MUNICIPAL LIABILITY

PRECEDENTS & STATUTES 2011

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

Cusumano v. City of New York, 15 N.Y.3d 319, 937 N.E.2d 74, 910 N.Y.S.2d 410 (2011). Firefighter who fell down flight of stairs in line of duty and sued building owner, contending that he had slipped on debris at the top of the stairs and, due to a poorly constructed handrail, was unable to grasp the handrail to prevent his fall. The case involved several provisions of the Code of the City of New York as predicates for the section 205–a claim. The majority of the Appellate Division panel had held that one of the sections plaintiff was relying on, section 27-375(f), did not apply to the underlying facts because the stairs did not constitute "interior stairs" as defined by the Administrative Code, and that Supreme Court improperly shifted the burden to the City of demonstrating the inapplicability of the section. Here, the Court of Appeals agreed with that portion of the ruling. A new trial was granted because the trial was tainted by testimony regarding Code section 27-375(f). Also, the majority and the dissent at the Appellate Division had parted company as to whether plaintiff presented sufficient evidence to establish that the City violated sections 27-127 and 27-128, with the majority concluding that he had and the dissent arguing that those sections did not provide a sufficient predicate for liability under GML 205-a. The Court of Appeals here declined the address the issue as there was no record evidence that the City contested plaintiffs' argument at trial that those sections provided an independent predicate. In a concurring opinion, Chief Judge Lippman would have held that section 27-127 was a proper predicate for plaintiff firefighter's recovery.

Groninger v. Village of Mamaroneck, 17 N.Y.3d 125, 950 N.E.2d 908 (2011). Slip and fall on ice in a parking lot owned and maintained by the Village, where issue on summary judgment motion was whether written notice requirement applied to municipal-owned parking lots. Plaintiff, relying on *Walker v. Town of Hempstead* (84 N.Y.2d 360 [1994]) (no prior written notice requirement for defect in paddleball court in the town's beach area, even though Town's prior written notice code purported to require prior written notice of defects in "beach area") argued that a publicly-owned parking lot does not fall within any of the six specifically enumerated locations in the written notice statutes, and as such is not subject to the written notice requirement. Court of Appeals rejects this argument, holding that "for nearly thirty years, the courts of this state have consistently found that a publicly-owned parking lot falls within the definition of a "highway" and therefore prior notice of defect is required". Court relied also on its prior case of *Woodson v. City of New York* (93 N.Y.2d 936 [1999]) in which it held that because a stairway "functionally fulfills the same purpose" as a standard sidewalk, save for the fact that the former is "vertical instead of horizontal", the prior written notice requirement applied to outdoor municipal stairways. Since here there was no prior written notice of the icy condition, summary judgment was granted to defendant. Chief Judge Lippman dissents, relying on *Walker,* and finding that "the intermediate appellate courts of this State have, in a handful of dubiously reasoned decisions perpetuated the pre- *Walker* notion that a parking lot is a kind of 'highway' as to which the prohibition of GML § 50–e (4) does not apply.

San Marco v. Village/Town of Mount Kisco, 16 N.Y.3d 111, 944 N.E.2d 1098, 919 N.Y.S.2d 459 (2011). Pedestrian slipped and fell on accumulation of black ice on the ace of a public

parking lot owned and maintained by village. The Village had treated the parking lot for ice conditions the day before. However, the Village did not employ a work crew on Saturdays and Sundays to monitor the parking lot for dangerous conditions. It was undisputed that in the interim between the Village's last inspection and salting of the lot and plaintiff's fall on Saturday morning, the air temperature had risen above freezing for approximately 19 hours and then dropped. Plaintiff alleged the patch of black ice was caused by the melting and refreezing of a pile of snow that the Village had plowed into a row of meters adjacent to the parking spaces. Plaintiff thus was arguing that defendant affirmatively created the hazard by its snow removal methods (leaving piles of snow that would re-melt and cause black ice.) On defendant's summary judgment motion, Supreme Court had found a question of fact as to whether the Village's snow removal procedure triggered an exception to the written notice statute, i.e., whether the Village had created the hazardous ice condition. The Appellate Division reversed and granted the Village summary judgment, concluding that the Court of Appeals' recent holdings in *Yarborough v. City of New York,* 10 N.Y.3d 726, 853 N.Y.S.2d 261, 882 N.E.2d 873 (2008) and *Oboler v. City of New York,* 8 N.Y.3d 888, 832 N.Y.S.2d 871, 864 N.E.2d 1270 (2007), which, in dealing with pothole cases, had held that the "affirmative negligence" exception to prior written notice statutes applies only where the action of the municipality "*immediately* results in the existence of a dangerous condition". The question then was whether this "immediacy" test extends to snow melting cases. The Second Department applied this test to the case, and found that the Village's action of snowplowing did not amount to "immediate creation" of the hazard that plaintiff allegedly encountered. Rather, the Court found, "the environmental factors of time and temperature fluctuations ... caused the allegedly hazardous condition". The Court of Appeals here reverses and denies defendant summary judgment. The Court concluded that the immediacy requirement for "pothole cases" should not be extended to cases involving hazards related to negligent snow removal. A municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.

Johnson v. City of New York, 15 N.Y.3d 676, 942 N.E.2d 219 (2010). Plaintiff and her infant daughter received minor bullet injuries from a police vs armed robber gunfight. She sued the City claiming the cops discharged their firearms in violation of department guidelines, specifically a Department Procedure titled "Deadly Physical Force", which sets forth that police officers shall "not use deadly physical force against another person unless they have probable cause to believe that they must protect themselves or another person present from imminent death or serious physical injury" and "police officers shall not discharge their weapons when doing so will unnecessarily endanger innocent persons." (Note: violation of such guidelines is often tantamount to violating a "ministerial" responsibility, which means plaintiff can hold defendant liable if plaintiff shows a "special relationship. Defendant can never be held liable for "discretionary" actions under the *McLean* case). The City moved for summary judgment on the ground that the officers exercised their professional judgment and acted reasonably in returning fire once fired upon. The Appellate Division, in a 3–2 decision, dismissed the complaint, holding that plaintiff failed to show that the officers violated any of the guidelines. The court pointed to the uncontradicted testimony of the officers that there were no pedestrians in sight as the officers "sought to protect themselves and their fellow officers by returning fire". It concluded that, absent any proof that there were pedestrians in view, the report from plaintiff's expert that there were questions of fact as to whether the officers violated police guidelines was without merit.

The dissenters, on the other hand, pointed to the deposition testimonies of officers, where they testified that they did not look for bystanders while they were shooting at the suspect, They opined that this raised an issue of fact as to whether those officers violated police guidelines "by failing to even ascertain whether innocent persons were unnecessarily endangered at the time they discharged their weapons". ***The Court of Appeals*** hear sides with the majority of the Appellate Division, holding that the professional judgment rule insulated the officers from liability because their conduct "involved the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions". The Court reiterated the *Haddock* rule that governmental immunity presupposes that the judgment and discretion are exercised in compliance with the municipality's procedures, because "the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion". The guideline here called for such judgment, i.e., the police must not discharge their firearms if doing so would "unnecessarily endanger innocent persons." It did not prohibit officers from discharging their weapons when innocent bystanders were present in every instance. Rather, the guideline granted officers the discretion to make a judgment call as to when, and under what circumstances, it was necessary to discharge their weapons. As such, defendants could not be held liable.

Kabir v. County of Monroe, 16 N.Y.3d 217, 945 N.E.2d 461, 920 N.Y.S.2d 268 (2011). The question for the Court of Appeals was whether defendant was to get the benefit of the "reckless disregard" standard where, while responding to a burglary call, the deputy sheriff rear-ended a stopped car after glancing down at his GPS. The Court of Appeals affirms the Fourth Department's re-reading of V&T Law 1104, holding that the "reckless disregard" standard only applies when an emergency responder is engaged in one of the four categories of privileged driving conduct set forth in V&T Law 1104(b), to wit:"1. Stopping, standing or parking where it is illegal to do so; 2. Proceeding past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation; 3 Exceeding the maximum speed limits so long as doing so does not endanger life or property; 4 Disregarding regulations governing directions of movement or turning.

Smith v Sherwood, 16 N.Y.3d 130, 944 N.E.2d 637 (2011). Student's father brought action against vehicle driver, city, school district and its board of education, regional transportation authority ("Centro"), and bus driver, for injuries suffered by a private school student when he was struck by a vehicle while crossing the street after he was dropped off on the wrong side of the street by a bus. The bus company, a regional transportation authority for the Syracuse area known as "Centro", had contracted with the Syracuse City School District to provide students in the District with bus transportation to and from various schools. The child did not get off when the bus passed his stop, but got off on the way back, on the other side of the street. Thus he had to cross the street after being let off, something he did not usually do. He started to cross, but was struck, apparently because the bus blocked his view of oncoming traffic. In allowing the negligence claim to proceed against Centro, the Appellate Division relied, in part, case law involving yellow school buses subject to the mandated use of specific safety equipment under V&T law 375(20). Such school buses are statutorily required to stop "with red signal lights flashing" until a passenger needing to cross a street does so (Vehicle and Traffic Law § 1174[b]). The Appellate division found a question of fact as to whether the bus driver should have made other vehicles stop while student crossed the street. The Court of Appeals here reverses, holding

that the driver did not have the legal authority (or the necessary safety equipment) to make other vehicles stop while the student crossed the street. It held that Centro satisfied its duty to the student by allowing him to exit the bus at a safe location, and that it did not have a special duty to make other vehicles stop while the student crossed the street.

