance of a governmental function. In light of this determination, the Court declined to address the applicability of the governmental function immunity defense. However, it noted that, were it to reach that issue, it would find that the trooper was acting within his *discretionary* rather than *ministerial* capacity in deciding to let the decedent go home on his own).

Merin v City of New York, 154 A.D.3d 928, 63 N.Y.S.3d 84 (2nd Dep't 2017). Property owner brought action against the city, alleging negligence and a claim under § 1983 for violation of her due process rights arising out of a stranger's filing of a fraudulent deed with city's department of finance and office of the register, purporting to transfer the property to stranger, who then moved into the premises. As to the causes of action alleging negligence, plaintiff failed to adequately allege a special duty owed to her by the City. As relevant here, a special duty exists when the City "voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty". Plaintiff failed to allege any particular act or promise on the part of the City, direct contact between the plaintiff and a City agent, or justifiable reliance by the plaintiff on any act or promise by the City. The plaintiff also failed to state a cause of action pursuant to 42 U.S.C. § 1983 for violation of her due process rights. "[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property". Since the plaintiff only alleged such negligent conduct on the part of the City, dismissal of the 1983 action was required.

Axt v. Hyde Park Police Department, 162 A.D.3d 728 (2nd Dep't 2018). Approximately one month prior to decedent wife's death, her husband had taken the decedent and their two teenage daughters hostage and threatened them with knives and a shotgun. An order of protection was issued requiring the husband to stay away from the decedent and refrain from communicating with her. Following the incident, the husband was arrested and jailed for approximately one month, after which he was released on bail. Later, the decedent received a text message on her cell phone and, believing that the text had been sent by the husband in violation of the order of protection, went to the police department to request that the police instruct the husband not to contact her. The police, in the presence of the decedent, contacted the husband's mother and asked her to tell the husband not to have contact with the decedent. The police took no further action and the decedent went home, where several hours later she was killed by husband. Defendants moved for summary judgment dismissing the complaint on the grounds that there was no special relationship between the police department and the decedent, and that, in any event, their actions were protected by governmental immunity. Defendants made their prima facie showing of entitlement to summary judgment by showing that police did not promise to arrest the husband and thus decedent could not have justifiably relied upon assurances of police protection. In opposition, the testimony of the decedent's daughter as to what she was told by the decedent regarding the decedent's interaction with the police was insufficient to raise a triable issue of fact.

2. Special Duty Formed by Statute

Franza v. State of New York, 2018 WL 3651997 (3rd Dep't 2018). Claimant, an inmate, alleged violation of his due process rights when the Board of Parole declined to release him to parole supervision following a hearing. Specifically, claimant alleges that his rights were violated when the Board denied his release without having promulgated "written procedures" that incorporate risk and needs principles in making parole release determinations, as required by the 2011 amendments to Executive Law § 259–c (4) (L 2011,

ch 62, part C, subpart A, § 38–b). According to claimant, rather than promulgating written procedures, the Board only added risk and needs assessment to the factors to be considered in making parole release decisions (see Executive Law § 259–i[2] [c][a]; 9 NYCRR former 8002.3), which was contrary to the Legislature's intent and rendered his parole proceeding unlawful. Defendant moved to dismiss the claim for failure to state a cause of action. Motion granted. "An agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public". Court found no special duty here. Although a special duty can in some cases be created by statute, here Executive Law article 12–B, which sets forth the procedures governing parole, does not expressly authorize a private right of action for claimant to recover civil damages for a violation of its provisions, nor did it imply such a right. The statute allows inmates to address perceived instances where the Board did not satisfy its statutory obligations in making parole release determinations. As the Legislature has established procedures for review of parole release decisions, "it is fair to infer that had it intended to create a private right of action ..., it would have specifically done so". Case dismissed.

Lee v. City of New York, 2018 WL 3650196 (1st Dep't 2018). Plaintiffs claimed their decident's remains, which were in a morgue at Bellevue Hospital, were mishandled by the City's emergency preparations and the decisions it made during and immediately after the unprecedented hurricane, which caused, among other things, unprecedented flooding in the Bellevue Hospital morgue. Faced with a governmental immunity defense motion, plaintiff's argued first that "the right of sepulcher by definition trumps governmental immunity". This novel argument was rejected. Second, plaintiffs argued that defendant (the City) was acting in a proprietary capacity (as owner of Bellvue Hospital morgue). But the Court found it was acting in its governmental capacity at all relevant times. Responding to the emergency situation created by Hurricane Sandy was a quintessential governmental function. Moreover, these preparations and decisions were discretionary, not ministerial. In any event, even if the actions were ministerial, plaintiff failed to establish the special relationship with the City required for holding the City liable for their injury. In support of their contention that the City violated a statutory duty enacted for their benefit, they rely on statutes that did not contemplate private rights of action and, in any event, were not relevant to this case, which did not involve autopsy, dissection or unclaimed remains (see Public Health Law § 4215) or individuals fighting for control over the disposition of those remains (see id. § 4201). Nor did plaintiffs establish that, in its treatment of the decedent's body in the wake of Hurricane Sandy, the City voluntarily assumed a duty that generated their justifiable reliance.

VI. DISCOVERY ISSUES INVOLVING MUNICIPALITIES

Watson v. City of New York, 157 A.D.3d 510, 69 N.Y.S.3d 294 (1st Dep't 2018). **Sanction of striking City's Answer Affirmed.** This is a split decision with an extensive dissent. Plaintiff brought action for false arrest and malicious prosecution against city. During discovery, the Court noted that the following took place:

- The motion court issued the preliminary conference order, which required the City defendants to provide various documents within 60 days. However, the City defendants failed to respond or provide any records whatsoever notwithstanding the preliminary conference order.
- Nearly a year later, the motion court issued a second order requiring the City defendants to respond to the preliminary conference order and to produce "all documents held by the NYCPD" pertaining to this matter by a date certain
- Ten days after the due date, and over a year after they were initially directed to do so, the City defendants served responses to the preliminary conference order but redacted certain material they alleged was privileged and confidential, including personal identifying information such as phone numbers, addresses, dates of birth and social security numbers for a police officer, the victim and a witness. However, the City defendants failed to provide a privilege log which is required under the discovery rules.

- Thereafter, plaintiff moved to compel the City defendants' compliance with the prior discovery orders. Based on the City defendants' substantial delay in complying with the preliminary conference order and their redaction of certain documents without providing a privilege log, the motion court issued an order granting plaintiff's motion to compel and requiring the City defendants to disclose their entire file without redactions. After that order was issued, the City defendants could have sought to appeal the order or sought a protective order based on the assertion that the order required them to produce privileged and confidential information. However, they did nothing at all to challenge the order and did not even timely respond to the order.
- Four months after the order was issued, the City defendants still had not responded or provided plaintiff with the unredacted discovery,
- Thereafter, plaintiff moved to strike the City defendants' answer based on their failure to comply with multiple discovery orders. On the return date of plaintiff's motion to strike, the City defendants finally served plaintiff with their very delayed discovery response, which still included redactions and a privilege log. Such response was provided over three years after the City defendants were initially ordered to produce the discovery and nearly a year after the court ordered them to produce the discovery with no redactions.

RESULT: The Appellate Division held that the motion court properly exercised its discretion in striking the City defendants' answer. The dissent contended that striking of the City defendants' answer was not warranted because plaintiff was not prejudiced by defendants' dilatory conduct. The dissent would have affirmed the sanction of a $10,000 payment to the plaintiff's attorney but reverse the sanction of striking the answer.

A.L. v. City of New York, N.Y.L.J. July 5, 2018 (N.Y. Sup. Ct. N.Y. Cty. 2018) (Tisch, J.). The Plaintiff made a discovery demand to which it took defendant City 1 ½ years to respond. Said response was replete with objections. Defendants then provided piecemeal responses and objections, then agreed to provide the requested information, then were court ordered to do so, and carried this on for three years, ultimately leading to no actual response at all. In addition, the defendants:

- Canceled a deposition without any reason the day before it was scheduled, and did not agree to produce anyone else until the next scheduled compliance conference.
- Insisted that a particular individual was a witness with knowledge about student training, and when this individual was produced at deposition, he had no knowledge at all about student training.
- City did not conduct a search the relevant year's student handbook until the handbook was so outdated it was no longer available.
- "City failed to respond to demands and failed to comply with court orders, conference after conference, and good faith letter after good faith letter".

As a sanction for this "willful" conduct, the court precluded defendant from offering evidence as to liability.

VII. DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Design – Qualified Immunity

1. General

Driscoll v. State, 160 A.D.3d 1240, 74 N.Y.S.3d 675 (3rd Dep't 2018). A vehicle attempting to turn left at an intersection was struck by an oncoming vehicle. Claimant alleged State was negligent in designing and maintaining a dangerous intersection with limited sight distance. Two traffic studies had been completed in 1996 and 2009. Claimants' expert relied on standards established in 1954 by the American Association of State Highway and Transportation Officials (AASHTO) determining that the intersection sight distance was between 350 and 400 feet, calculating a safe stopping distance 650 feet. State DOT witnesses relied on State's own standard set forth in the Manual of Uniform Traffic Control Devices (MUTCD) to measure line of sight, explaining that DOT did not use AASHTO standards to measure intersection sight distance because the MUTCD applied to existing conditions, while AASHTO provided design standards for new or reconstructed roads. The MUTCD measurements of sight distance exceeded 1000 feet, but even using

AASHTO, they measured the sight distance at 812 feet and stopping distance of 550 feet, plainly enough time to safely stop by either standard. The Court of Claims credited the State Experts' use of the MUTCD standard and this was affirmed by the Appellate Division. Case was dismissed.

Enker v. County of Sullivan,162 A.D.3d 1366 (3rd Dep't 2018). Plaintiff pedestrian crossed street 15 feet away from intersection by walking between two parked vehicles when vehicle, making a left, struck plaintiff. Defendant claimed immunity in that it submitted a three-year traffic study and plan. Specifically, the plan included the implementation of traffic control signals to control vehicular traffic in the intersection, stop bars in all four directions and two pedestrian push signals. Defendant also received no complaints or notices of claim since the traffic plan was implemented. Plaintiff asserted that defendant was not entitled to qualified immunity because the intersection's design was unsafe and the traffic study was unreasonable. Plaintiff's professional engineer testified that defendant should have prohibited parking at the corner of that intersection and installed a "No Pedestrian Crossing" sign at the subject road. Court held that this opinion merely showed another option available, and did not raise a triable issue of fact. Plaintiff also contended that qualified immunity was inapplicable because defendant's traffic study and plan did not pass on the same question of risk that underlied the claim. Court disagreed. Defendant's installation of pedestrian push signals at only two cross streets was a deliberate and reasonable planning decision made to ensure the safety of pedestrians while navigating the subject intersection, which was the "very same question of risk" underlying plaintiffs' claim. Further, since plaintiff did not use the pedestrian push signals while at the intersection, he could not now assail their reasonableness as a safety measure. Summary judgment was properly granted.