Donald v. State, --- N.Y.3d ---, --- N.E.2d ----, 2011 WL 2471551 (2011). Claimants in four cases were convicted of crimes for which they received determinate sentences. A statute required that such a sentence include a period of post-release supervision (PRS), but in each claimant's case the sentencing judge failed to pronounce a PRS term. The sentencing judge pronounced only a term of imprisonment, not a term of PRS, a practice held to be improper in *People v. Sparber* (10 N.Y.3d 457 [2008]) and *Matter of Garner v. New York State Dept. of Correctional Servs*. (10 N.Y.3d 358 [2008]). Claimants were nevertheless subjected to PRS, and in three of the four cases were imprisoned for PRS violations. The claimants sought damages from the State of New York, asserting that they were wrongly made to undergo supervision and confinement. All claimants asserted, in substance, that they are entitled to damages from the State because DOCS, acting without court authority, administratively added PRS to their prison terms. The Court rejected all the claims. One of them was dismissed because in that case DOCS did not err; in entering a PRS term; DOCS was merely carrying out the mandate of the sentencing court, as recorded by the court clerk in a commitment sheet. The only error in that case was by the sentencing judge, who failed to pronounce the PRS term orally. Any claim against the State based on the judge's error would be barred by judicial immunity. In three of the claims, claimants sued only for for false imprisonment (also known as wrongful confinement), but "a detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction" and none of the claimants alleged a defect in the *process*. Furthermore, the State is immune from liability for the discretionary acts of its officials and DOCS's actions in recording PRS terms as part of claimants' sentences were *discretionary* in that sense. In each of these cases, DOCS was presented with a prisoner sentenced to a determinate prison term, for whom PRS was mandatory under State law. DOCS made the "reasoned judgment" that it should interpret their sentences as including PRS, though the sentences rendered by the courts did not mention it.

Goldenberg v. Westchester County Health Care Corp., 16 N.Y.3d 323, 946 N.E.2d 717, 921 N.Y.S.2d 619 (2011). Patient-plaintiff got an index number and used to apply for permission gto file a late notice of claim for medical mal-practice, which permission was granted. But then claimant served the notice of claim as well as a summons and complaint with the same index number, *never filing the summons and complaint*. The one–year–and–90–day statute of limitations had expired three weeks before defendant moved to dismiss the lawsuit as untimely. Plaintiff cross-moved for an order permitting him to file a summons and complaint nunc pro tunc with a new index number, relying on CPLR 2001 as amended in 2007 so as to allow courts to overlook defects in the filing process, including the failure to acquire or purchase an index number, so long as the applicable fees were eventually paid. But here CPLR 2001 would do plaintiff no good because he *failed to file the summons and complaint* within the SOL, under any index number at all, and thus his claims were time-barred.

II THE NOTICE OF CLAIM

A. WHEN IS NOTICE OF CLAIM REQUIRED?

1. Against NYCH

Potter v. Atarien, 31 Misc.3d 846, 918 N.Y.S.2d 869 (Queens Co. Sup. Ct. 2011). Section 8 tenant brought action against city housing authority after landlord allegedly refused to let her move into her subsidized apartment based on theories of breach of lease agreement, breach of contract, and other non-tort causes of action. Normally, a notice of claim is required only in tort actions. The issue was whether a notice of claim was required here, where suit was against the NYCHA. Court holds that one was required (and therefore dismissed the case). Court points out that GML 50-e , concerning the service of a notice of claim, applies generally "in any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation," and the plaintiff's second and fourth causes of action did not sound in tort. GML 50-e, however, is ***not the statute requiring the presentment of a claim to NYCHA***. While § 50–e refers generally to public corporations, not just municipal corporations, nonetheless it is not the statute which actually requires a notice of claim. It contemplates the existence of some other statute that will make a notice of claim a condition precedent to suit. If such a statute exists, then § 50–e provides the uniform rules for the notice of claim. PHL section 157(1) is the statute actually requiring the presentment of a claim to NYCHA before suit, and the statute expressly requires the presentment to be made "[i]n every action or special proceeding, for any cause whatsoever" (emphasis added). While it is true that in most cases that the notice of claim requirements of GML 50-e do not apply where the plaintiff primarily seeks equitable relief and only incidentally seeks monetary damages, PHL section 157(1), the statute that actually makes presentment of a claim to NYCHA a condition precedent to suit, applies, nevertheless, to "any cause whatsoever".

2. Against CUNY

McKie v. LaGuardia Community College/CUNY, 85 A.D.3d 453, 2011 WL 2184187 (1st Dep't 2011). In employment discrimination case, plaintiff contended that she was not required to serve a notice of claim. But Court held that, pursuant to the plain language of Education Law § 6224(1), which expressly incorporates the requirements of General Municipal Law §§ 50–e and 50–i, the requirement of filing a notice of claim within 90 days as a condition precedent to bringing suit against a community college of the City University of New York (CUNY) applies to *all* claims asserted against such community college, not just tort and wrongful death claims. The Court was without authority to extend the time to file a notice of claim beyond the statutory time limitation for the asserted claim.

3. When Suing County under County Law Section 52 and CPLR 9802

Mendik v. Incorporated Village of Lattingtown, 76 A.D.3d 616, 906 N.Y.S.2d 599 (2nd Dep't 2010). Property owners brought action against village and county to recover damages for negligence, trespass, and nuisance, based on defendants' allegedly negligent maintenance and ownership of a drainage system causing a brick wall on their property to collapse. They also sought an injunction compelling the defendants to repair, fix, and restore the wall at their sole cost and obligation. No notice of claim was served prior to suit. Case dismissed for failure to

comply with that condition precedent. Contrary to the plaintiffs' contention, a letter sent by one of the plaintiffs to the Village's Commissioner of Highways referring to “our recent conversations over the past few days” regarding the collapse of the wall did not constitute a “notice of claim” and defendants did not engage in conduct giving rise to an estoppel argument. Further, the cause of action for injunctive relief was also dismissed for failure to time serve a notice of claim. The notice of claim requirements in both County Law 52 and CPLR 9802 encompass causes of action for equitable relief.

4. When Suit Seeks Money Damages More So Than Equitable Relief

Way v. City of Beacon, 30 Misc.3d 1203, 2010 WL 5252845 (Dutchess Co. Sup. Ct. 2011). Where an action is brought against a municipality for both injunctive relief and money damages, the one-year ninety-day time constraint set forth in GML 50-I applies only if the primary relief requested is money damages. Whether the demand for damages is subordinate to injunctive relief is determined by considering the complaint in light of all its allegations and its full scope and purport. Here, the plaintiffs' action could not be said to primarily seek injunctive relief thereby exempting them from complying with the time limits set forth in GML 50-I.

Carafora v. Town of Newburgh, 83 A.D.3d 879, 920 N.Y.S.2d 788 (2nd Dep't 2011). Landowner brought action against town for damages to real and personal property caused by town's negligent failure to maintain sewer. Case dismissed for failure to serve a notice of claim and to sue within one year and ninety days. The allegations sounded in ***negligence*** and ***did not seek equitable relief*** by way of an injunction. Service of a timely notice of claim within 90 days after accrual of the claim is a condition precedent for commencing an action against a public corporation sounding in ***tort***.

Stone v. Town of Clarkstown, 82 A.D.3d 746, 918 N.Y.S.2d 167 (2nd Dep't 2011). According to the plaintiff property owners, Town drainage projects significantly increased the volume of water flowing underneath a bridge, causing the bridge to flood when there was any significant rainfall, damaging their property. The causes of action for trespass, nuisance, and unlawful taking were dismissed because they sounded in tort, and a notice of claim is required in tort cases against public corporations (except for demands for equitable relief). Since the notice of claim failed to specify that plaintiffs were seeking money damages for these causes of action, and failed to articulate a sufficient factual basis to support those claims, those claims were dismissed.

Rowe v. NYCPD, 85 A.D.3d 1001, 926 N.Y.S.2d 121 (2nd Dep't 2011). Court found that a notice of claim was required to be served upon the defendants to the extent the plaintiff asserted claims sounding in common-law tort. The Court rejected plaintiff’s contention that his claims were equitable in nature, as the plaintiff's principal objective was to recover money damages. The Supreme Court also properly rejected the plaintiff's contention that his claims arose from a “continuous wrong,” as the plaintiff did not predicate his claims on continuing unlawful acts but, rather, on the continuing effects of “earlier unlawful conduct”. But the Court threw plaintiffs a bone: (It was unwilling to determine at this pre-answer stage of the litigation that the plaintiff failed to assert claims alleging violations of federal civil and constitutional rights under color of state law, especially where, as here, the pleading was not being challenged for its sufficiency pursuant to CPLR 3211.

5. Not Required for Federal Claims Such As 42 USC § 1983

Burton v. Matteliano, 81 A.D.3d 1272, 916 N.Y.S.2d 438 (4th Dep't 2011). Former public employee brought action against employer, employer's medical director, and his former physician, seeking damages arising out of his discharge from employment with Niagara Frontier Transportation Authority (NFTA). The breach of contract and tort causes of action against NFTA were barred because plaintiff failed to file a notice of claim as required by Public Authorities Law § 1299–p(1) and (2), and the tort causes of action were time-barred pursuant to section 1299–p(2). Although plaintiff, in opposition to NFTA's motion, sought to amend his complaint to add a cause of action against NFTA pursuant to 42 USC § 1983, for which no notice of claim is required, Court held he was barred by the doctrine of res judicata from asserting such a cause of action inasmuch as the dismissal of his federal action "constituted an adjudication that the plaintiff has no [f]ederal claim."

B. SUFFICIENCY OF NOTICE OF CLAIM

1. Failure to Allege "Prior Written Notice" In Notice of Claim.

Cruzado v. City of New York, 80 A.D.3d 537, 915 N.Y.S.2d 548 (1st Dep't 2011). Infant plaintiff injured when his roller blades allegedly made contact with a steel beam separating bricks from asphalt pavement at a park entranceway moved for leave to amend the complaint so as to allege that the City had received prior written notice of the dangerous and defective condition in the form of a Big Apple Map. Defendant's argument that prior written notice was a new theory of liability not alleged in the notice of claim was rejected; plaintiff's notice of claim, their original complaint, and their bill of particulars consistently alleged "actual notice", the notice of claim was timely served, and the one-year 90-day SOL did not bar an amendment to the complaint.