2. *If City is in the Midst of a Study When Accident Happens, Court Must Examine the Risks Studied.*

Cohen v. Macaya, 59 Misc.3d 888, 72 N.Y.S.3d 813 (Sup. Ct. Kings Cty. 2018). Pedestrian was struck by bicyclist who was riding in a designated bicycle lane at an intersection. Bicyclist testified that the location was "fast down hill." Plaintiff claimed that defendant City was negligent in the design and maintenance of the roadway, and for failing to conduct proper safety studies and implement simple remedial measures despite nine previous incidents on the subject road, which purportedly gave the City actual notice of the dangerous condition on the roadway. The City moved for summary judgment on the grounds of qualified immunity because **it was in the midst of a study** of the subject roadway at the time of the incident involving plaintiff: A DOT Task Force was formed in response to a previous incident at the location, where a pedestrian was hit head on by a bicyclist as she was crossing the roadway. At the time of the incident, however, the members of the Task Force **had not discussed the problems on the street with highway or civil engineers, traffic safety experts, or other outside consultants**. The Court explained that a municipality has qualified immunity from liability arising out of highway planning decisions in the specific proprietary field of roadway safety. To establish entitlement to this immunity, the municipality must first demonstrate that the relevant discretionary determination resulted from a "deliberative decision-making process." A "deliberative" process involves invoking the expertise of qualified employees and obtaining the necessary data. It must then demonstrate that its duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury. Defendant City conceded it had notice of a dangerous condition on the Street, and that the Task Force was formed in response. **The issue was whether defendants conducted an adequate study**. Although the defendants participated in a Task Force to study the general safety of the street for pedestrians, bicyclists and motorists, the Court found that **at the time of the incident involving plaintiff, a duly authorized public planning body had not yet passed on the very same questions of risk that would go to the jury, as the study was still in the preliminary stage**. The City's failure to invoke the expertise of highway and civil engineers, traffic safety experts, or other experts at the Task Force meetings prior to the incident, indicated a lack of a genuine deliberative process. **The Court took pains to distinguish this case from others which held the municipality was immune when the municipality was in the midst of studying a particular risk that would be put before the jury and experts were retained.**

3. If Qualified Immunity Cannot be Invoked, Ordinary Negligence Applies

Brown v. State, 2018 WL 2724985 (2018)(**Court of Appeals**). Decedent and wife involved in motorcycle accident at a right angle intersection, claiming improper design of said intersection. Between 1995 and 1999, there had been 14 right-angle collisions at the particular insersection and at the local town's request, the DOT began studying the intersection in 1999. DOT never completed its study and took no remedial action. At trial, Claimant's expert testified that the appropriate corrective action would have been to place a four-way stop sign at the intersection. DOT's expert stated that the installation of a four-way stop sign would have been a measure of last resort, to be considered if other less restrictive measures were insufficient. After appeal and remittal to Court of Claims, the Court of Claims found that the dangerous condition was a proximate cause of the accident and held the State 100% liable for the accident, finding decedent was not negligent. The State appealed from the final judgments awarding damages, and the Appellate Division affirmed. In the Court of Appeals, the State argued no proximate cause because claimant failed to prove that a four-way stop sign would have been installed before the accident and would have prevented it. (It should be noted that **the State agreed it could not invoke qualified immunity because it did not complete the safety study; therefore, ordinary rules of negligence applied**.) The Court of Appeals closely examined its jurisprudence regarding the "proximate cause" requirement in roadway design cases. The Court of Appeals concluded that "We have never required accident victims to identify **a specific remedy and prove it would have been timely implemented and prevented the accident**." A plaintiff is not required to show that traffic calming measures—much less any specific traffic calming measure adopted at a specific time—would have avoided the accident. **The relevant inquiry is whether the "City's failure to conduct a traffic calming study and to implement traffic calming measures was a substantial factor in causing the accident"** Here, there was record support for the finding that the State's breach was a proximate cause of the accident. It was undisputed that there was a pattern of right-angle accidents at the intersection. It was undisputed that the State did not complete the traffic study, reduce the speed limit on the State Road, change the design or signage, or take any steps whatsoever to attempt to improve safety at the intersection. Once on notice of the dangerous condition, it was the State's burden to take reasonable steps in a reasonable amount of time. Instead, it did nothing. Where, "as here, the risk of harm created by the defendant corresponds to the harm that actually resulted, we cannot say that proximate cause is lacking as a matter of law".

B. Defective Roadway Maintenance

1. General

Pasternak v County of Chenango, 156 A.D.3d 1007, 67 N.Y.S.3d 670 (3rd Dep't 2017). Motorcyclist lost control and was thrown off his bike on a County road.. Although there was no dispute that defendant did not receive prior written notice of the alleged defects in the road, defendant failed to demonstrate it had no constructive notice (Highway Law § 139 provides that constructive notice is sufficient for county roadways). Defendant's Director of Public Works testified to some knowledge of the subject road's readily apparent, less than ideal surface conditions, which he suspected to have been caused by the observable increase in traffic and presence of heavy vehicles in the years leading up to the subject accident. Other eyewitness testified that the road at the scene was wavy and uneven. Defendant also failed to submit proof that the roadway had been properly designed. Defendant also failed to carry its prima facie burden as to its claim that plaintiff's intoxicated conduct was the sole proximate cause of the accident. Court denied defendant summary judgment.

Whitaker v. Kennedy/Town of Poland, 162 A.D.3d 1542 (4th Dep't 2018). Plaintiff passenger injured when vehicle, which failed to stop at the intersection, continued across the street, went down an embankment, struck a tree, and came to rest in a creek. Plaintiff alleged that defendants were negligent in failing to install guiderails at the intersection. Court held that a municipality has a duty to maintain its roads in a reasonably safe condition in order to guard against contemplated and foreseeable risks to motorists, including risks

related to a driver's negligence or misconduct and that there was notice of prior similar accidents at the intersection, which created an issue of fact whether they were negligent in failing to install guiderails.

Jimerson v State of New York, 158 A.D.3d 1334, 71 N.Y.S.3d 289 (4th Dep't 2018). Claim against State for the wrongful death of one person and injuries to another when they fell through a hole on a truss bridge that the State built more than 80 years earlier as part of a former state highway and that was located on Indian reservation land. While an order in 1980 from the DOT ostensibly discontinued maintenance and jurisdiction over the former state highway, Highway Law § 53 ("[t]he [DOT] shall have supervision and control, in the construction, maintenance and improvement of all highways and bridges constructed or to be constructed by the [S]tate on any Indian reservations.") created an unambiguous duty with no temporal limitation for State to maintain the bridge for which it promised to undertake a long delayed replacement. Plaintiff's motion for partial summary judgment granted.

Gray v. State of New York, 159 A.D.3d 1166, 72 N.Y.S.3d 208 (3rd Dep't 2018). Claimants sued State when a mudslide cascaded down a slope and across the highway where they were waiting in a vehicle. While defendant owes the public a nondelegable duty to keep its roadways in a reasonably safe condition and the duty extends to conditions adjacent to the highway which interfere with a motorist's safe and legal use of the roadway, plaintiff must show State had actual or constructive notice. Claimant relied on testimony of professor of geotechnical engineering, who testified that DOT had issued a report in 1988 and two reports in 1997 that indicated that the subject slope had previously experienced rock falls. State presented the testimony of an engineering geologist and a geotechnical engineer, who testified that the November 2006 incident was caused by a mudslide and not a rock fall. The experts demonstrated that a rock fall and a mudslide were two distinct geologic events caused by separate and distinct triggering mechanisms. The Court held that even if the defendant should have regularly inspected the subject slope, even if such inspections had occurred, a rock fall inspection would not have provided any information relevant to whether the subject slope was at risk of a potential mudslide. Case dismissed.

Stiggins v. Town of North Dansville, 155 A.D.3d 1617, 63 N.Y.S.3d 796 (4th Dept. 2017). Drunk driver lost control of his vehicle while driving with four passengers on a road maintained by defendant. The vehicle ultimately struck a tree and flipped over, resulting in the death of Plaintiff 1 and injury to Plaintiff 2. The road ended in a parking lot that was part of a public park, and drunk driver lost control of the vehicle at a curve just past the park gate, which was open. A sign near the gate stated that the park was open from dawn until dusk, and the accident occurred at about 2:00 a.m. Plaintiffs alleged that defendant was negligent in, inter alia, failing to close the park gate, failing to provide adequate lighting for the road, and failing to provide a speed limit sign or a sign warning of the curve. Court noted that a municipality has a duty to maintain its roads in a reasonably safe condition "in order to guard against contemplated and foreseeable risks to motorists," including risks related to a driver's negligence or misconduct. In other words, the defendant's duty to maintain the road was therefore not negated by the drunk driver's intoxication or the fact that the park was closed when the accident occurred. Since the defendant did not establish as a matter of law that drunk driver's presence under those circumstances was unforeseeable, summary judgment denied.

2. Traffic Lights

Gaines v El Sol Contr. & Constr. Corp, 58 Misc.3d 1202 (Kings Co. Sup. Ct. 2017). Plaintiff was employed by construction subcontractor as a supervisor, helping create an HOV lane on co-defendant City street. Plaintiff parked his company vehicle on a median which separated the north and southbound lanes of said City street. As he exited his vehicle and was standing on the median speaking with his co-worker, an SUV was making a left at a turning lane and, although the left-hand turn traffic signal was not working, he made the left turn onto the street, which caused a collision, injuring plaintiff. Defendant City moved for summary judgment. The City contended it performed a search of the traffic logs and maintenance records for the two months prior to and including the date of plaintiff's accident at the accident location. The last complaint the City received related to the subject intersection, prior to the accident, was two months prior to the accident and that co-defendant private contractor responded to that complaint and performed the needed

repair. Consequently, the City argued that it did not receive the requisite notice of the alleged malfunction of the traffic signal in order to impose liability upon it. Moreover, the City argued that superseding acts broke the chain of causation. Specifically, the City alleged that another contractor's work on the traffic signals often caused them to go out. The Court held that a municipality is liable for the failure to maintain its traffic lights in a reasonably safe condition, but the liability for such failure will only attach if it is proven that the municipality caused the defective condition alleged or had prior notice, actual or constructive, of the same. The Court found that the City has established its entitlement to summary judgment by setting forth evidence that it maintained the traffic light at the subject intersection in a reasonably safe condition and that it did not have notice of the broken traffic signal prior to the incident at issue. None of the opposing parties raised an issue of fact in this regard. The Court thus granted the City's motion for summary judgment.

3. Trees

Schillaci v. Town of Islip, 2018 WL 3291914 (2nd Dep't 2018). Plaintiff was a passenger in a vehicle when a tree on the side of defendant's road fell onto the vehicle. The plaintiff alleged that the incident occurred as a result of the Town's negligence in failing to inspect the tree and to maintain the tree in a reasonably safe condition. The Town moved for summary judgment claiming it lacked actual and constructive notice of the allegedly dangerous condition of the tree. The Court held that Municipalities have a duty to maintain their roadways in a reasonably safe condition, **and this duty extends to trees adjacent to the road which could pose a danger to travelers**. Additionally, Municipalities possess a common-law duty to inspect trees adjacent to their roadways The Court held that the Town did not establish, prima facie, that it met its duty to inspect and maintain the subject tree, or that it lacked constructive notice of the alleged dangerous condition of the tree. Summary Judgment denied.

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

A. Prior Written Notice Required

1. General

Doherty v Town of Lewisboro, 154 A.D.3d 737, 63 N.Y.S.3d 62 (2nd Dep't 2017). Property owners brought action against city, seeking to collect for damages for flooding to their home which was caused by a defective storm drain culvert maintained by city. Summary judgment was granted to defendant since there was no prior written notice of the defect and plaintiff submitted no evidence that defendant affirmatively created the defect.

Taustine v Incorporated Vil. of Lindenhurst, 158 A.D.3d 785, 71 N.Y.S.3d 54 (2nd Dep't 2018). Plaintiff tripped and fell on a slightly slopped area of sidewalk near a tree well and a dedication plaque. Defendant established its entitlement to summary judgment by demonstrating that it did not receive prior written notice of the condition and did not create the dangerous condition through an affirmative act of negligence. In opposition, the plaintiffs failed to raise a triable issue of fact.

Troia v. City of New York, et. al., 162 A.D.3d 1089 (2nd Dep't 2018). Plaintiff injured when she slipped and fell as a result of debris and a slippery substance on the street in front of a public school. The substance on the street allegedly leaked from four dumpsters that had been placed on the sidewalk during a construction project on school grounds. Plaintiff sued City property owners, City cross claimed against contractors for contribution and indemnifications and commenced third party lawsuit. City's motion for summary judgment on the ground that they had no prior written notice failed. City failed to submit proof of such lack of notice from the proper municipal official or that they did not create the alleged dangerous condition. Such evidence submitted by the City defendants for the **first time in their reply papers** could not be considered.

2. Written notice in General Vicinity insufficient

Trentman v. City of New York, 162 A.D.3d 559 (1st Dep't 2018). Plaintiff tripped and fell on a hole in the roadway, away from the curb. Defendant submitted evidence showing that it lacked prior written notice of the alleged defect. Court held that Plaintiff's reliance on several August 2014 DOT inspections of defects located in the *general vicinity* of her fall did not constitute either written acknowledgment of the defect or evidence that defendant caused or created the condition during unspecified road repair work. Records regarding other defects that were repaired in a certain area do not provide written notice of the specific defect that caused plaintiff's injury. Additionally, evidence that defendant repaired a defect several months before plaintiff's accident does not provide a basis for an inference that the repair resulted in an immediately hazardous condition. Case dismissed.

Kalsmith v. City of New York, 158 A.D.3d 442 (1st Dept. 2018). Plaintiff tripped and fell on a City roadway. Defendants made a prima facie showing that they did not have prior written notice of the defective roadway condition that caused plaintiff to trip and fall. Although the FITS reports submitted by defendants showed the existence of potholes at the accident site during the nearly two years prior to plaintiff's accident, there was no proof that any of these defects, which were all repaired, were the cause of plaintiff's accident. The awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident.

3. 'Prior Written Notice Established by "Big Apple Map"

Jimenez v. City of New York, 159 A.D.3d 518, 69 N.Y.S.3d 801 (1st Dep't 2018). Plaintiff tripped and fell over cobblestone around Defendant City's defective tree well. Plaintiff established prima facie that the City received prior written notice of the defective tree well that she tripped over by submitting a Big Apple map containing a notation of a defect in the area where she fell. According to the key to the Big Apple map symbols submitted into evidence, the symbol "V" at issue denotes "tree wells without a 'fence' or in place barrier." Defendant City employee testified that cobblestones are considered a buffer or barrier around the tree and that they need to be flush with the sidewalk so as not to constitute a tripping hazard. Jury's determination that the notation was sufficient to bring the defective condition of an out of place barrier to the City's attention was affirmed.

Williams v. City of New York, 59 Misc.3d 1213 (Bronx Co. Sup. Ct. 2018). Plaintiff tripped and fell on uneven, cracked, broken sidewalk on East 180th Street near Vidalia Park in between Daly Avenue and Vyse Avenue in the Bronx. The Big Apple Map for the accident area depicted the existence of an uneven and cracked sidewalk on the south side of East 180th Street, between Daly Avenue and Vyse Avenue, but closer to the corner of East 180th Street and Daly Avenue. Plaintiff's bill of particulars located the accident at "East 180th Street between Vyse and Daly Avenue by the BX36 and BX9 Bus, bordering Vidalia Park, in the County of Bronx, State of New York." The Court found issues of fact as to whether the Big Apple Map markings depicted the condition that caused Plaintiff's accident, as the precise location of the defect could not be determined from Plaintiff's General Municipal Law § 50-h hearing testimony. The plaintiff testified at her 50-h hearing that she was in the middle of the block. The Court held that this testimony did not defeat Plaintiff's claim, as it failed to indicate with specificity the precise location of the alleged defect. It was not clearly evident that the question "so you weren't closer to one than the other," or Plaintiff's answer, was in specific reference to corners of East 180th Street and the two intersecting streets. The Court held that defendants failed to eliminate all triable issues of fact as to whether the markings on the Big Apple Map denoted the cracked sidewalk that caused this accident and denied the motion for summary judgment.

4. Verbal or Telephonic Communication Reduced to Writing does not Satisfy Prior Written Notice Requirement

Tracy v. City of Buffalo, 158 A.D.3d 1094, 68 N.Y.S.3d 618 (4th Dep't 2018). Motorist sued City for injuries caused by potholes on City street. Defendant established that its lacked prior written notice of a defective or unsafe condition in the road, and plaintiff failed to meet its burden of demonstrating that an

exception to the general rule was applicable. Contrary to plaintiff's contentions, "verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy a prior written notice requirement".

B. "AFFIRMATIVELY CREATED" EXCEPTION TO THE PRIOR WRITTEN NOTICE RULE

1. Must Prove Defendant Created the Hazard

Pylarinos v Town of Huntington, 156 A.D.3d 922, 68 N.Y.S.3d 124 (2nd Dep't 2017). Pedestrian had a trip-and-fall over a dismantled wooden barricade that was lying on a sidewalk. Town established entitlement to summary judgment by demonstrating that it did not receive prior written notice of the condition complained of and that it did not affirmatively create that condition through an act of negligence. It was uncontroverted that the Town was responsible only for dropping off the barricades and picking them up after the parade. The Town was not involved in the dismantling of the barricades or in their placement after the parade. It also was undisputed that the Town picked up the barricades two or three days after the parade. Town's conduct, at most, amounted to nonfeasance for which there can be no liability absent prior written notice of the condition. In opposition, the plaintiff failed to raise a triable issue of fact.

Toscano v Town of Huntington, 156 A.D.3d 837, 68 N.Y.S.3d 81 (2nd Dep't 2017). Pedestrian tripped over a metal barricade on a walkway in a park in the Town of Huntington. The Town moved for summary judgment dismissing the complaint on the grounds that it did not have prior written notice of the allegedly dangerous positioning of the metal barricade, and that it did not create that allegedly dangerous condition. Although the Town established, prima facie, that it did not have prior written notice of the allegedly negligent positioning of the barricade, it failed to establish, prima facie, that it was not responsible for the allegedly negligent placement of the barricade, and thus that it did not affirmatively create the alleged hazard. Motion for summary judgment denied.

Trela v City of Long Beach, 157 A.D.3d 747, 69 N.Y.S.3d 58 (2nd Dep't 2018). Bicyclist fell on a sidewalk. Approximately 1½ months prior to the incident, the defendant City of Long Beach had excavated a portion of the sidewalk and backfilled it with a temporary patch, and cordoning off the area with safety barrels and yellow caution tape. At the time of the incident, the safety barrels and yellow caution tape were not present. Upon SJ motions, adjoining commercial landowner failed to establish, prima facie, that it had no duty to maintain the abutting sidewalk where the incident occurred (see Charter of City of Long Beach § 256; Code of Ordinances of City of Long Beach § 1–2). Oceanwalk failed to meet its initial burden that it did not have constructive notice of the defect. With respect to the City, although it demonstrated that it did not receive prior written notice, it failed to establish, prima facie, that it did not create the allegedly dangerous condition.

2. Affirmative Act of Negligence Must be "Affirmative"

Morreale v Town of Smithtown, 153 A.D.3d 917, 61 N.Y.S.3d 269 (2nd Dep't 2017). Pedestrian allegedly slipped and fell on ice in park owned by Town. The Town established its entitlement to summary judgment by submitting evidence, including an affidavit from its Town Clerk, demonstrating that it did not receive prior written notice, and that it did not create the alleged condition through an affirmative act of negligence. In opposition, the plaintiff failed to raise a triable issue of fact. The Town's failure to remove any snow or ice from the area where the subject accident occurred was passive in nature and did not constitute an affirmative act of negligence excepting it from prior written notice requirements.

Mimikos v. The City of New York, 161 A.D.3d 674, 78 N.Y.S.3d 56 (1st Dep't 2018). Pedestrian slipped and fell on snow and ice while crossing the street within the crosswalk. The City argued "storm in progress" and submitted climatological data showing that there was a storm in progress when the accident happened, which plaintiff did not dispute. Instead, plaintiff argued that the City created or exacerbated the icy condition of the crosswalk since it failed to adhere to its snow removal protocols. Court did not agree, and

also **held that the city cannot be held liable for failing to salt the roadway before the storm**, because such alleged inaction does not constitute an affirmative act of negligence that caused, created or exacerbated the icy condition.

3. Affirmatively Creating Hazard by Snow Removal Efforts

Seegers v. Village of Mineola, 161 A.D.3d 910, 77 N.Y.S.3d 86 (2nd Dep't 2018). Plaintiff slipped and fell on ice in a parking lot owned, operated, and maintained by the defendant Village. Although the Village demonstrated that it did not receive written notice of an ice condition in the subject parking lot prior to the accident, it failed to demonstrate, prima facie, that it did not create the ice condition. The Village, therefore, failed to demonstrate its prima facie entitlement to judgment as a matter of law.

Connolly v. Ventuzelo, 59 Misc.3d 1215 (Suffolk Co. Sup. Ct. 2018). Pedestrian walking on road struck by a vehicle operated by intoxicated driver who left the scene of the accident. Case against driver was settled. Plaintiff sued tTown alleging that defendant Town was negligent in causing him to walk directly on the road as a result of excessive snow piles not removed from the sidewalk adjacent to the roadway. Defendant Town moved for summary judgment on the grounds that it did not have prior written notice, and it did not engage in affirmative negligence that contributed to any alleged dangerous condition. Plaintiff testified that it had snowed "a couple of days" prior to the accident and the roads were plowed, but the sidewalks were "completely covered by two to three feet of snow." Defendant admitted it was responsible for maintaining the road and that while the sidewalks alongside the road are owned by the Town, the maintenance responsibilities for such sidewalks are with the adjacent landowners (non party School District and the County). The Court found that it was the responsibility of the adjacent property owners, not the Town, to clear the sidewalk of snow and that there was no allegation that clearing snow from the roadway days earlier prevented those property owners from fulfilling that responsibility. Thus, the Town's plowing of snow from the roadway, and the method it employed in doing so, which was the only "affirmative act" of the Town cited by plaintiff, could not reasonably be found to be "an affirmative act of negligence." Summary Judgment granted.