Cruzado v. City of New York, 80 A.D.3d 537, 915 N.Y.S.2d 548 (1st Dep't 2011). The infant plaintiff's in-line skates allegedly made contact with a steel beam separating bricks from asphalt pavement at a park entranceway. Plaintiffs moved for leave to amend the complaint so as to allege that the City had received prior written notice of the dangerous and defective condition in the form of a Big Apple map. Defendants argued that prior written notice was a new theory of liability not alleged in the notice of claim. However, plaintiff's notice of claim, their original complaint, and their bill of particulars consistently alleged actual notice (although it dif not specifically allege prior written notice). Furthermore, there was no evidence that defendants would be prejudiced by the amendment.

2. Court Can Look at 50-H Hearing Testimony, Too.

Portillo v. New York City Transit Authority, 84 A.D.3d 535, 922 N.Y.S.2d 397(1st Dep't 2011). Plaintiff's leg got caught in gap between a subway car and station platform at the Union Square Station. Allegedly, the press of passengers exiting the car caused him to release his grip on the pole he had been holding, and be pushed out the door. Although plaintiff filed a timely notice of claim, defendant moved to dismiss the complaint on the ground, in part, that the notice of claim was defective for failing to specify the exact location of the accident. In considering the sufficiency of a notice of claim, a court is not confined to the notice of claim itself, but may also look to evidence adduced at a § 50–h hearing, and to such other evidence that is properly before

the court. Plaintiff reported his accident to defendant on the day it occurred, providing the train line that he was on, the station where the accident occurred, and the time at which the accident took place. He provided enough information for defendant to identify the train in which he was a passenger and to inspect the train on the same day as the accident. In addition, based on plaintiff's testimony at the § 50–h hearing, defendant was able to determine that plaintiff was riding in one of 3 cars out of 10 cars on that particular train. Even though the Notice of Claim itself was insufficient in detail, the additional information gathered at the 50-h was enough to permit a prompt meaningful investigation, and thus claim would not be dismissed.

Luke v. Metropolitan Transp. Authority, 82 A.D.3d 1055, 919 N.Y.S.2d 189 (2nd Dep't 2011). Passenger brought action against metropolitan transportation authority and city transit authority to recover for injuries he allegedly sustained while attempting to board bus. Although the notice of claim lacked some details, it was deemed sufficient, when coupled with plaintiff's 50-h testimony taken only a month after the notice of claim was served, to allow the municipality to investigate the accident.

3. Failure to Give Enough Information about Place or Time of Accident

Parker v. New York City Housing Authority, 81 A.D.3d 964, 916 N.Y.S.2d 841 (2nd Dep't 2011). The proposed notice of claim and the plaintiff's affidavit did not provide a sufficient description of the location of the accident to allow NYCHA to investigate the allegations, and plaintiff also failed to demonstrate that there would be no prejudice to NYCHA as a consequence of the delay caused by her failure to serve an adequate and timely notice of claim.

4. Can't Add New Theory of Liability into Complaint If Not Alleged in Notice of Claim

O'Connor v. Huntington U.F.S.D. --- N.Y.S.2d ----, 2011 WL 3505767 (2nd Dep't 2011). Although courts have not interpreted the statute to require that a claimant state a precise cause of action in a notice of claim, a party may not add a new theory of liability into the complaint which was not included in the notice of claim. Here, the defendants established entitlement to summary judgment dismissing the cause of action alleging negligent supervision by submitting proof that the notice of claim did not mention this theory.

C. PERMISSION TO LATE-SERVE THE NOTICE OF CLAIM

1. Oops! Served the Wrong Entity

Davis v. County of Westchester, 78 A.D.3d 698, 911 N.Y.S.2d 103 (2nd Dep't 2010) Plaintiff asserted that the bus driver negligently caused her to fall as she was exiting the bus by raising the wheelchair lift located at the center of the bus while she was in the process of stepping off the lift. A supervisor for a private company that operated the bus for the County of Westchester arrived at the scene while the plaintiff was awaiting medical attention. The supervisor proceeded to compile a "Confidential Supervisor Report" and an incident report, and assisted in obtaining medical attention for plaintiff. Under the erroneous belief that the bus was owned by the private company, plaintiff failed to serve the plaintiff with a notice of claim within 90 days of the incident. Upon learning of her mistake, plaintiff filed an order to show cause, requesting leave to

file a late notice of claim 52 days after the 90-day period had expired. The Supreme Court denied the application, but the Appellate Division reversed, because the report prepared by the private company documented the time and place of the accident, the number of the bus, and all other relevant information, AND had been directed to County Risk Management Services, LLC, and the County conceded it received the report.

2. Granting Leave to Late-Serve in Child Sexual Assault Cases

Mindy O. v. Binghamton City School Dist., 83 A.D.3d 1335, 921 N.Y.S.2d (3rd Dep't 2011). Parents of minor student sued school district alleging that, as result of its negligent supervision, their daughter was physically assaulted and forced or coerced into sexual activity by fellow students on school grounds on repeated occasions when she was attending sixth grade. Defendant rejected the notice of claim for, among other things, being untimely. Plaintiffs then sued, and defendant moved to dismiss the complaint for, among other things, failure to comply with the notice of claim provisions of GML §§ 50–e and 50–i. Plaintiffs cross-moved for leave to serve a late notice of claim. Motion denied and cross-motion to permit late service granted.

- As to whether a reasonable excuse existed: When plaintiffs first learned that the child had been sexually assaulted (after asking her about certain drawings they found in her room), they almost immediately served a notice of claim. A reasonable excuse exists for delay in filing a notice of claim where the nature and extent of a child's injuries are not immediately apparent.
- As to whether the notice of claim was even late: In the course of the investigation, police officers interviewed the child and several classmates who had allegedly engaged in sexual activity with her. The children gave detailed, consistent accounts of participating in sexual activity on school property, including less than 90 days before the notice of claim was served on defendant (the sexual activity had been on-going for about a year and a half). In addition to casting doubt on the lateness of the notice of claim at least as to some of the events, the police report provided defendant with actual knowledge of at least some of the facts constituting the claim approximately two months after the most recent assault occurred and, thus, "within a reasonable time" after the claim arose.
- As to whether defendant was prejudiced by any lateness: Defendant contended that the memories of the children involved in the incident were likely to have faded. However, this was not established since defendant had not interviewed the children. Further, the records of the police investigation indicated the children were able to remember the events in detail. Defendant could have, but did not

As to defendant's contention that no nexus was established between the delay in filing the notice of claim and the child's infancy, Court found that the child's initial reluctance to report or admit the alleged assaults was unrelated to her infancy. In any event, the absence of such a nexus was not fatal where, as here, defendant had actual notice of at least some of the pertinent facts and did not shown prejudice.

3. Permission to Late Serve Granted for Infant but Not Parent

Chirse ex rel. McGregor v. City School Dist. of Albany, 83 A.D.3d 1232, 920 N.Y.S.2d 841 (3rd Dep't 2011). Student was injured while descending a rope in gym class served a notice of claim, but stated the wrong date for her injury, and served the notice of claim late based on the misunderstanding of when the injury had happened. As it turns out, the true date of the injury

made the notice of claim 2 weeks late. Three years later, when claimant discovered the error, it moved to serve a late notice of claim. Motion for permission to late serve was granted since the School quickly learned of the probable actual date of the injury by reviewing plaintiff's class schedule and questioning her gym teacher. But Court declined to entertain the application insofar as it was made on behalf of plaintiff's parent because the application was well beyond the one year and 90–day statute of limitations (this sol was tolled for the infant, but not for the parent). The Court also declined to grant plaintiff's motion to add an additional claim asserting that the school nurse failed to timely attend to plaintiff's medical needs because "this request presents an entirely new theory that would require investigation by defendants [and] given the significant passage of time, the absence of compelling excuse and likely prejudice to defendants".

4. Most Important "Factor" For Court to Consider: Actual Knowledge

a. Actual Knowledge Generally

Shane v. Central New York Regional Transp.Authority, 79 A.D.3d 1820, 914 N.Y.S.2d 810 (4th Dep't 2010). Application to late-serve granted where plaintiff offered a reasonable excuse for the delay in serving a notice of claim (she was unaware of the severe or permanent nature of her injuries until after the statutory time period had elapsed), but more importantly, she established that defendants had actual knowledge of the motor vehicle accident at issue because defendants paid plaintiff's property damage claim. Two dissenters voted to disallow the late service of the notice of claim because the record demonstrated that plaintiff did not file her application for leave to late serve until far more than 90 days after she allegedly learned that she sustained a serious injury. In addition, although defendants knew of the accident and the property damage soon after the accident, there was no indication in the record that defendants had actual knowledge that plaintiff had been injured in the accident.

Mitchell v. City of New York, 77 A.D.3d 754, 908 N.Y.S.2d 603 (2nd Dep't 2010). Defendant did not gain, within 90 days or a reasonable time thereafter, knowledge of sufficient facts upon which the claim was based where the investigation performed by the NYPD revealed that the accident occurred when the plaintiff, who was operating his vehicle at a speed of about 100 miles per hour, lost control of the vehicle and broke through the guardrail along the Belt Parkway. The NYPD's investigation failed to suggest any connection between the happening of the accident and any alleged negligence by the City in the maintenance of the guardrail. Application to late-serve thus denied.

Iacone v. Town of Hempstead, 82 A.D.3d 888, 918 N.Y.S.2d 202 (2nd Dep't 2011). Plaintiff failed to demonstrate defendant obtained actual knowledge of the essential facts of the claim by virtue of prior complaints from residents to install a traffic signal light at the intersection where the accident occurred. There was no showing that defendants had actual timely knowledge of the occurrence of the accident, the identity of the claimants, and the nature of the claim, the cause of the accident, or of any connection between the infant claimant's injuries and any alleged negligence of the defendant. Also, the two-year delay in moving for leave to serve a late notice of claim prevented defendant from conducting a timely investigation into whether the alleged dangerous condition was a cause of the accident and from interviewing potential witnesses while their recollections were fresh.