4. Defect Must Be Immediately Visible (except in snow removal cases)

Dibble v Village of Sleepy Hollow, 156 A.D.3d 602, 66 N.Y.S.3d 26 (2nd Dep't 2017). Driver brought personal injury action against village and other parties after manhole cover exploded underneath driver's vehicle. The Village owned the manhole, including its cover, and sewer system beneath it. However, the Village abandoned use of the manhole prior to the accident, and the manhole allegedly was sealed over during a repaving project undertaken by the State. Plaintiff's suit alleged the Village had negligently abandoned use of the manhole and allowed it to be sealed, thereby preventing the manhole from venting and permitting the build up of flammable gasses. The Village moved for summary judgment on the ground that it did not have prior written notice of the condition alleged, as required by the Village Code. Court held that the Village established its entitlement to summary judgment law by submitting evidence, including an affidavit from the Village Clerk, demonstrating that it did not receive prior written notice of the condition alleged. The Village further established that it did not create the alleged condition through an affirmative act of negligence as there would have been no apparent or visible defect after Villege abandoned the manhole. In opposition, the plaintiff failed to raise a triable issue of fact.

Malek v. Village of Depew, 156 A.D.3d 1412, 65 N.Y.S.3d 843 (4th Dep't 2017). Plaintiff injured when his foot fell through the pavement adjacent to a storm drain that was located in defendant Village. Plaintiff's expert opined that the dangerous condition developed over time as a result of the intake of storm water, not that the dangerous condition was the immediate result of allegedly negligent work. While an exception to the prior written notice rule is that the municipality affirmatively created the defect, this applies only to work by the municipality that immediately results in the existence of a dangerous condition. Summary judgment granted to defendant.

Casciano v. Town/Village of Harrison, 160 A.D.3d 801, 74 N.Y.S.3d 619 (2nd Dep't 2018). Plaintiff injured when he slipped and fell on ice on a roadway in defendant Town. He alleged that the Town affirmatively created, through its negligence in constructing and paving the road, a condition which allowed water to accumulate and freeze on the roadway, which caused his fall. The evidence submitted in support of defendant's motion failed to demonstrate, prima facie, that it did not negligently construct or pave the road in a manner that permitted water to accumulate and freeze on the roadway, or that it subsequently successfully repaired the alleged defective condition prior to the plaintiff's accident. Defendant's motion was properly denied without regard to the sufficiency of the plaintiff's opposition papers.

Martin v. City of New York, 158 A.D.3d 527, 68 N.Y.S.3d 705 (1st Dep't 2018). Pedestrian injured when she tripped and fell on a hole at a curb. The record showed defendant City lacked prior written notice of the alleged defect (A.C. § 7–201[c][2]). Plaintiff's expert's assertions that the City negligently installed the pedestrian ramp and curb, or had negligently repaired the area sometime before the accident, were speculative and unsupported by the record and their expert failed to establish how the installation of the pedestrian ramp and curb, or a subsequent repair to the area, immediately resulted in the hole that caused the accident so as to bring the alleged defect out of the ambit of ordinary wear and tear. Summary Judgment granted.

Burke v. City of Rochester, 158 A.D.3d 1218, 70 N.Y.S.3d 271 (4th Dep't 2018). Pedestrian injured when she stepped into a snow covered area between the street curb and the sidewalk in front of her home, alleged that her foot went through the snow and into a sinkhole. A year earlier, defendant performed a "lawn cut" in the area where plaintiff fell, and plaintiff alleged that defendant's negligence in performing the work resulted in a dangerous or defective condition (the sinkhole). Defendant demonstrated that it did not receive prior written notice. Plaintiff did not dispute the absence of prior written notice but alleged that the defendant affirmatively created the defect through an act of negligence. The Court held that although plaintiff submitted evidence that defendant may have created the sinkhole by improperly excavating and backfilling the excavated area, the plaintiff failed to proffer evidence that the depression was present *immediately* after completion of the work. Summary Judgment to defendant granted.

C. New York City Sidewalk Law

1. *Manholes*

Nyack v City of New York, 153 A.D.3d 1266, 60 N.Y.S.3d 471 (2nd Dep't 2017). Plaintiff sustained a trip-and-fall on a sidewalk defect as she was walking towards a subway entrance. Rules of City of New York Department of Transportation (34 RCNY) § 2–07(b) provide that owners of covers or gratings on a street, which includes the sidewalk, are responsible for monitoring the condition of the covers and gratings and the area extending 12 inches outward from the perimeter of the hardware, and for ensuring that the hardware is flush with the surrounding surface. In support of its motion, the Transit Authority submitted, demonstrated that it did not own the sidewalk. However, the alleged defective portion of the sidewalk was in close proximity to a manhole cover. Regardless of whether the Transit Authority owned the subject sidewalk, it failed to establish the absence of any triable issues of fact as to whether it owned the subject manhole cover.

2. *Residential owner-occupied Exception*

Brown v. City of New York, et. al., 162 A.D.3d 731 (2nd Dep't 2018). Plaintiff injured after tripping and falling on a defective section of sidewalk abutting two properties in Brooklyn. Private defendants owned one of the abutting properties, which was owner occupied and single family and moved for summary judgment contending that they did not create the alleged defect or cause it to occur through a special use of the sidewalk. Additionally they argued they were exempt from liability under the provisions of Administrative Code § 7–210(b). Court held that 7-210(a) does not apply to "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." Court held 7-210(a) did not impose liability. Moreover, private defendants

established, prima facie, that they could not be held liable for the plaintiff's injuries under common-law principles since absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use.

Gerendash v. City of New York, 2018 WL 3371692 (2nd Dep't 2018) Plaintiff tripped and fell on an uneven sidewalk abutting real property owned by private defendants. Private defendants moved for summary judgment claiming she was exempt from the liability imposed by Administrative Code of the City of New York § 7–210(b). Private defendant demonstrated that the property was a single-family residence, that it was owner-occupied, and that it was used solely for residential purposes. Accordingly, private defendant established, prima facie, that she was exempt from the liability imposed pursuant to Administrative Code of the City of New York **§ 7–210(b)**, and that she had no statutory duty to maintain the subject sidewalk. Private defendant also demonstrated, prima facie, that she could not be held liable for the injured plaintiff's injuries under common-law principles that it either created the defect or caused it to occur by special use.

3. Affirmatively created exception

Tomashevskaya v. City of New York, 161 A.D.3d 511, 73 N.Y.S.3d 433 (1st Dep't 2018). Plaintiff tripped over a raised cobblestone in lower Manhattan. The cobblestone area was a "pedestrian walk or path," falling within the definition of "sidewalk" in Administrative Code of City of N.Y. § 7–201(c)(1)(b). City demonstrated that it did not receive prior written notice of the defective condition. Plaintiff did not submit any evidence as to whether the City was affirmatively negligent in creating the uneven condition. While Plaintiff's expert opined that it looked as if the cobblestone had been imbedded improperly, plaintiff presented no evidence concerning when the cobblestone area was installed, much less evidence sufficient to demonstrate that the City performed work in the area that immediately resulted in the existence of the alleged uneven condition of the cobblestones. Case dismissed.

Bania v City of New York, 157 A.D.3d 612, 70 N.Y.S.3d 183 (1st Dep't 2018). Police officer's vehicle fell into hole in roadway. City had no prior ***written*** notice of the roadway defect under the Pothole Law (see Administrative Code of City of N.Y. § 7–201 [c][2]), but there was evidence the City created the defect through an affirmative act of negligence by placing only a patch over a hole 10 days before the accident whereas it should have done much more to fix the problem. Plaintiffs proffered the affidavit of a professional engineer who opined that any attempted patch repair of the sinkhole—"without excavation, proper backfilling and tamping—would begin to fail almost immediately and manifest itself in the recurrence of the sinkhole." There was nothing in the record here to indicate that the dangerous condition in question developed over time (cf. Yarborough, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873). Thus, summary judgment to defendant was denied.

Trawinski v Jabir & Farag Props., LLC, 154 A.D.3d 991, 63 N.Y.S.3d 431 (2nd Dep't 2017). Plaintiff testified that the City sidewalk was wet due to rain and she fell because of "the decline of the sidewalk" which "was at a relatively sharp angle versus other sidewalks" and caused her to "basically slid[e] down on it." Plaintiff submitted documents demonstrating that one of the agencies of the NYC defendants approved the design of the sidewalk at issue and that the installation of the sidewalk was part of an extensive sidewalk improvement project proposed by the New York City Economic Development Corporation. This established a triable issues of fact exist as to whether the NYC defendants created the sidewalk condition complained of by the plaintiff. While Administrative Code § 7–210 expressly shifts tort liability to an abutting property owner for injuries proximately caused by the owner's failure to maintain the sidewalk in a reasonably safe condition, it does not shift tort liability for injuries proximately caused by a municipality's affirmative acts of negligence.

4. Liability for Negligent Snow Removal

Filius v. New York City Housing Authority, 156 A.D.3d 434, 64 N.Y.S.3d 553 (1st Dep't 2017). Plaintiff injured after slipping and falling upon Housing Authority property. Authority established its entitlement to judgment as a matter of law by submitting evidence showing that plaintiff fell during a Storm in Progress: The certified meteorological records and plaintiff's testimony demonstrated that it was snowing at the time of the accident. Plaintiff did not raise issue of fact as to whether defendant's snow removal efforts created or exacerbated a hazardous condition: Plaintiff's testimony that he fell on "dirty snow," which could have fallen in the time between defendant's snow removal and the accident, and his conclusory claim that defendant's shoveling was inadequate, did not raise triable issues of fact.

Jones v New York City Hous. Auth., 157 A.D.3d 426, 67 N.Y.S.3d 200 (1st Dep't 2018). Pedestrian slipped and fell on ice on sidewalk abutting city authority's building. Defendant's "supervisor of caretakers" testified that the sidewalks abutting its building were free of ice and snow when he arrived at the building on the date of the accident. Plaintiff raised triable issues of fact as to whether a hazardous icy condition existed and whether defendant had notice of that condition by use of a climatological expert who that snow had ceased falling two days before plaintiff's accident, but that snow and ice would have remained on the ground in untreated areas on the morning of his accident, thus giving defendant sufficient time to discover and remedy the hazardous ice condition. Plaintiff described the ice that he saw after his fall as "[b]rownish" and "dirty," raising issues as to whether the icy condition had been on the sidewalk long enough to clear it before the accident. Also plaintiff identified the cause of his fall, since he testified that he saw ice on the ground when he looked sideways, when he fell, face down, onto it.

5. GOL § 9-103 Duty to Those on Property

Rodriguez v. City of New York, 161 A.D.3d 682, 77 N.Y.S.3d 48 (1st Dep't 2018). The decedent, who trespassed onto a Yankee Stadium parking lot in the off season with others who rode motorcycles, dirt bikes and all-terrain vehicles, suffered fatal injuries in a collision with another vehicle operator. Plaintiffs established that the nature of the trespass activity involved was commonplace for the parking lot in question, for at least two years, and that drag racing would sometimes be involved. Plaintiff alleged that the City (as lot owner) and private lessee were negligent for not repairing and/or securing the lot's perimeter fence, and in not employing proper security or supervision to keep trespassers off the premises. The Court held that the property was physically conducive to the motorcycle activity taking place and was appropriate for public use in pursuing the activity as recreation (see General Obligations Law § 9–103). As such, the City was immune from liability for any ordinary negligence on its part that may have given rise to the cause of the decedent's accident, and plaintiff did not demonstrate that the City's conduct was willful or malicious as might preclude the City's reliance on the defense afforded under General Obligations Law § 9–103. Summary Judgment granted.

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

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

1. What is an "Emergency Operation"?

Oddo v. City of Buffalo, 159 A.D.3d 1519, 72 N.Y.S.3d 706 (4th Dep't 2018). Plaintiff injured when her vehicle collided at an intersection with a police vehicle operated by defendant police officer while he was responding to a police call. Motion and cross- motions for summary judgment. Court ruled that the fact that the police call was a "priority call," but not a "priority one call (an apparent reference to the police department's response classification) was irrelevant inasmuch as either way, it constituted an emergency operation. **The more interesting issue in this case is the paradox V&T law 1104 creates with regard to a defendant's behavior, i.e., a municipal defendant is rewarded for violating the V&T rules of the road during an emergency.** Here, there was a dispute about the color of the lights. Both plaintiff driver and

defendant police officer claimed to have had a green light. But if defendant officer had a red light (*see*, Vehicle and Traffic Law 1104[b][2]), then he was protected by the "reckless disregard" standard of V&T Law 1104, while if his light was green, he was subject to the ordinary negligence standard. Thus, should defendant really want the jury to find the light was red for defendant, and plaintiff want the jury to find it was green for defendant? The Court rejected defendants' contention that the color of the traffic light was not a material issue of fact precluding summary judgment. If the factfinder determines that defendant officer was engaged in the exempt conduct of proceeding past a steady red signal (*see* Vehicle and Traffic Law § 1104 [b] [2]), then the reckless disregard standard of care would apply under the circumstances presented herein (*see* § 1104 [e]). If, however, the factfinder credits defendant officer's account that he was proceeding through a green light, then the alleged injury-causing conduct by defendant officer would be governed by principles of ordinary negligence (*see Kabir,* 16 NY3d at 220). Inasmuch as the resolution of that factual issue was going to determine the standard of care by which the factfinder must evaluate defendant officer's conduct. Court concluded that motion Court erred in finding that the reckless disregard standard applies as a matter of law. .Plaintiff also argued that defendant's conduct was "unprivileged as a matter of law", even if the officer did have the red light, because the evidence showed the officer did not slow down prior to entering the intersection (as required by V&T 1104[b][2]), but the Court found that this created only an "issue of fact whether he acted with reckless disregard for the safety of others " in the event the reckless disregard standard applied.

2. Which Standard Applies?

Green v. Zarella, 153 A.D.3d 1162, 61 N.Y.S.3d 6 (1st Dep't 2017). Plaintiff-Pedestrian injured when police vehicle, responding to radio call of "man with a gun", struck him. Summary judgment granted to defendant because reckless disregard standard applied and conduct was not reckless. The reckless disregard standard applied because it was an emergency response and the police vehicle straddled and then crossed the double yellow lines, in disregard of regulations "governing directions of movement" (VTL § 1104[b][4]). Defendants demonstrated that the officer did not operate the police vehicle in reckless disregard for the safety of others as the traffic warranted moving her vehicle left and operating it on the double yellow lines to avoid the stopped vehicles to her right and ahead of her. The officer had no duty to engage her sirens or lights, as she was operating a police vehicle, and her failure to do so was not evidence of recklessness.

Pugh v. City of New York, 161 A.D.3d 466, 76 N.Y.S.3d 45 (1st Dep't 2018). Plaintiff was passenger in a double-parked car (driver inside laudromat), on a one-way single lane Manhattan street injured when a NYFD Fire Truck, responding to an emergency, attempted to maneuver around subject vehicle, but scraped its left rear panel. Fire truck operator activated siren, emergency lights, and horn. Court held that the trial court appropriately ruled fire truck held to Ordinary Negligence standard, but that plaintiff that not entitled to a directed verdict on the issue of the fire truck operator's negligence, inasmuch as the typical rear-end collision cases had no application here, rather, the ordinary negligence standard governed, grounded in the reasonableness of the fire truck operator's actions in light of the circumstances presented.

3. What Constitutes "Reckless Disregard"?

Coston v. City of Buffalo, 162 A.D.3d 1492, 77 N.Y.S.3d 817 (4th Dep't 2018). Plaintiff injured when his vehicle collided with a police vehicle. Reckless disregard standard of care was held applicable where officer was responding to a dispatch call in an authorized emergency vehicle and police vehicle was exempt from the requirement that the vehicle's emergency lights or siren must be activated. Additionally, fact that police officer did not slow down prior to running a stop sign and colliding with plaintiff's vehicle did not render officer's conduct unprivileged as a matter of law. Court found triable issues of fact whether officer acted with reckless disregard for the safety of others.

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

1. What is "Actually Engaged" in Protected Work?

Zanghi v Doerfler, 158 A.D.3d 1275, 70 N.Y.S.3d 716 (4th Dep't 2018). A dump truck owned by defendant Town rear-ended plaintiffs' vehicle while they were stopped at an intersection. Defendants moved for summary judgment dismissing the complaint on the ground that the "reckless disregard" standard of care applied pursuant to Vehicle and Traffic Law § 1103(b). Plaintiffs cross-moved for partial summary judgment on negligence, contending that the reckless disregard standard of care was not applicable to this case, and that the rear-end collision established defendants' negligence as a matter of law. Here the Court rejected defendant's argument that it was "actually engaged in work on a highway" at the time of the collision. Instead, the driver was traveling between work sites and the dump truck was empty. He was not plowing, salting, sanding or hauling snow. The Court also rejected defendants' contention that the court erred in granting plaintiffs' cross motion on liability. Defendant failed to state a reasonable non-negligent explanation for the rear-end collision.

2. What Constitutes Reckless Disregard?

Freitag v Village of Potsdam, 155 A.D.3d 1227, 64 N.Y.S.3d 396 (3rd Dep't 2017). Pedestrian who was struck and run over at night in a municipal parking lot by front-end loader operated by a Village employee heavy equipment operator. Defendants moved for summary judgment dismissing the complaint based on Vehicle and Traffic Law § 1103(b). One issue here was whether "motor vehicles and other equipment" under § 1103 includes "front-end loaders". Defendant easily won that argument. Next, plaintiff argued that the municipal parking lot where the accident occurred did not constitute a "highway" as intended by the Statute. The Court here disagreed with plaintiff. The parking lot was owned by the Village and was open and accessible from various entrances adjacent to public roadways. Although parking there was prohibited between the hours of 2:00 a.m and 6:00 a.m., there was no restriction on driving through the lot during those hours. Accordingly, because the lot was publicly maintained and the traveling public had a general right of passage through it at the time the accident occurred, it constituted a "highway" within the meaning of the Vehicle and Traffic Law. Plaintiff did win one argument, though. Plaintiff contended that a question of fact existed with respect to whether defendants' conduct constituted "reckless disregard for the safety of others". In this regard, defendants submitted, among other things, the deposition testimony of the the operator of the vehicle, who testified he had vast experience operating it, and had just finished unloading a pile of debris into a dump truck, when he put the loader in reverse, looked over his shoulder, and noted the presence of a garbage truck down the lot. He then began to back up and then halted when he heard hollering. Jumping from the loader, he found plaintiff lying on the pavement next to it. Defendant also submitted the affidavit of an expert who testified that the proper standard of care for work being performed in a parking was to ensure that the work site and work activities were visible to anyone in the vicinity of the parking lot (which they were) and concluded that no cones, barricades or other traffic control devices were necessary under the circumstances inasmuch as the functioning safety devices installed on the loader were sufficient to ensure safety under the circumstances. In opposition to the motion, plaintiff submitted the affidavit of an expert who opined that the machine operator's conduct grossly deviated from fundamental safety standards and rose to the requisite level of recklessness. The Appellate Division agreed with plaintiff that defendants had failed to establish on their summary judgment motion that their conduct did not rise to the level of reckless disregard for the safety of others. The Village had a safety zone policy in place that called for the establishment of work zones when heavy machinery was being operated in parking lots during the daytime and chose not to implement it during nighttime operations. The testimony indicated that a flagperson would have been helpful and may have been able to stop plaintiff before she crossed behind the loader. Defendants thus failed to establish their entitlement to summary judgment as a matter of law.

X. SCHOOL LIABILITY

A. Negligent Hiring or Retention

McBride v. City of New York, 160 A.D.3d 414, 70 N.Y.S.3d 836 (1st Dep't 2018) (Much of this had to be culled from the lower court's decision). Plaintiff's infant, a 14 year old child claimed to have been sexually assaulted by a handyman at defendant's school and sued for negligent hiring and retention. Court held that Plaintiffs failed to raise an issue of fact as to whether defendants should have had specific knowledge or notice of the handyman's propensity for sexual misconduct so that his sexual misconduct with the infant plaintiff could reasonably have been anticipated. The Court noted that until the handyman's arrest, defendants had received no complaints about him, other than that of alcohol abuse, for which he was terminated (three months before plaintiffs served their notice of claim in the instant matter). The Court held that the complaints about alcohol abuse did not constitute notice of a propensity for sexual misconduct on handyman's part. The Court further held that a propensity for sexual misconduct was not reasonably inferred from evidence that the infant plaintiff, a former student, was seen on school grounds by school personnel, that she once asked a security guard if she could see the handyman and ran away when the guard questioned her, or that the school principal may have told investigators after the handyman's arrest that the handyman had said "a girl like[d] him."

B. Student on Student Assaults

K.J. v City of New York, 156 A.D.3d 611, 65 N.Y.S.3d 522 (2nd Dep't 2017). 14–year–old student was assaulted by four fellow students in a stairwell leading from the cafeteria. In support of their motion, the defendants relied upon the plaintiffs' 50–h testimony and the deposition testimony of a school safety officer. The infant plaintiff testified that while he was in the cafeteria during the lunch period, one of the assailants threw an object at him. The infant plaintiff went over to the assailants' table, and one of the assailants repeatedly challenged him to a fight. The infant plaintiff declined the challenges to fight and returned to his table without reporting the incident to any school personnel. The infant plaintiff then observed the assailants exit the cafeteria and one of the assailants walk toward the stairwell. At the end of the lunch period, the infant plaintiff exited the cafeteria doors to the stairwell in order to go to his next class, which was located up the stairs. The four assailants blocked the infant plaintiff's access to the stairs and proceeded to punch and kick him. The infant plaintiff estimated that he was punched and kicked for 25 seconds. After the assault, the infant plaintiff fled the stairwell back into the cafeteria where he found a dean who took him to the nurse's office. There were no school safety officers, school personnel, or security cameras in the subject stairwell at the time of the incident. The defendants' submissions failed to eliminate all triable issues of fact as to whether the DOE had actual or constructive notice of the fellow students' potential for causing harm, and whether, under the circumstances, the DOE provided adequate supervision at the end of the lunch period in the area where the assault occurred. The defendants failed to proffer any evidence demonstrating that the DOE lacked actual or constructive notice of any prior violent behavior by any of the infant plaintiff's assailants. Moreover, given the witnesses' testimony regarding the disciplinary history of one of the infant plaintiff's assailants, there were triable issues of fact as to whether the DOE had specific knowledge of that student's dangerous propensities. The defendants failed to proffer sufficient evidence demonstrating the general security measures at the school, including the number of school safety officers on duty, where the school safety officers were assigned in the vicinity of the cafeteria and stairwell, and the frequency of violence in the hallways and stairwells between class periods and after lunch. Defendants also failed to eliminate triable issues of fact as to whether inadequate security was a proximate cause of the infant plaintiff's injuries.