Debose v. City of New York, 28 Misc.3d 1240, 2010 WL 3730107 (N.Y.City Civ.Ct. 2010). While aboard defendant's ferry, plaintiff's leg brushed against a protruding lock hinge of a chest positioned near the entry/exit door of the ferry. Plaintiff sustained a severe leg laceration that required treatment by the Staten Island Ferry Emergency Response Crew. Plaintiff gave the crew her personal information, including a copy of her driver's license, and the crew filled out an incident report. The Crew advised her that she needed stitches and called an ambulance. Plaintiff served a notice of claim with defendant 11 months after the accident, and defendant disallowed the claim due to plaintiff's tardy service. In her motion to late-serve, plaintiff alleged the City had timely notice of the facts constituting the claim from the information he had given the Emergency Response Crew. Court held that defendant did not have actual knowledge of the facts constituting the claim because, although the Crew knew plaintiff had been injured on the ferry, and treated her for the injury, plaintiff did not inform the crew of *how she sustained the injury*, or of *the protruding lock hinge of a chest* positioned near the entry/exit door of the ferry, or of the ferry's failure to position the hinge so that individuals would not inadvertently run into it. Thus, the City had no knowledge that it had done anything wrong to cause the injury. Contrary to plaintiff's argument, the City did not waive its right to bring a motion to dismiss for failure to file a notice of claim because it did not mention such argument as an affirmative defense in its answer. The City in under no obligation to apprise plaintiff that she had failed to file a timely notice of claim against it.

Carpenter v. N.Y. Advance Elec., Inc., 77 A.D.3d 1344, 908 N.Y.S.2d 297 (4th Dep't 2010). The affidavit of a representative of the defendant that no investigation was conducted into the cause of the accident until it received the late notice of claim was insufficient to defeat plaintiffs' motion to late serve where defendant had immediate knowledge of the accident and injury and could have investigated the cause at that time. In determining whether to grant an application for leave to serve a late notice of claim, the relevant inquiry is whether there was actual knowledge of the facts constituting the claim within a reasonable time after the underlying incident, not whether an investigation was conducted.

Bush v. City of New York, 76 A.D.3d 628, 906 N.Y.S.2d 597 (2nd Dep't 2010). The plaintiff-arrestee's notice of claim was timely with respect to the petitioner's malicious prosecution claim, but untimely with respect to his false arrest claim. He subsequently applied for leave to serve a late notice of claim with respect to his claimed false arrest. Motion denied. Plaintiff's claim that he was unaware of the notice of claim requirement did not constitute a reasonable excuse for his failure to serve a timely notice with respect to the false arrest claim. Moreover, he failed to establish that the City had actual knowledge of the essential facts constituting the false arrest claim within 90 days following its accrual or a reasonable time thereafter.

b. Actual Knowledge through Reports

Police Reports

Coplon v. Town of Eastchester, 82 A.D.3d 1095, 919 N.Y.S.2d 199 (2nd Dep't 2011). Representatives of the estate of a pedestrian who was allegedly injured when she slipped and fell on ice that was formed from water running out of a drain pipe onto a town's parking lot were granted leave to serve a late notice of claim where the Town had timely notice of the facts constituting the claim within 90 days after the incident through an incident report prepared by the

Town's Police Department on the date of the accident, which stated that the Town's Highway Department responded to correct the icy condition. There was no prejudice to the Town by the four-month delay in making this application. The condition of the drain pipe was nontransitory and uninfluenced by the delay.

School Nurse Reports

Werner v. Nyack Union Free School Dist.,76 A.D.3d 1026, 908 N.Y.S.2d 103 (2nd Dep't 2010) Parent sued school district after he slipped on spilled water on gymnasium floor. Plaintiff failed to establish that defendant acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time. Although a student incident report and a medical claim form were prepared by school officials immediately after the accident, those documents merely indicated that the infant was injured after he slipped on spilled water on the gymnasium floor but did not provide defendant with actual knowledge of the essential facts constituting the plaintiff's present claim that defendant caused the infant's injury by allowing the water to remain on the floor or that defendant was negligent in the ownership, operation, maintenance, management, control, supervision, construction, design, and repair of the premises.

Medical Records

Kaur v. New York City Health and Hospitals Corp., 82 A.D.3d 891, 918 N.Y.S.2d 545 (2nd Dep't 2011). Almost nine years after birth, plaintiff moved for leave to serve a late notice of claim on the hospitals. Plaintiff did not assert that defendants committed malpractice in their performance of the VBAC or the subsequent caesarian section; rather, she contended that the malpractice stemmed from the defendants' failure to obtain her informed consent to attempt a VBAC. Motion to late-served denied because plaintiff failed to demonstrate a reasonable excuse for the lengthy delay in commencing the proceeding or to demonstrate defendants had actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter. Although the hospital records clearly indicated that the infant sustained brain injuries as a result of the mother's ruptured uterus, the records did not evince that the medical staff failed to obtain the petitioner's informed consent for a VBAC, which is the only claim asserted by plaintiff, and therefore defendants did not have timely notice of the facts of the claim. In addition, defendants would be prejudiced if they were forced to investigate the plaintiff's allegations nine years later.

Perez ex rel. Torres v. New York City Health and Hospitals Corp., 81 A.D.3d 448, 915 N.Y.S.2d 562 (1st Dep't 2011). Motion to late-serve granted where hospital records provided "actual knowledge of the facts—as opposed to the legal theory—underlying the [malpractice] claim". Plaintiff submitted affirmations from two physicians establishing that the records, on their face, evinced defendant's failure to provide the infant's mother with proper prenatal and labor. In response, defendant did not submit any expert affirmations to challenge the conclusions of plaintiff's medical experts. Defendant's claim that it was substantially prejudiced because the resident obstetrician who delivered the baby was no longer in its employ was insufficient, since there is no assertion or showing that the obstetrician was actually unavailable.

Kelley v. New York City Health and Hospitals Corp. 76 A.D.3d 824, 907 N.Y.S.2d 11, 2010 (1st Dep't 2010). Plaintiff was seen at Harlem Hospital after being punched in the left eye. The hospital record indicated that he had swelling and bruising from above his left eye extending down to his cheek. He was released later that day after being directed to return if he experienced headaches, vomiting, trouble seeing or fever. He was directed to see his primary care physician within 5 days. But he didn't, and even though his eye sight was deteriorating in that eye over the ensuing months, he did not seek further medical treatment for more than one year, at which time a doctor advised him that he had a severe retinal detachment, which could not be corrected appropriately because of the failure to promptly treat the injury following the assault. More than 14 months after he was seen at Harlem Hospital, he sought leave to serve a late notice of claim, claiming an evaluation by an ophthalmologist should have been performed. But he did not support these assertions with an affidavit from a physician. Court held there was no excuse for the delay in serving the notice of claim where, if plaintiff had gotten timely medical treatement, he would have found out about the alleged medical negligence early on. Court also held that the medical records did not give the Hospital actual knowledge of the facts underlying the claim, since they did not indicate what, if anything, they had done wrong, nor that there was a problem. Plaintiff failed to identify anything in the records which would have alerted defendant as to any potential negligence on its part. Notably absent from the hospital records was any complaint by plaintiff that he was experiencing difficulty with his vision.

Kumar v. Westchester County Health Care Corp., 78 A.D.3d 1054, 912 N.Y.S.2d 88 (2nd Dep't 2010). Permission to late-serve granted where defendant had actual knowledge of the essential facts constituting the claim. It is not required that defendant have specific notice of the legal theory itself. Importantly, the medical records suggested injury attributable to malpractice, and thus defendant had actual notice of the facts underlying the claim within the 90-day period. There was no evidence that defendant would be prejudiced in the defense of this action if leave were granted to serve a late notice of claim. Although three of the doctors involved in the infant's care had left the employ of defendant, there was no indication in the record that they are actually unavailable.

Contreras v. 357 Dean Street Corp., 77 A.D.3d 604, 908 N.Y.S.2d 734 (2nd Dep't 2010). The continuous treatment doctrine could not be invoked to toll the 90-day period for serving a notice of claim. Permission to late-serve denied because plaintiffs failed to satisfactorily explain their lengthy delay in seeking leave to serve a late notice of claim and to show that the defendant hospital had actual notice of the essential facts underlying their claims within the requisite 90-day period, or within a reasonable time thereafter. Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on the plaintiff.

c. Reasonable Excuse Factor - If Excuse Is "Didn't Know I Was So Hurt", Prove It with Med Records

Cali v. City of Poughkeepsie, 84 A.D.3d 1229, 923 N.Y.S.2d 880 (2nd Dep't 2011). Plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The petitioner's excuse, improperly raised for the first time in a reply affirmation, that she only recently realized the severity of her injuries, was belied by the record. Plaintiff failed to offer any proof suggesting that the City of Poughkeepsie acquired actual knowledge of the essential

facts constituting the claim within the 90–day statutory period or within a reasonable time thereafter.

Werner v. Nyack Union Free School Dist.,76 A.D.3d 1026, 908 N.Y.S.2d 103 (2nd Dep't 2010) Parent sued school district after he slipped on spilled water on gymnasium floor. Plaintiff's excuses for the delay of more than eight months after the expiration of the 90-day period in seeking leave were not reasonable. First, plaintiff's ignorance of the notice of claim requirement was not an acceptable excuse. Furthermore, her conclusory assertions that she did not immediately appreciate the nature and severity of her infant's injury, and that she was caring for the infant, were unavailing without supporting medical evidence.

Hayes v. Delaware–Chenango–Madison–Otsego Bd. of Co-op. Educational Services, 79 A.D.3d 1405, 912 N.Y.S.2d 781 (3rd Dep't 2010). Roofer who had been injured while performing construction work at site owned by regional educational agency would be permitted to file late notice of claim, even though agency did not become aware of the accident until approximately six months after it occurred and three months after the period in which to file a notice of claim had elapsed, where roofer had undergone hospitalization, surgery, and physical therapy as a result of accident, and remained disabled, delay in filing was brief, and agency was not prejudiced by delay.