Hale v. Holley Central School District, 159 A.D.3d 1509, 72 N.Y.S.3d 700 (4th Dep't 2018). Plaintiff's son was injured when an 11th-grade classmate unexpectedly walked up behind him before gym class and put him in a choke hold, causing him to lose consciousness and fall face-first against the floor. The Court reversed the lower court's denial of summary judgment noting that defendant met its initial burden on its motion by establishing that it did not have "sufficiently specific knowledge or notice of the dangerous conduct which caused injury" such that the classmate's acts "could reasonably have been anticipated." The deposition testimony of plaintiff's son and the classmate, established that there were no prior incidents and no history of any animosity between the two students. **Although the classmate had an extensive**

disciplinary history, the majority of the incidents involved insubordinate and disruptive behavior, and the instances of violent and endangering conduct occurred when the classmate was much younger with his last citation for violent conduct occurring three years prior to the subject incident when the classmate was in 11th grade. In addition, a single, "dissimilar" previous incident that occurred in March 2012 (one month prior) in which two different students engaged in consensual choking iwass insufficient to raise an issue of fact whether the classmate's nonconsensual, unexpected choking of plaintiff's son in gym class could reasonably have been anticipated. The Court also held that the court below erred in determining that there is an issue of fact precluding summary judgment based upon the mixed grade levels in the gym class and the size differences between plaintiff's son and the classmate. Despite the mixed grade levels and the corresponding differences in age and physical characteristics of the students, the record establishes that there were no problems at all in that gym class before the subject incident.

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

Hanson v Sewanhaka Cent. High Sch. Dist., 155 A.D.3d 702, 64 N.Y.S.3d 303 (2nd Dep't 2017). Student who was injured during gym basketball game when he was kicked in the leg by another student brought action against other student and school district, alleging negligence. Defendants established plaintiff voluntarily engaged in the activity of basketball and was aware of the risks inherent in the activity. His testimony that the other boy had intentionally kicked him did not raise a triable issue of fact as to the applicability of the primary assumption of risk doctrine. The plaintiff had not asserted a cause of action for an intentional tort, and neither the complaint nor the bills of particulars alleged intentional conduct. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars". Also he did not raise a triable issue of fact as to the application of the "inherent compulsion" doctrine, which "provides that the defense of assumption of the risk is not a shield from liability, even where the injured party acted despite obvious and evident risks, when the element of voluntariness is overcome by the compulsion of a superior". The plaintiff testified at his deposition that he *chose* to play basketball from a number of options.

Smero v. City of Saratoga Springs, 160 A.D.3d 1169, 75 N.Y.S.3d 120 (3rd Dep't 2018). Plaintiffs' infant was struck by an errant hockey puck that left the ice while she was spectating a youth hockey practice at Defendant's ice rink. Plaintiff claimed defendant was negligent by failing to install proper safety netting or barriers in the area where the child was injured, to construct or maintain the rink in a safe manner, and to supervise, control and maintain the activities occurring on the ice. Defendant claimed the plaintiff's infant assumed the risk. At the time of the incident, two separate hockey practices were ongoing, and, to accommodate this, the hockey goals were set up in a cross-rink fashion to allow both practices to use the hockey rink at the same time. Thus, the goals were repositioned across the width of the ice rink instead of at the ends of the rink where they are normally situated. In support of their motion, defendant established that the Rink was entirely surrounded by 4–foot 7–inch dasher boards in addition to plexiglass panels atop the dasher boards. On the sides of the rink, lower three-foot plexiglass panels are atop the dasher boards, and higher six-foot plexiglass panels are atop the dasher boards at the ends of the rink where the hockey goals are normally positioned. In opposition to defendants' motion for summary judgment, plaintiffs' expert, an engineer with extensive experience in ice rink design, construction and management, attested that the barrier system at the Rink failed to comply with industry standards utilized to protect spectators and nonparticipants. In particular, placement of the hockey goals in a cross-ice fashion on the sides of the rink and "directly in front of an area of the rink with a significant gap in the protective screening created the significant likelihood that a puck traveling at high velocity would leave the playing surface, placing spectators ... in danger of injury." The Court held that Plaintiff's expert's affidavit raised a triable issue of fact as to whether defendants satisfied their duty of care owed to the child walking down the ramp behind the repositioned goal. Summary Judgment denied.

D. **Negligent Supervision**

Boland v. North Bellmore Union Free School District, 2018 WL 3748326 (2nd Dep't 2018). Infant plaintiff injured when she fell from an apparatus in the defendant's school playground during recess. Defendant moved for summary judgment dismissing the portion of the complaint which alleged negligent training and supervision. The defendant school submitted evidence demonstrating that it provided adequate training of its staff and playground supervision, and that the level of training or supervision was not a proximate cause of the accident. In opposition, the plaintiff failed to raise a triable issue of fact. Defendant also demonstrated that it adequately maintained the playground and that it did not create an unsafe or defective condition. In opposition, the plaintiff's expert opined that the ground cover beneath the apparatus from which the plaintiff fell was inherently dangerous as installed and/or maintained, because it did not meet American Society of Testing Material (ASTM) standards or standards established by the Consumer Product Safety Commission (CPSC) These standards, however, are guidelines and not mandatory, and are insufficient to raise a triable issue of fact regarding negligent installation or maintenance. Summary Judgment granted to defendant.

RT v. Three Village Central School District, 153 A.D.3d 747 (2nd Dep't 2017). Classmate of infant plaintiff grabbed him by the back of his head and pushed his face into a table at which they were working during class. Defendant failed to demonstrate, prima facie, that the classmate's grabbing of the infant plaintiff's head and pushing it down into the table was not foreseeable or that the defendant's alleged **negligent supervision** was not a proximate cause of the infant plaintiff's injuries. Record demonstrated issues of fact as to whether defendant had knowledge of the offending classmate's dangerous propensities due to his involvement in other altercations with classmates in the recent past. As to proximate cause, the defendant did not demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously "that even the most intense supervision could not have prevented it". Motion denied.

Ramirez v. Brentwood Union Free School District, 2018 WL 3862948 (2nd Dep't 2018). Third-grade student was leaving school at dismissal time when another student ran up behind her and pushed her while she was walking in the hallway of the school. The District established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent supervision of the plaintiff's daughter by submitting evidence demonstrating that it did not have actual or constructive notice of the dangerous conduct that caused the injury, and that the other student's act of running up behind the daughter and pushing her as she was walking down the hallway at dismissal time was impulsive and could not have been anticipated In opposition, the plaintiff failed to raise a triable issue of fact. The District also established its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging negligent hiring, training, and supervision of its employees. In opposition, the plaintiff failed to raise a triable issue of fact.

E. **Issues of Waiver**

Marc v Middle Country Ctr. Sch. Dist., 57 Misc.3d 1225 (Suffolk Co. Sup. Ct. 2017). Plaintiff was injured in a League flag football game, when he jumped to catch a pass and landed on a concealed sprinkler head. The game was being played on a field located at defendant's high school, operated by the defendant District. Prior to playing, plaintiff signed a **Waiver and Release of Liability.** The defendants contended that by signing the Release, the plaintiff effectively released the defendants from liability for any injuries plaintiff sustained during the game. Defendants moved to dismiss based on CPLR 3211(a)(1) arguing the release constituted the documentary evidence necessary. Plaintiff argued that the Release was void as against public policy pursuant to GOL § 5–326, and that defendant was barred from relying on the Release. To void a release of liability executed by a user of a recreational facility pursuant to GOL § 5–326, there must be an evidentiary showing that the individual paid a fee for use of the facility. Here, plaintiff's complaint was dismissed by virtue of the waiver he signed because he failed establish that he paid a fee for use of the facility.

F. School Bus Liability

V.E. v. Quality Transp. Corp., 59 Misc.3d 1227 (Sup. Ct. Kings Cty. 2018). Infant (6-year old) school bus passenger was struck by a car after being discharged from a bus. There was contradictory testimony as to whether the child's guardian was there to receive him when he was released from bus (as is required). After being released, the child walked around the back of the bus and stepped off the curb to cross the street. Defendant bus company contended that it breached no duty of care to the injured infant because the bus driver had its stop signs extended and red signal lights flashing when it stopped to discharge the injured infant to his guardian. It also contended guardian was there among 14 other adults. Court found issues of fact. A school bus driver allowing an unaccompanied six year old child into a public highway, street or private road with no adult to receive him would constitute a breach of a duty of due care to the child. The risk of a motor vehicle accident to a six year old child under these circumstances was foreseeable.

This conflicting testimony raised an issue of fact. Additionally VTL § 1174 provides that a school bus driver "shall instruct such passengers to cross in front of the bus and the driver thereof shall keep such school bus halted with red signal lights flashing until such passengers have reached the opposite side of such highway, street or private road." The driver's testimony established that he did not instruct the injured infant to cross in front of the bus. Summary Judgment was denied.

XI. CLAIMS BROUGHT BY ON-DUTY COPS AND FIREFIGHTERS (GOL 205-a and 205-e claims)

A. Need to Predicate on a Statute or Rule

Walsh v Michelson, 156 A.D.3d 449, 66 N.Y.S.3d 5 (1st Dep't 2017). Plaintiff firefighter was injured while attempting to fight a fire that had originated in defendant's apartment. Issues of fact exist as to whether defendant was negligent in leaving a warming tray/hot plate plugged into a timer, in the "on" position, when she left her apartment to go to a friend's home for dinner. Although the motion court correctly concluded that defendant's alleged negligence was not a proximate cause of plaintiff's injuries, General Municipal Law § 205–a imposes liability where there is a practical or reasonable connection between a statutory or code violation and the firefighter's injury or death. Plaintiff's expert fire investigator opined that, by leaving the apartment with the electrical heating devices on, defendant delayed the discovery of the fire and allowed it to grow and spread. Accordingly, there was a sufficient connection between defendant's alleged negligence and plaintiff's injury. Also, the New York City Fire Code (Administrative Code of City of NY tit 29, ch 2) § FC 305.4 was applicable to the facts of this case. That section is not limited to "combustible waste," but expressly includes "combustible material." Moreover, while combustible waste that has economic value to premises is considered combustible material, combustible material is not so limited, but is any material capable of combustion. The materials in defendant's kitchen were clearly combustible.

Viselli v Riverbay Corp., 155 A.D.3d 439, 63 N.Y.S.3d 240 (1st Dep't 2017). Plaintiff firefighter, while responding to a reported fire in defendant's residential apartment building, allegedly slipped, fell and was injured on an unknown "wet" substance upon the painted concrete stairs of an internal, common stairwell. Defendant established entitlement to summary judgment by demonstrating that the substance on which plaintiff slipped remained unidentified, its duration on the steps was undetermined, and the cement stairs on which it rested had been painted with a specified non-skid paint that possessed a measured slip-resistance coefficient of between 0.550 and 0.625. According to a submitted professional engineering publication, the above-noted slip-resistance coefficient afforded a standard, non-hazardous traction surface. Further, to the extent plaintiff alleged the subject staircase was unsafe and violated, inter alia, Multiple Dwelling Law (MDL) § 52(1), MDL § 78 and Administrative Code of City of N.Y. § 28–301.1 because it had only one handrail and the defendant owner otherwise failed to maintain the premises in a safe condition, defendant's submission of a certificate of occupancy which indicated that the building was in compliance with all applicable statutes, codes and ordinances shifted the burden to plaintiffs to offer evidence as might raise triable issues on the claims asserted. Plaintiffs' submissions, including an expert affidavit that afforded no

basis on which to find the expert possessed personal knowledge of the width of the subject staircase, or of the traction coefficient of the painted steps, and who offered no other competent, non-hearsay proof in support of his opinions, were insufficient to raise triable issues as to any of the claims asserted in the complaint.