5. Tolling of SOL pending Application to Late-Serve

Ambrus v. City of New York, --- N.Y.S.2d ----, 2011 WL 2714224 (2nd Dep't 2011). In action against municipal defendants to recover for property damage, motion court at first declined to sign an order to show cause for leave to serve a late notice of claim on procedural grounds (the Court's rules required that this be done by notice of motion and plaintiff's counsel had instead done so by Order to Show Cause), but the plaintiff brought a subsequent application for the same relief following proper procedure, and permission was granted. Normally, CPLR 204(a) tolls the SOL from running from the date of the application for leave to late-serve until an Order granting permission goes into effect. The issue here was whether the period of time during the first, failed application tolled to SOL, or only the period of time during the second application tolled it. If the first application did not toll the SOL, then plaintiff's S&C was untimely filed. But if that first application did toll the SOL, then the S&C was timely filed. Motion Court counted both tolling periods, and thus denied defendant's motion to dismiss complaint on SOL grounds. Second Department affirms. Court reasoned that plaintiffs were effectively prohibited from properly commencing their action during the first 12–day period in which their initial application to proceed by order to show cause for leave to serve a late notice of claim was pending, as well as the period during which their second application for similar relief was pending, and thus they were entitled to a toll for both periods pursuant to CPLR 204(a). The Court distinguished the First Department's *Rieara v City of NY Dept of Parks & Recreation* case (156 AD2d 206) because the plaintiffs in that case plaintiffs did not make their second application for leave to serve a late notice of claim until the statute of limitations had already expired, and the primary focus of that decision was whether the second application should relate back to the plaintiffs' timely made initial application. The plaintiffs in *Rieara* were not merely seeking a toll for the period in which their first application was pending. Rather, they claimed entitlement to a toll

beginning from either the date their initial application was denied or the date the action was commenced, and extending until the second application was decided.

6. Moving to Late-Serve Just Before the SOL Expires: How To Handle the 30-Day Waiting Period and CPLR 205(a).

Shannon v. Westchester County Health Care Corp., 76 A.D.3d 680, 907 N.Y.S.2d 277 (2nd Dep't 2010). Patient at a county medical center, whose fetus was stillborn, brought a proceeding, just barely within one year and 90 days from the alleged malpractice, against, inter alia, the hospital and a county health care corporation seeking leave to late-serve a notice of claim and for leave to file a proposed summons and complaint nunc pro tunc. In her verified petition, the plaintiff asserted that she had a reasonable excuse for failing to timely serve the notice of claim in that she had mistakenly served a notice of claim upon Westchester County rather than on the Hospital because she believed that the County was responsible for the Hospital. In addition, the plaintiff argued that there was no prejudice as defendant possessed the medical records which provided actual notice of the underlying incident. Supreme Court denied the application to late-serve the notice of claim on the ground that it was "moot" because the petitioner could not ***timely*** commence the action while also giving the defendant the required **30-day period** to respond to the notice of claim. The Appellate Division modifies. The motion court properly denied that branch of the application which was for leave to file the proposed summons and complaint, nunc pro tunc, because the proposed complaint could not accurately allege that the notice of claim was served at least 30 days prior to the commencement of the action, as required by GML 50-i(1). However, the Court improperly failed to determine, on the merits, that branch of the application that was for leave to serve a late notice of claim. This was not rendered "moot". Plaintiff could commence the action without awaiting the required 30 days, allow the complaint to be dismissed for failure to comply with that condition precedent, and then re-file the summons & complaint pursuant to CPLR 205(a) (within 6 months of the dismissal). The failure to comply with the conditions precedent of GML 50-e i is a procedural rather than jurisdictional defect. Thus, although the failure to comply with the 30-day waiting period would render the complaint subject to dismissal, any such dismissal would be without prejudice to commence of a new action against the defendant within the 6-month time limit set forth in CPLR 205(a).

Billman v. Port Jervis School Dist., 84 A.D.3d 1367, 924 N.Y.S.2d 541 (2nd Dep't 2011). Fifteen year-old climbed onto school roof and fell through a skylight, causing her to sustain injuries that resulted in her death. The decedent's parents served a notice of claim soon thereafter, but before an administrator had been appointed for the estate. The notice of claim alleged that milk crates from the school cafeteria outside of the school created an attractive nuisance upon which students and other teenagers would climb to ascend to the roof so that they could sit or skateboard on the roof. After the administrator was appointed, plaintiffs sued for personal injuries and wrongful death. But ***the complaint was dismissed*** since the notice of claim was deemed a nullity in that it had been served before an administrator was appointed. Within 2 years of the incident, plaintiff brought an application for leave to serve a late notice of claim. The motion court granted permission to late-serve with respect to the claim alleging ***wrongful death***, but was denied it with respect to the claim for ***conscious pain and suffering*** because more than 1 year and 90 days had passed since the happening of the event, and the Court thought it without discretion to grant a motion to late-serve beyond the "statute of limitations". The

Appellate Division held that this was error because, pursuant to CPLR 205(a), plaintiff would have 6 months to recommence the dismissed action, and the complaint had been dismissed less than 6 months before plaintiff brought the motion seeking permission to late-serve the notice of claim.

Clark v. Roswell Park Cancer Institute Corp., 31 Misc.3d 578, 919 N.Y.S.2d 268 (Ct. Claims 2010). Pursuant to Public Authority Law 3567(1) plaintiff was required to comply with GML 50-e in the service of a notice of claim upon Roswell Park within 90 days of accrual. Patient sought leave to serve a late notice of claim upon defendant Roswell Park Cancer Institute and for the court to deem the notice of claim that he tendered with the motion to serve to satisfy the 30–day condition precedent set forth as a pleading requirement under Public Authority Law 3567(1). Defendant contended, *inter alia,* that plaintiff failed to properly serve the application to late-serve upon defendant. Although GML 50-e(a) sets forth specific provisions for the service of a notice of claim, including service by delivery "to an attorney regularly engaged in representing such public corporation," the statute is silent with respect to the *manner by which an application for leave to file a late notice of claim* is to be served. Since Roswell Park received actual knowledge of the facts of the claim within the 90-day period from the medical records, the motion to late-serve was granted, and further, the Court deemed the notice of claim served with the motion seeking permission to late-serve timely served nunc pro nunc, and thus counted the 30-day waiting period to have commenced at that time.

7. Moving to Late-Serve After the SOL Expires

Chauhan v. New York City Transit Authority, 78 A.D.3d 1176, 913 N.Y.S.2d 918 (2nd Dep't 2010). Although raised for the first time on appeal, the defendants' contention that the plaintiff's application to late-serve was made beyond the one year, 90-day, time limit for the commencement of an action was considered by the Court, and the lower court's granting of permission to late-serve was reversed. The record revealed that plaintiff clearly failed to serve a notice of claim within the requisite 90-day statutory period, and failed to make her application for leave to serve a late notice of claim within one year and 90 days of the accrual date of the claim.

Argudo v. New York City Health and Hospitals Corp., 81 A.D.3d 575, 916 N.Y.S.2d 143 (2nd Dep't 2011). Supreme Court granted plaintiff's motion to late-serve the notice of claim, and unequivocally directed the plaintiffs to serve a notice of claim on the NYCHHC within 30 days from the date of entry of that order. Plaintiff failed to do so, which plaintiff failed to do. Moreover, by the time the defendants moved to dismiss the complaint for the plaintiffs 'failure to serve a timely notice of claim", more than one year and 90 days had elapsed since the plaintiffs' claims accrued. Thus, the Court lacked authority to again grant leave to serve a late notice of claim or to deem the notice of claim served nunc pro tunc.

Lombardo v. Temple Beth–El of Rockaway Park, 31 Misc.3d 1219, 2011 WL 1598026 (Queens Co. Sup. Ct. 2011). Although the infant plaintiff's claims were not time-barred (thanks to the infancy tolling), the infancy tolling provision did not extend plaintiff's time to file a notice of claim, and since the notice of claim was served more than 90 days after the running of the clock had started, and no application to serve one late had been brought, the claim was dismissed.

Dorce v. United Rentals North America, Inc., 78 A.D.3d 1110, 915 N.Y.S.2d 79 (2nd Dep't 2010). It was uncontested that the plaintiffs failed to serve a notice of claim, and that no application was made for leave to serve a late notice of claim within the applicable statutory period. Contrary to the plaintiffs' assertion, there was no express agreement to waive the statutory notice of claim provision. Defendants were under no obligation to plead, as an affirmative defense, the plaintiffs' failure to comply with the statutory requirement, nor did defendant's participation in the litigation before bringing his motion to dismiss the complaint preclude him from seeking dismissal on this ground since the failure to serve a timely notice of claim may be raised any time prior to trial. Additionally, plaintiffs' equitable estoppel claim failed, since estoppel against a municipal defendant will lie only when the municipal defendant's conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party. Here, the plaintiffs failed to demonstrate that defendant engaged in any misleading conduct that would support a finding of equitable estoppel.

Nappi v. County of Suffolk, 79 A.D.3d 990, 914 N.Y.S.2d 247 (2nd Dep't 2010). Motion to late-serve denied where plaintiffs failed to serve a notice of claim within 90 days from the appointment of a representative of the decedent's estate, and plaintiffs were required to move within two years after the death of the decedent for leave to serve a late notice of claim with respect to the wrongful death. Since the plaintiffs failed to make a timely application for such relief, the court lacked the power to deem the late notice of claim on behalf of the estate with respect to the claim alleging wrongful death to be timely served, nunc pro tunc.

Kim L. v. Port Jervis City School Dist, 77 A.D.3d 627, 908 N.Y.S.2d 725 (2nd Dep't 2010). Application to late-serve granted as to infant child who was repeatedly sexually assaulted by other students at school where record demonstrated that defendant school received timely actual notice of the essential facts constituting the claim within the 90-day statutory period, or within a reasonable time, but denied as to parent in her individual capacity since the one year ninety-day SOL had expired. The infancy toll is personal to the infant and does not extend to a derivative cause of action.

Dier v. Suffolk County Water Authority, 84 A.D.3d 861, 923 N.Y.S.2d 847 (2nd Dep't 2011). Plaintiff failed to serve a notice of claim, and defendant then waited until after the SOL expired to move to dismiss for failure to serve a notice of claim. Plaintiff argued estoppel. Plaintiff failed demonstrates that the defendant engaged in any misleading conduct that would support a finding of equitable estoppel. The fact that the appellant conducted a 50-h hearing prior to making its motion to dismiss did not justify a finding of estoppel.

8. When Does 90-day period Accrue in Right of Sepulcher Cases?

Dixon v. City of New York, 76 A.D.3d 1043, 908 N.Y.S.2d 433 (2nd Dep't 2010). Plaintiff sought damages for the right of sepulcher and negligent infliction of emotional distress based on certain actions taken by personnel of the defendant Office of Chief Medical Examiner of the City of New York in connection with the autopsy of their deceased son. The plaintiffs contended, among other things, that their son's body was returned to them after the autopsy without the brain and certain other organs and/or body parts, a circumstance which the plaintiffs did not discover until their receipt of the autopsy report months after the autopsy and burial of the decedent. The claim

with respect to so much of the complaint as alleged a violation of the right of sepulcher and related claim for negligent infliction of emotional distress in this case did not arise, and the 90-day period did not commence to run, on the date of the autopsy. Rather, they accrued at the time the plaintiffs *became aware* of the defendants' actions and suffered mental anguish as a result. Accordingly, plaintiffs' notice of claim with respect to those portions of the complaint was timely served.

9. Permission to Late-Serve the Summons & Complaint??

Goldenberg v. Westchester County Health Care Corp., 16 N.Y.3d 323, 946 N.E.2d 717, 921 N.Y.S.2d 619 (2011). Patient-plaintiff got an index number and used to apply for permission gto file a late notice of claim for medical mal-practice, which permission was granted. But then claimant served the notice of claim as well as a summons and complaint with the same index number, *never filing the summons and complaint*. The one–year–and–90–day statute of limitations had expired three weeks before defendant moved to dismiss the lawsuit as untimely. Plaintiff cross-moved for an order permitting him to file a summons and complaint nunc pro tunc with a new index number, relying on CPLR 2001 as amended in 2007 so as to allow courts to overlook defects in the filing process, including the failure to acquire or purchase an index number, so long as the applicable fees were eventually paid. But here CPLR 2001 would do plaintiff no good because he *failed to file the summons and complaint* within the SOL, under any index number at all, and thus his claims were time-barred.

D. AMENDING THE NOTICE OF CLAIM

1. Usually, no "substantive" changes allowed

Scovazzo v. Town of Tonawanda. 83 A.D.3d 1600, 921 N.Y.S.2d 591 (4th Dep't 2011). Plaintiff tripped and fell on the cover of a shut-off valve for a water main, which was allegedly above the grade of a sidewalk in defendant town. The Town established its entitlement to judgment as a matter of law by submitting evidence in admissible form that prior written notice of the defective condition was not given to the Town Clerk or Town Superintendent of Highways, as required by the Town's code. In opposition, plaintiff failed to raise a triable issue of fact whether such prior written notice was given. Although plaintiff sought to demonstrate that the Town affirmatively created the hazard, plaintiff did not raise that theory of liability in her notice of claim, amended notice of claim or complaint. Thus, she was not permitted to raise it for the first time in opposition to defendant's motion for summary judgment.

Niewojt v. City of Middletown, 78 A.D.3d 948, 910 N.Y.S.2d 690 (2nd Dep't 2010). Plaintiff's motion for leave to amend the notice of claim to assert additional causes of action alleging violations of LL 200, 240 and 241(6) denied because the new theories of recovery contained in the proposed amended notice of claim would have substantially altered the nature of the claims. Amendments of a substantive nature are not within the purview of GML 50-e(6).

Pelaez v. City of New York, 79 A.D.3d 1115, 913 N.Y.S.2d 771 (2nd Dep't 2010). More than two years after the plaintiff's claim accrued, defendant moved to dismiss the complaint on the ground that the notice of claim did not comply with GML 50-e(2) in that it failed to set forth, with sufficient particularity, the place where the claim arose. Plaintiff cross-moved to amend the n/c,

but Court held plaintiff was not entitled to amend it since its incorrect description of the accident location prejudiced the city by depriving it of the opportunity to conduct the type of prompt investigation envisioned by the notice statute, the fact that the plaintiff ultimately provided the correct address approximately nine months after the accident did not mitigate the prejudice, and plaintiff's assertion that the accident scene was essentially unchanged since the date of the accident was not a satisfactory substitute for a meaningful investigation by the city. (*Notice how defendant waited for the sol to expire before moving so that it would be too late for plaintiff to cross-move to late-serve a new n/c*).

2. But Sometimes, Substantive Changes Allowed . . . .

Betette v. County of Monroe, 82 A.D.3d 1708 920 N.Y.S.2d 512 (4th Dep't 2011). Administrator of estate of wrongful death victim was allowed permission to amend the notice of claim (and complaint) to allege a new cause of action under Public Health Law § 2801–d. Plaintiff asserted a good faith basis for his initial failure to include the Public Health Law § 2801–d cause of action in the notice of claim, to wit, that prior to recent case law, the Court did not allow a plaintiff to assert both a cause of action for wrongful death and a cause of action under section 2801–d. While defendants were correct in that GML § 50–e(6) ordinarily is not applicable in an attempt to state a new theory of recovery, there are exceptions to that general rule. For example, to add a derivative cause of action for loss of consortium, or a claim for wrongful death where such claim results from the same facts as were alleged in the original notice of claim. One judge dissented, and would have denied the motion because GML § 50–e(6) applies only to a "mistake, omission, irregularity or defect made in good faith in the notice of claim" and because "amendments of a substantive nature are not within the purview of GML § 50–e(6)".

Lariviere v. New York City Transit Authority, 82 A.D.3d 1165, 920 N.Y.S.2d 231 (2nd Dep't 2011). Leave to amend notice of claim and complaint to assert a derivative cause of action to recover for loss of services on behalf of husband granted because they were based on the same facts which had already been included in the plaintiff's notice of claim and 50-h testimony, which gave defendant timely notice of the facts underlying the claim.

3. Non-Substantive Changes that Don't Prejudice Allowed . . .

Sanchez v. City of New York, --- N.Y.S.2d ----, 2011 WL 3505711 (2nd Dep't). Here, there was no indication that the typographical error in setting forth the accident date in the original notice of claim was made in bad faith. Moreover, the defendants did not demonstrate any actual prejudice as a result of the error. Defendant was not precluded from seeking to amend the notice of claim merely because the error in setting forth the accident date in the original notice of claim made it appear that the notice of claim was served beyond the 90–day statutory period. Motion for leave to serve an amended notice of claim granted.

III THE 50-H EXAMINATION – PLAINTIFF'S FAILURE TO COMPLY

Gravius v. County of Erie. 925 N.Y.S.2d 732, 2011 WL 2278985 (4th Dep't 2011). In response to a 50-h hearing notice, plaintiff's counsel indicated plaintiff was a resident of Florida and was uncertain whether she would be able to attend the 50-h examination on that date in the Notice.

Plaintiff's counsel also inquired whether the examination could be conducted by telephone. Defense counsel responded he would not conduct it by phone, and offered another date. Plaintiff's counsel then notified defense counsel for the first time that plaintiff was incarcerated in Florida and unable to attend the examination. Later, defendant requested an update on plaintiff's status and inquired whether the examination could be conducted by video conference if she was still incarcerated. Plaintiff failed to respond, but she filed the summons and complaint, and defendant moved to dismiss for failure to comply with defendant's demand for an oral examination pursuant to GML 50-h. The Majority of the Court concluded that "under the circumstances, plaintiff had the burden of rescheduling the examination ... and, because she failed to do so prior to commencing this action, the court properly dismissed it". The two-member Dissent found there were "exceptional circumstances" that excused plaintiff's compliance with the Statute in that plaintiff was preventing from attending a 50-h hearing because of her incarceration in Florida, and it could not have been conducted by video conference because the facility at which plaintiff was incarcerated did not have a video conference system. Even if plaintiff's attorney had provided a more expeditious response to defendant's inquiry as to whether the 50-h could have been conducted by video conference, there were no other options that could have been implemented to conduct the 50-h. Moreover, plaintiff was released from incarceration in Florida approximately three weeks before the expiration of the statute of limitations (*see* § 50–i[1]), she returned to New York, verified the complaint commencing, and attempted to reschedule the examination before the statute of limitations period expired.

Ross v. County of Suffolk, 84 A.D.3d 775, 922 N.Y.S.2d 784 (2nd Dep't 2011). Case dismissed for failure to comply with GML 50-h where incarcerated plaintiff was granted an adjournment of 50-h hearing but neither he nor his counsel confirmed the date as instructed by the defendants, nor did they take any steps to procure the plaintiff's attendance on the adjourned date, nor did they appear on the date. The plaintiff's subsequent commencement of the action without rescheduling the 50-h warranted dismissal.

Ward v. New York City Health & Hospitals Corp., 82 A.D.3d 471, 918 N.Y.S.2d 93 (1st Dep't 2011). Defendant obtained a default judgment dismissing the action after plaintiffs failed to comply with a 50-h notice after adjourning the hearing nine times. In seeking to vacate the dismissal, plaintiffs failed to demonstrate a meritorious defense to the default or the merits of their cause of action. There were, in addition to the 10 missed appointments for a GML 50-h hearing, and other things, three motions to file a late notice of claim. In the nearly 10 years since plaintiffs filed their late notice of claim, discovery has not even been commenced.

Designer Limousines, Inc. v. Town of North Hempstead, 32 Misc.3d 1212, 2011 WL 2652887 (N.Y.Sup.Ct. 2011). Defendant contended that the Plaintiff failed to comply with GML 50-h(5) in failing to appear for the hearing and requesting adjournments or postponements beyond the statutory time period. Plaintiff claimed that it was entitled to commence this action due to numerous agreements amongst the parties to adjourn the hearing. Plaintiff's arguments in opposition to the Defendant's motion to dismiss based upon his failure to appear for the municipal hearing were unavailing. The record established that a hearing was timely noticed, that it was adjourned multiple times at the Plaintiff's request, and that the Plaintiff served a summons and complaint upon the Defendant before the hearing was held. The plaintiff's excuses for delaying the hearing mandated by statute were insufficient to overcome the requirement.

IV POLICE OFFICER AND FIREFIGHTER CLAIMS

A. SECOND DEPARTMENT SPLITS WITH FOURTH AND FIRST ON ISSUE OF WHETHER WORKERS' COMPENSATION BARS RECOVERY AGAINST EMPLOYER WHEN GML 205-A AND 205-E ASSERTED.