Freder v. Costello Industries, Inc., 162 A.D.3d 984 (2nd Dep't 2018). Plaintiff New York State Police Trooper, was injured in the line of duty while responding to a vehicular accident. A pickup truck driven by defendant suddenly moved from the right lane of traffic into the left lane where the officer was operating his police vehicle at a high rate of speed. Defendant vehicle allegedly moved into the left lane to avoid striking a construction sign that was present in the right lane. Defendants moved for leave to amend their answer to add the affirmative defenses of the Emergency Doctrine and Seat Belt Defense. The Court held that the plaintiffs failed to show that adding these affirmative defenses lacked merit or would prejudice them, and affirmed the lower Courts granting of the motion. Plaintiff moved affirmatively for partial summary judgment on liability pursuant to GML § 205-e. The Court held that the plaintiffs were required to (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm and that the plaintiffs established this and thus their prima facie entitlement to judgment as a matter of law on their GML §205-e cause of action by demonstrating that defendant negligently violated, inter alia,VTL § 1128(a) , which prohibits drivers from making lane changes before they have ascertained that they can do so safely. However, in opposition, defendant established that a triable issue of fact exists as to whether Murphy operated his vehicle reasonably pursuant to the emergency doctrine, thereby precluding a grant of summary judgment to the plaintiffs on this cause of action.

B. Use of Labor Law § 27 as a Predicate

Sears v. City of New York, 160 A.D.3d 471, 76 N.Y.S.3d 2 (1st Dept. 2018). Plaintiff's decedent, a probationary firefighter, died due to dehydration while performing the Fire Academy's physically demanding Functional Skills Training (FST) exercise course, which was designed to simulate actual firefighting tasks under a controlled environment. Plaintiff was not entitled to recover under GML § 205–a, as the injuries sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (*Williams v. City of New York,* 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]). The Court noted that while the performance of the FST course was part of training, and not part of firefighting per se, the ability to perform it efficiently was a necessary and important part of the job, as it ensures that a firefighter could effectively perform the tasks during an actual fire. The risks of dehydration and other physiological conditions experienced during FST training are the same as those inherent in actual firefighting.

C. Need to Prove Negligence

Shea v New York City Economic Dev. Corp., 161 A.D.3d 803, 76 N.Y.S.3d 564 (2nd Dep't 2018). Plaintiff, in the course of his employment as a firefighter, fell and broke his ankle when his foot got caught in a gap between grates on a pier. The pier is owned by the City. The plaintiff alleged General Municipal Law § 205–a. General Municipal Law § 205–a(1) provides a right of action for firefighters who are injured "as a result of any neglect, omission, willful or culpable negligence" of a defendant "in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments." To make out a valid claim under General Municipal Law § 205–a and common law negligence against the City. The GML 205-a claim was predicated on Labor Law § 27–a(3)(a)(1), which provides that every employer shall furnish employment and a place of employment that

are "free from recognized hazards" that cause or are likely to cause death or serious physical harm to employees. Plaintiff's submissions in support of a motion for summary judgment failed to establish, prima facie, that the gap in the grates was a result of negligence by the City. Furthermore, plaintiff failed to establish, prima facie, that inoperable lights were a direct or indirect cause of his injuries. Defendant's motion also failed. There were triable issues of fact on both issues.

D. 205-e or 205-a Claim when employer provides 207-c benefits instead of Workers' Compensation.

Lockwood v. City of Yonkers, 57 Misc.3d 728, 60 N.Y.S.3d 798 (Sup. Ct. Westchester Cty., 2017) Firefighter was injured while participating in a training exercise for the Defendant City of Yonkers Fire Department. He was instructed to jump, head first, out of a second story window approximately ten to eleven feet off the ground while connected to a harness and while mats were available, they were not used to break plaintiff's fall. Plaintiff's employer gave plaintiff GOL § 207–a disability benefits, as opposed to workers' compensation. Recent Court of Appeals decision *Diegelman v. City of Buffalo*, 28 N.Y.3d 231, 43 N.Y.S.3d 803, 66 N.E.3d 673 (2016) held that the receipt of disability benefits pursuant to GOL 207–a does not preclude a claim against municipality pursuant to GML 205-e (for police officers). Plaintiff contends that the *Diegelman* ruling which interpreted GML 205-e (for police officers) should be extended to GML 205-a (for firefighters). The Court agreed. The Plaintiff argued that since this was a change in the law, he should be able to serve a late notice of claim premised upon this change. The Court noted that in determining whether to grant an application for leave to serve a late notice of claim, the court must consider (1) whether the respondent had actual knowledge of the essential facts constituting the claim within the time required for service of a timely notice of claim or a reasonable time thereafter, (2) whether the claimant had a reasonable excuse for failing to serve a timely notice of claim, and (3) whether the respondent would be substantially prejudiced in its defense on the merits if the application were to be granted. The plaintiff argued that the defendant had actual knowledge of the essential facts constituting the claim on the date of the accident. The Court found that the plaintiff's initial medical leave report together with the petitioner's application for disability benefits, filed within 90 days of the incident that states in detail how the accident occurred and that the safety line failed to catch him and did not stop him from hitting the ground and that there were two safety mats in place under the opening of the window where he dove out, provided the respondent with actual knowledge of the essential facts constituting the claim. The Court granted leave to file the late notice of claim notwithstanding a lack of a "reasonable excuse."

XII. FALSE ARREST, MALICIOUS PROSECUTION AND EXCESSIVE FORCE

Owen v. State of New York, 160 A.D.3d 1410, 72 N.Y.S.3d 905 (4th Dep't 2018). Claimant claims false imprisonment/arrest, malicious prosecution and negligent supervision and training after he was arrested by a New York State Trooper at a sobriety checkpoint for several minor traffic violations and on suspicion of DWI. A hospital blood draw taken two hours later revealed BAC of 0.00%. Claims for false imprisonment/arrest and malicious prosecution were properly dismissed because claimant did not establish that the State Trooper did not have probable cause to arrest him for DWI: The Trooper testified that he initially asked claimant to pull over because on of a missing registration sticker and to test claimant's window tint. The Trooper observed that claimant had bloodshot eyes, slurred speech, and a flushed face. Trooper also observed claimant with watery eyes and smelled alcohol and that claimant deliberately paused 3-4 seconds after each question he was asked and refused to make eye contact. Additionally claim for negligent supervision and training was also properly dismissed because such a claim does not lie where the employee is acting within the scope of his or her employment, thereby rendering the employer liable for damages caused by the employee's negligence under the [alternative] theory of respondeat superior.

Thompson v. City of New York, 159 A.D.3d 654, 70 N.Y.S.3d 830 (1st Dep't 2018). Plaintiff was unlawfully arrested and charged with criminal possession of a forged instrument in the third degree (Penal Law § 170.20) due to the erroneous conclusion that the temporary license plate on his vehicle was forged. Plaintiff cannot prevail on his false arrest, false imprisonment, and malicious prosecution claims because the police officer's observations, based on his training and experience with similar license plates, provided a

reasonable basis for him to conclude that plaintiff's temporary plate was forged, granting him probable cause to arrest plaintiff. The 42 USC § 1983 was dismissed because plaintiff failed to adequately allege that the challenged acts of the police were the result of an official municipal policy or custom a so called "Monell" claim. Negligent hiring, training, and supervision claim dismissed because the police were acting within the scope of their employment.

Fowler v. City of New York, 156 A.D.3d 512, 67 N.Y.S.3d 171 (1st Dep't 2017). Driver and passengers brought action against city and police officers, for false arrest, false imprisonment, malicious prosecution, excessive force, assault and battery, and claims under § 1983. There is no dispute that the vehicle being operated by plaintiff had illegal tint to its windows, making the initial stop legal The odor of marijuana emanating from the vehicle, in and of itself, provided probable cause to arrest plaintiffs and search the vehicle. The officers' observations of a marijuana cigarette in plain view provided independent probable cause to search the vehicle. Defendants' showing of probable cause defeats plaintiffs' claims of false arrest, false imprisonment, and malicious prosecution as well as the claims alleging assault and battery relating to the handcuffing of plaintiffs. Plaintiff's 42 USC § 1983 claims were also defeated because the allegations (attributable to the group of defendants) did not allege particular facts indicating that each of the individual defendants [were] personally involved in the deprivation of ... plaintiffs' constitutional rights, plaintiffs' allegations of joint and several liability are legally insufficient, as there is no vicarious liability between individual police officers in a section 1983 claim.

Harris v. City of New York, 153 A.D.3d 1333, 62 N.Y.S.3d 411 (2nd Dep't 2017). Occupants of home searched by police officers pursuant to search warrant brought § 1983 action against city, police department, and officers, alleging claims for excessive force, false arrest, false imprisonment, and assault and battery. The plaintiff claimed police officers used excessive force in the process of executing a "no-knock" search warrant at her home. The warrant indicated that there was probable cause to believe that weapons would be found at the home, based upon representations of a confidential informant to the police. The plaintiff and her two teenaged sons were handcuffed for approximately two hours while officers searched her home. The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment. The Second Department held that where a court issues a search warrant, there is a presumption of probable cause for the detention of the occupants of the premises to be searched, which the plaintiff has the burden of rebutting. Defendants submission of the court-issued search warrant established, prima facie, the existence of probable cause for the detention of the plaintiff and her children during the search of her home. In opposition, the plaintiff failed to raise a triable issue of fact as to whether she could rebut the presumption of probable cause that attaches to a court-issued search warrant. The assault and battery claims were also dismissed as a police officer executing a search warrant is privileged to use reasonable force to effectuate the detention of the occupants of the place to be searched. Finally, the 42 U.S.C. § 1983 violations were properly dismissed as plaintiff's conclusory assertions failed to raise a triable issue of fact as to whether the alleged unconstitutional actions resulted from a policy, regulation, or custom of the City. Case dismissed.

XIII. CLAIMS BY INMATES

A. Inmate on Inmate Assault – Must be Reasonably Foreseeable.

McAllister v. City of New York, 159 A.D.3d 887, 74 N.Y.S.3d 54 (2nd Dep't 2018). Plaintiff (former Riker's Island inmate) claims he was assaulted by another inmate in jail's gym, breaking his jaw. Plaintiff claimed defendants were negligent in failing to exercise appropriate supervision. Defendants moved for summary judgment. A municipality owes a duty of care to inmates in correctional facilities to safeguard them from attacks from other inmates, but the duty is limited to risks of harm that are reasonably foreseeable. The

defendants demonstrated that the assault upon the plaintiff was not reasonably foreseeable by demonstrating that the plaintiff's assailant was not a known gang member, had no prior incidents of fighting or aggressive behavior while at Rikers Island, and was not classified as high risk for fighting. Additionally, there was a correction officer present providing the proper level of supervision in accordance with the applicable standard of "active supervision" as defined in the State Commission of Correction Minimum Standards and Regulations for Management of County Jails and Penitentiaries (9 NYCRR 7003.2[c]; 7003.4[a]). Summary Judgment granted to defendant.