Weiner v. City of New York, 84 A.D.3d 140, 922 N.Y.S.2d 160 (2nd Dep't 2011). The issue here was whether a New York City Emergency Medical Technician injured in the line of duty on municipal property because of alleged defects in those premises (a boardwalk) could maintain an action against his municipal employer under GML 205-a despite his eligibility for Workers' Compensation benefits. In determining this issue, the Court had to resolve the tension between Workers' Compensation Law 11, which provides that an employer's liability under the Workers' Compensation Law "shall be exclusive and in place of any other liability whatsoever," and GML 205-a(1), which provides firefighters a right of action "[i]n addition to any other right of action or recovery under any other provision of law." The City pleaded the WC bar, and moved to dismiss, but the lower court denied the motion relying on the only then-existing appellate authority on the issue, the Fourth Department's *Lo Tempio v City of Buffalo* case (6 A.D.3d 1197). In that case, the Fourth Department held that the plaintiff (an EMT employed by a fire department) was not barred by the Workers' Compensation Law from bringing an action against his municipal employer asserting liability under GML 205-a and common-law negligence. Similarly, the Appellate Division, First Department, has opined, in dictum, that the Workers' Compensation Law does not bar a claim against a government employer under GML 205-e, which is applicable to police officers (*see* Salvador–Pajaro v. Port Auth. of N.Y. & N.J., 52 A.D.3d 303, 860 N.Y.S.2d 47). The Court here sides with the workers' compensation law, in disagreement with the Fourth and First Departments. It found that giving effect to the Workers' Compensation Law exclusivity provision would make more sense than giving effect to the language of GML 205-a. Doing so would not significantly impinge on the more modest legislative goals embodied in GML 205-a and 205-e. Since the provisions of GML 205-a must yield to the exclusivity provisions of the Workers' Compensation Law, plaintiff's claim against the City defendants under GML 205-a was barred. The Court noted that this ruling has very limited effect on the rights of the New York City firefighters, who, unlike EMTs, are not covered by the Workers' Compensation Law in the first place, but by the more generous and non-exclusive provisions of the Administrative Code of the City of New York (*see* Administrative Code of City of N.Y. § 15–108.1). Nor would the holding affect the City's police officers, who likewise are not covered by the Workers' Compensation Law, but by the provisions of the Administrative Code (*see* Administrative Code of City of N.Y. § 14–122.1). Finally, the ruling does not affect the rights of firefighters and police officers outside the City who are not covered by their municipal employers under the Workers' Compensation Law and are instead entitled only to benefits under GML 207-a (firefighters) and 207-c (police) or some other disability provision. The Court also held that plaintiff's cause of action alleging common-law negligence against the City was also barred by the Workers' Compensation Law, rejecting plaintiff's contention that he was entitled to proceed against the City not in its status as his employer, but as the owner of the boardwalk. Defendants' motion to dismiss the complaint granted.

B. PRIOR WRITTEN NOTICE REQUIREMENT APPLIES TO GML 205-A AND 205-E CLAIMS

Politis v. Town of Islip, 82 A.D.3d 1191, 920 N.Y.S.2d 185 (2nd Dep't 2011). Police Officer who tripped and fell into a pothole while on duty sued town. Contrary to the plaintiff's contention, the Town's computer database recording of telephonic complaints concerning the Street did not constitute prior written notice so as to satisfy the requirements of the Town Law or the Town Code of the Town of Islip. Plaintiff also failed to show that either of the two exceptions to the prior written notice rule (affirmatively created or special use) applied. Moreover, contrary to the plaintiff's contention, he was required to comply with the prior written notice requirement to sustain his cause of action under GML 205-e.

Cross v. City of New York, 32 Misc.3d 1219, 2011 WL 2899426 (NY Sup 2011). Here, plaintiff's notice of claim provided the date, time, and place of his accident and specifies that his claims are for personal injury, medical expenses, and lost earnings, and defendant's negligence was identified in it as the cause of his injuries. Although neither GML § 205–e nor the Administrative Code were mentioned, his notice of claim was sufficient to permit defendant to investigate his claims. But the prior written notice requirement of applied to his claims under GML 205-e and since he failed to demonstrate that defendant had prior written notice, his claims under GML § 205–e were dismissed.

C. VIOLATION OF "WELL-DEVELOPED BODY OF LAW AND REGULATION" AS PREDICATE FOR GML 205-A OR 205-E CLAIM.

Vosilla v. City of New York, 77 A.D.3d 649, 909 N.Y.S.2d 462 (2nd Dep't 2010). Plaintiff firefighter alleged that the City of New York violated certain provisions of the New York City Fire Department All Unit Circulars, Incident Command System manual provisions, and internal rules concerning, inter alia, classification and inspection of buildings, and that such violations directly or indirectly caused the injuries he sustained in the line of duty. Such internal regulations, however, cannot serve as a predicate for liability under GML 205-a, since they are not part of a "well-developed body of law and regulation" imposing clear legal duties or mandating the performance or nonperformance of specific acts. Summary judgment to defendant.

Sebastiano v. New York City Transit Authority, 86 A.D.3d 432, 926 N.Y.S.2d 506 (1st Dep't 2011). Plaintiff police officer tripped on a stairway in a subway station. After trial, the jury returned a verdict in plaintiff's favor on her GML 205-e claim, finding that defendant failed to comply with Administrative Code of the City of New York §§ 27–127, 27–128 and 27–375, Building Code of New York State § 1003.3.6, and Property and Maintenance Code of New York State § 304.4, and that each noncompliance was a "direct or indirect cause" of plaintiff's injuries. The jury also found that while defendant was negligent, such common-law negligence was not a "substantial factor" in causing plaintiff's injuries. Although the record established that the subject station, built in 1915, was undergoing extensive renovation at the time of the accident, Court held that plaintiff failed to demonstrate that the nature and extent of the renovations subjected the station to the cited Code provision. New York City Administrative Code § 27–115 requires that an existing building comply with the requirements of the Code "[i]f the cost of making

alterations in any twelve-month period shall exceed sixty percent of the value of the building." Here, the renovations were not yet complete at the time of the accident and there was no evidence of the cost of the renovation or the value of the structure. Accordingly, the Court ordered an entry of judgment in defendant's favor.

Gammons v. City of New York, 30 Misc.3d 1230, 924 N.Y.S.2d 309 (N.Y. Sup.Ct. 2011). Plaintiff police officer was gathering and loading police department barriers that were used for the purpose of regulating traffic. While unloading barriers from a flatbed truck, plaintiff lost her balance and fell backward off the end of the truck. Plaintiff alleged that defendants violated GML 205-e by failing to comply with Labor Law 270-a (general requirement to provide a safe workplace). She also sued under GOL 11-106, i.e. common law negligence. As for the latter cause of action, the court found that plaintiff was engaged in an act in furtherance of a specific police function, which exposed her to a heightened risk of falling off the rear of the flatbed truck. Consequently, pursuant to the firefighter's rule, plaintiff could not recover damages for common-law negligence against employer or co-employee. As for the 205-e claim, the Court allowed it to proceed since plaintiff had adequately asserted a claim under Labor Law 27-a(3)(a)(1). There was a material and triable issue of fact as to whether the failure by defendants to provide plaintiff with a longer truck or railings on the rear of the flatbed of the truck were substantial factors in causing plaintiff's accident regardless of whether plaintiff was caused to move backward by the conduct of a coworker.

Monahan v. 102–116 Eighth Avenue Associates, L.P., 85 A.D.3d 879, 925 N.Y.S.2d 199 (2nd Dep't 2011). Defendant established its prima facie entitlement to judgment by demonstrating that it did not violate any relevant government provision. In response, plaintiffs failed to raise a triable issue of fact as to whether said defendant violated former sections 27–127 and 27–128 of the Administrative Code of the City of New York. There was no evidence that the dryer which caught fire was maintained in an unsafe manner. Accordingly, the alleged failure to supervise each dryer cannot serve as a basis for a cause of action under GML 205-a. Case dismissed.

Alexander v. City of New York, 82 A.D.3d 1022, 920 N.Y.S.2d 148 (2nd Dep't 2011). Former NYPD Detective accidentally shot himself in the knee in a precinct station house office and then sued the City pursuant to GML 205-e based on a claimed violation of Labor Law 27-a, which requires, among other things, that public employers furnish their employees with a place of employment free from hazards that are likely to cause death or serious physical harm. The incident happened when plaintiff leaned back in a swivel chair at an NYPD station house, in order to place a fellow officer's gun in his waistband. The chair collapsed backward, then came back to its normal position, but not before plaintiff accidently shot his own knee. The jury returned a verdict in favor of the plaintiff. The Court here sets aside this verdict because there was no valid line of reasoning which could have led to the conclusion that the claimed violation of Labor Law 27-a resulted from the defendant's "neglect, omission, willful or culpable negligence" (GML 205-e). There was no evidence showing that defendant had knowledge of any defects in the chair involved in the accident, and thus the case was legally insufficient to establish the defendant's culpability for the alleged violation of Labor Law 27-a and pursuant to GML 205-e.

Heim v. Trustees of Columbia University in City of New York, 81 A.D.3d 507, 917 N.Y.S.2d 159 (1st Dep't 2011). Other than their contention that a missing drain cover constituted a violation of

the Building Code, which it did not, plaintiffs pointed to no other statutory provisions which could serve as a predicate for their GML 205-e claim. As such, that claim was dismissed.