B. Inadequate Supervision

Iannelli v County of Nassau, 156 A.D.3d 767, 68 N.Y.S.3d 97 (2nd Dep't 2017). Arrestee and her husband brought § 1983 action and state-law claims for negligence, assault and battery, and loss of consortium against county and county police department, relating to arrestee's injuries from attempting suicide by jumping out of second-floor window at police station, and the medical care provided to arrestee after her suicide attempt. The County owes a duty of care to protect its prisoners, even from self-inflicted harm when the risk is foreseeable. Here the plaintiffs both testified that the injured plaintiff told a detective that she needed her prescription medication but the detective would not permit her to bring it to the station house. The injured plaintiff also testified she told the detectives that she suffered from claustrophobia and anxiety and had just gotten out of the hospital. During the 40–minute period she was in the small holding cell, she was crying and begging for someone to open the cell door. Someone unlocked the cell door. She was able to wiggle her hands out of the handcuffs and push the door open. She ran to an open window directly across from the cell door and jumped out. The injured plaintiff further testified that as she lay injured on the ground, some unidentified police officers kicked her in the back and accused her of trying to escape. The defendants' submissions failed to eliminate triable issues of fact as to whether the defendants knew or should have known that the injured plaintiff posed a risk of harm to herself and whether the defendants "failed to use adequate supervision to prevent that which was reasonably foreseeable". Moreover, the defendants' submissions failed to eliminate triable issues of fact as to whether they violated 42 USC § 1983 by depriving the injured plaintiff of her Fourteenth Amendment right to adequate medical care.

XIV MUNICIPAL BUS PASSENGER CASES

Cui Fang Li v New York City Tr., 155 A.D.3d 938, 63 N.Y.S.3d 894 (2nd Dep't 2017). Bus driver suddenly pulled away from the curb at a "very fast" speed, causing the plaintiff to lose her balance and fall. Defendants met their summary judgment burden by submitting transcripts of the plaintiff's General Municipal Law § 50–h hearing and deposition testimony, and bus camera video footage of the subject accident, which demonstrated that the movement of the bus was not "unusual or violent" or of a class different from "the jerks and jolts commonly experienced in city bus travel". In opposition, the plaintiff failed to raise a triable issue of fact. SJ granted to defendant.

Vanderhall v. MTA Bus Company, et al., 160 A.D.3d 542, 74 N.Y.S.3d 548 (1st Dept. 2018). Bus passenger brought sued bus company, for injuries sustained when bus driver suddenly stopped to avoid rear-end collision. First Department reversed lower court's dismissal where Defendants failed to establish prima facie that they are entitled to summary dismissal of the complaint on the basis of the emergency doctrine. While Defendants contend that the driver of the bus was not negligent in braking to a sudden, hard stop but reacted reasonably to the sudden stop of a car in front of the bus. However, the emergency doctrine is typically not available to the rear driver in a rear-end collision, who is responsible for maintaining a safe distance. The bus driver's affidavit demonstrates that he was confronted with a "common traffic occurrence" when the vehicle in front of the bus stopped short. A factfinder could reasonably conclude that the bus driver was negligent in failing to maintain a safe distance between the bus and the car in front of it (see Vehicle and Traffic Law § 1129[a]) and that his own conduct caused or contributed to the emergency situation.

Cangelosi v. New York City Transit Authority, 161 A.D.3d 503, 73 N.Y.S.3d 432 (1st Dep't 2018). Plaintiff bus passenger injured when driver stopped suddenly, causing her to fall. Defendant submitted evidence showing that the driver's sudden stop was precipitated by a pedestrian suddenly running in front of the bus. Court declined to entertain plaintiff's claim that her injuries were caused by insufficient handrails, since the allegations in the notice of claim were not sufficient to put defendant on notice of any such claim.

XV COURT OF CLAIMS

A. Late Notice of Claim

Barnes v. State, 161 A.D.3d 1325, 77 N.Y.S.3d 196 (3rd Dep't 2018). Claimant, state prison inmate, alleges retaliatory assault by corrections officers for filing grievences His notice of intention was late, (beyond 90 days (see Court of Claims Act § 10[3–b])). Claimant moved for permission to file a late claim pursuant to Court of Claims Act § 10(6) wherein alleging that state employees were interfering with his outgoing mail in attempts to prevent the instant litigation. The Court of Claims denied claimant's application on the grounds that he failed to proffer a reasonable excuse for the delay, that alternative remedies were still available to him and that his claim lacked the appearance of merit. Claimant appealed and the Third Department affirmed holding that the Court of Claims is vested with broad discretion to grant or deny a motion for permission to file a late claim following the consideration of the statutory of Court of Claims Act § 10(6). The Court further held that even if the majority of the statutory weigh in claimant's favor, if the excuse offered for the delay is inadequate and the proposed claim is of questionable merit The Court of Claims was within its discretion to deny the claim.

Casey v. New York State, 161 A.D.3d 720, 76 N.Y.S.3d 600 (2nd Dep't 2018). Motorcyclist was injured when his motorcycle skidded off the roadway and struck a guardrail on a State Parkway. The police accident report attributes no fault of the accident to the State. Claimant moved pursuant to Court of Claims Act § 10(6) for leave to file a late claim, alleging inter alia, negligence of state in allowing a dangerous and hazardous condition to exist on the roadway. Claim was to be filed a few months short of the three year statute of limitations, however, no notice of intention was filed. 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 factors are whether the delay in filing was excusable, the State had notice of the essential facts constituting the claim, the State had an opportunity to investigate the circumstances underlying the claim, the claim appears to be meritorious, the State is prejudiced, and the claimant has any other available remedy. The Second Department held that the claimant failed to demonstrate a reasonable excuse for the more than two-year and six-month delay in seeking leave to file a late claim noting that his hospitalization and rehabilitation accounted for only five months of the delay. While claimant asserts that the further delay was caused by his attorney's extensive investigation of this matter but the Court ruled that his attorney's failure to timely and properly investigate the claim, in effect, constitutes law office failure, which is not an acceptable excuse. The claimant failed to demonstrate that the State had notice of the essential facts constituting his claim that his injuries were caused by a defect in the roadway and the improper placement of the guardrail. As the police accident report did not connect the accident with any negligence on the part of the State, it was insufficient to provide the State with notice of the essential facts constituting the claim. Additionally, the Court held that the claimant failed to demonstrate that the State had an opportunity to investigate the road condition as it existed at the time of the accident, and acknowledged that no accident reconstruction was performed and failed to sustain his initial burden of demonstrating that the State would not be substantially prejudiced if the motion were granted more than two years and nine months after his accident, given the lack of timely notice of the claim, the lengthy delay in serving this motion, the transitory nature of the alleged roadway defect, and the admittedly changed condition of the roadway defect as well as failing to set forth a potentially meritorious cause of action.

Decker v. State of New York, 2018 WL 3863317 (2nd Dep't 2018). Claimant developed pressure sores and ulcers at defendant state hospital. The death certificate listed the causes of death as cardiopulmonary arrest and sepsis of unknown etiology. Claimants moved pursuant to Court of Claims Act § 10(6)for leave to file a late claim, inter alia, to recover damages for personal injuries, conscious pain and suffering, and mental anguish arising from medical malpractice in relation to, among other things, the treatment of the ulcers. 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 enumerated factors are whether the delay in filing was

excusable, the State of New York had notice of the essential facts constituting the claim, the State had an opportunity to investigate the circumstances underlying the claim, the claim appears to be meritorious, the State is prejudiced, and the claimant has any other available remedy. The claimants failed to demonstrate a reasonable excuse for the delay of more than one year and eight months in seeking leave to file a late claim. Although the claimants retained counsel 74 days after the claim accrued, their counsel's further delay in obtaining the medical records and an expert affidavit amounted to law office failure, which is not a reasonable excuse. Moreover, the claimants failed to demonstrate that the defendant had timely notice of the essential facts constituting their claim, inter alia, to recover damages for personal injuries, conscious pain and suffering, and mental anguish arising from medical malpractice and negligent hiring, supervision, and training, by virtue of SBUH's possession of the hospital records relating to the decedent's care. The records must evince that the medical staff, by its acts or omissions, inflicted any injury" on the claimants' decedent attributable to malpractice or negligence. These records did not. In addition, the claimants failed to demonstrate a potentially meritorious cause of action based on their allegations of medical malpractice, since they failed to provide an affidavit of merit from a physician. Further, as another factor in denying leave to file a late claim, we note that the claimants have another remedy available to them, as they commenced a related action against a defendant in the Supreme Court, Nassau County. Motion for leave to file late claim was properly granted.

B. Wrongful Death Claims Must Have Appointed Administrator or Executor Prior to Commencement

Kiesow v. State of New York, 161 A.D.3d 1060, 78 N.Y.S.3d 192 (2nd Dep't 2018). Claim for personal injuries and wrongful death on behalf of claimant's son. Defendant moved to dismiss. Court of Claims Act § 10(3) provides that a claim to recover damages for personal injuries caused by the negligence of a state employee must be filed within 90 days after the accrual of such claim, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the accrual of the claim Court of Claims Act § 10(2) provides that a wrongful death claim must be filed **within 90 days after the appointment of an executor or administrator** of a decedent, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the death of the decedent. In this case, neither the claim nor the notice of intention to file a claim was filed within 90 days after the accrual of the personal injury claim, and thus, the personal injury claim was not timely. **Moreover, since the claim was commenced *prior* to the claimant's appointment as administrator of her son's estate, she failed to comply with the requirements for commencing a wrongful death claim**. The failures to strictly comply with Court of Claims Act § 10(2) and (3) were jurisdictional defects compelling dismissal of the claim.

C. Medical Malpractice Claims and the Continuous Treatment Doctrine in Court of Claims Acts

Gasparro v. State of New York, 2018 WL 3383579 (3rd Dep't 2018). Claimant filed a notice of intention to file a medical malpractice claim alleging that defendant negligently failed to treat an infection in his left knee between July and August 2013 while he was incarcerated at State Correctional Facility, resulting in an amputation of his leg. Claimant further alleges that, after the surgery, he received continuous treatment from defendant's medical staff for pain associated with his amputated leg. Defendant moved for dismissal in that the claim was time barred. Claimant concedes that his claim accrued, at the latest, on August 12, 2013, and it is uncontroverted that the notice of intention to file a claim was not filed until more than 90 days thereafter. Accordingly, the claim is time-barred unless claimant can establish the applicability of the **continuous treatment doctrine**. Under this doctrine the time in which to bring a malpractice action is stayed'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint. Essential to the application of the continuous treatment doctrine, however, is a course of treatment established with respect to the condition that gives rise to the lawsuit. The Court held that here, the gravamen of the malpractice claim is not that certain negligent

acts or omissions occurred during a course of treatment for claimant's knee infection, but rather that defendant was negligent in failing to provide any medical treatment for the infection during July and August 2013 and that such omissions do not implicate the continuous treatment doctrine. The matter was dismissed.