Cusumano v. City of New York, 15 N.Y.3d 319, 937 N.E.2d 74, 910 N.Y.S.2d 410 (2011). Firefighter who fell down flight of stairs in line of duty and sued building owner, contending that he had slipped on debris at the top of the stairs and, due to a poorly constructed handrail, was unable to grasp the handrail to prevent his fall. The case involved several provisions of the Code of the City of New York as predicates for the section 205–a claim. The majority of the Appellate Division panel had held that one of the sections plaintiff was relying on, section 27-375(f), did not apply to the underlying facts because the stairs did not constitute "interior stairs" as defined by the Administrative Code, and that Supreme Court improperly shifted the burden to the City of demonstrating the inapplicability of the section. Here, the Court of Appeals agreed with that portion of the ruling. A new trial was granted because the trial was tainted by testimony regarding Code section 27-375(f). Also, the majority and the dissent at the Appellate Division had parted company as to whether plaintiff presented sufficient evidence to establish that the City violated sections 27-127 and 27-128, with the majority concluding that he had and the dissent arguing that those sections did not provide a sufficient predicate for liability under GML 205-a. The Court of Appeals here declined the address the issue as there was no record evidence that the City contested plaintiffs' argument at trial that those sections provided an independent predicate. In a concurring opinion, Chief Judge Lippman would have held that section 27-127 was a proper predicate for plaintiff firefighter's recovery.

Fahey v. A.O. Smith Corp., 77 A.D.3d 612, 908 N.Y.S.2d 719 (2nd Dep't 2010). Injured firefighters and families of deceased firefighters sued the owner of a hardware store. The fire allegedly started when a non-party accidentally spilled a container of gasoline outside the store, the gasoline flowed under a door into the basement, and the vapors were allegedly ignited by the pilot light in the hot water heater. Several minutes later, after the firefighters had arrived, an explosion occurred, killing three firefighters and injuring several others. Plaintiffs sued, *inter alia,* under General Municipal Law § 205-a premised upon an alleged violation of the implied warranty of merchantability imposed by UCC 2-314. Court held that UCC 2-314 was not a proper predicate to support those claims. But there was a triable issue of fact with respect to the common law claims of design defect in the water heater.

Brady v. Village of Malverne, 76 A.D.3d 691, 907 N.Y.S.2d 68 (2nd Dep't 2010). This case involves the tension between GML 205-a, which provides that recovery pursuant to this Statute is "[i]n addition to any other right of action or recovery under any other provision of law", and Volunteer Firefighters' Benefit Law 19, which states that it is the "exclusive" remedy available to voluntary firefighters against their municipal "employer" (i.e., the fire company, department, district or municipality they were serving as a volunteer for). A volunteer firefighter's widow sued the village and fire department for whom the deceased firefighter was a volunteer to recover damages for wrongful death and personal injuries, alleging a GML 205-a cause of action. Plaintiff was working on top of the fire truck in the firehouse when a fellow volunteer firefighter, not realizing that the decedent was working on the top of the truck, began to drive the truck out of the fire house. The decedent was pinned between the top of the truck and either the ceiling or a ceiling beam, fell, and was killed. The motion court dismissed the claim on the grounds that GML 205-a was not applicable to a volunteer firefighter's line-of-duty injuries sustained *in a*

firehouse. The Appellate Division affirmed, but for a totally different reason. According to the Court, the claim was barred by Volunteer Firefighters' Benefit Law 19. (Volunteer Firefighter Benefits are similar to workers' compensation, but for volunteer firefighters, and section 19 is analogous to workers' compensation laws 11 and 29 in that it generally bars recovery against the volunteer's "employer"). The Court pointed out that VFBL 19 purports to be the exclusive remedy of an administrator of a volunteer firefighter's estate, a volunteer firefighter's spouse, "or anyone entitled to recover damages" on account of a line-of-duty injury sustained by a volunteer firefighter, *inter alia,* the political subdivision liable for the payment of such benefits. The Court held that the VFBL 19 exclusive-remedy bar applied despite plaintiff's argument that a GML 205-a claim is an exception to the general bar. Looking at the legislative history of both Statutes, the Court found that, although GML 205-a provides that recovery can be sought under said Statute "[i]n addition to any other right of action or recovery under any other provision of law", this does not include "in addition" to volunteer firefighter benefits, which remains the volunteer's exclusive remedy as against his "employer" and others as set forth in VFBL 19.

D. "DIRECTLY OR INDIRECTLY CAUSE . . ."

Cotter v. Pal & Lee Inc., --- N.Y.S.2d ----, 86 A.D.3d 463 (1st Dep't 2011). Firefighter who suffered injuries while extinguishing fire at restaurant was not entitled to recover under GML 205-a predicated on defendant's alleged failure to comply with provisions of City's Administrative Code and violation where plaintiff's allegation of holes in floor and accumulated debris were speculative and there was no evidence that exacerbation of intensity or spread of fire even "directly or indirectly caused plaintiff's injuries. Defendants met their initial burden by presenting deposition testimony, post-fire inspection reports, and other evidence indicating that there were no violations, specifically holes in the floor and accumulated debris, that directly caused plaintiff's injuries, or that indirectly caused plaintiff's injuries by increasing the inherent dangers of firefighting. Plaintiff failed to rebut this showing. Plaintiffs' assertion that a hole in the floor directly caused the injuries was pure conjecture. Plaintiff conceded that he could not see the floor and did not know what trapped his foot. The firefighters who entered the building with him were similarly unable to describe the condition of the floor. Plaintiffs' allegation that defendants allowed debris to accumulate, causing him to trip and fall, was also speculative. By his own admission, plaintiff could not say that the debris did not consist of those items normally found in a restaurant, which, rather than being negligently placed by defendants, had been knocked down by the force of the spray from the fire hose employed in suppressing the fire.

Menard v. Highbridge House, Inc., 82 A.D.3d 532, 918 N.Y.S.2d 460 (1st Dep't 2011). Plaintiff firefighter was injured in a common stairwell between two floors after a tenant, descending in a panic because of the smoke filling the hallway on the floor above, collided with him. He sued under GML 205-a, claiming his injuries resulted from defendants' violations of Administrative Code of City of N.Y. §§ 27–127 and 27–128, which require building owners to maintain their premises in a safe condition. Plaintiff claimed that the storage of combustible clothing on the exterior balcony of an apartment violated these provisions, that the clothing caught fire, encouraged the spread of the fire, and created the heavy smoke conditions that prompted the tenant to flee down the stairs, knocking him down as she tried to pass him. But the Court found that the record demonstrated that any such alleged violation "did not directly or indirectly cause plaintiff's injuries", but that they were caused by the collision with a panicked tenant heedlessly

fleeing the scene of a likely fire. This is among the risks ordinarily encountered by firefighters. GML 205-a case dismissed.

Anderson v. Columbari. 79 A.D.3d 679, 913 N.Y.S.2d 687 (2nd Dep't 2010). Plaintiff, a New York City firefighter, sued under GML 205-a after he was injured while responding to a fire at the defendant's premises. The fire originated in the basement, which was occupied at the time by the defendant's wife, and was ignited by a cigarette in bedding material. The plaintiff testified at his deposition that, intending to go down to the basement to shut off the utilities, he arrived at the top of a staircase between the first floor and the basement and that visibility was poor. He could not remember where he placed his free hand when he got to the top of the stairs or as he started to descend the stairway. Court held that the defendant made a prima facie showing that the premises either did not contain any defects which constituted a violation of the sections of the Administrative Code alleged to be violated, or that those sections were not applicable to the subject premises. Although it was undisputed that the defendant violated Administrative Code § 27–118.1, in that he made an illegal change in occupancy of the premises, and that he caused work to be performed at the premises without a work permit, in violation of Administrative Code § 27–147 and Administrative Code § 27–126, the defendant demonstrated that the violations did not "directly or indirectly" contribute to the plaintiff's injuries. Plaintiff offered no proof from which it could be inferred that these violations made the occurrence of a fire more likely or firefighting operations more dangerous, or that the alleged violations were otherwise a direct, indirect or proximate cause of" the plaintiff's injuries. Although violations of Administrative Code §§ 27–127 and 27–128 may form a predicate for liability under GML 205-a, here the case was dismissed because plaintiff could not show any kind of connection between those violations and his injuries. Defendant also demonstrated prima facie, through the plaintiff's deposition testimony, that any conclusion that the absence of a handrail contributed to the plaintiff's injuries would be purely speculative and plaintiff failed to raise a triable issue of fact in that regard.

E. GOL 11-106 (COMMON LAW CLAIM BY COPS AND FIREFIGHTERS)

Cross v. City of New York, 32 Misc.3d 1219, 2011 WL 2899426 (N.Y. Co. Sup. Ct. 2011)**.** Here, plaintiff police officer was injured while discharging an official duty, having tripped on the pothole after speaking with the vehicle's driver and while returning to the van to continue driving the other officers to a detail. However, as he was simply walking, his duty to drive the other officers to a detail did not increase the risk of injury, and this risk is not the sort he was trained to confront as a police officer. Accordingly, the firefighter's rule did not bar plaintiff's common law negligence claims.

Gammons v. City of New York, 30 Misc.3d 1230, 2011 WL 723596 (Kings Co. Sup. Ct. 2011). Plaintiff police officer was gathering and loading police department barriers that were used for the purpose of regulating traffic. While unloading barriers from a flatbed truck, plaintiff lost her balance and fell backward off the end of a the truck. Plaintiff alleged that defendants violated GML 205-e by failing to comply with Labor Law 270-a (general requirement to provide a safe workplace). She also sued under GOL 11-106, i.e. common law negligence. As for the latter cause of action, the court found that plaintiff was engaged in an act in furtherance of a specific police function, which exposed her to a heightened risk of falling off the rear of the flatbed truck.

Consequently, pursuant to the firefighter's rule, plaintiff could not recover damages for common-law negligence against employer or co-employee.

Fernandez v. City of New York, 84 A.D.3d 595, 924 N.Y.S.2d 43 (1st Dep't 2011). Police officer brought GOL 11-106 claim against city when desk drawer fell on officer's knee and foot while she was working at desk at precinct. Defendants moved for summary judgment, making a showing that they could not have known that the track of the drawer was not secured or that the drawer was likely to fall. In opposition, plaintiff failed to raise a triable issue of fact. The fact that the sergeant observed, after the accident, that the track of the drawer was "hanging off" did not establish notice, as the condition of the track mounting was only visible after the drawer fell, and there was no prior indication that the drawer was at risk of falling as might require an inspection of the tracks.

F. GML 205-B VOLUNTEER FIREFIGHTER IMMUNITY DOES NOT BAR CLAIM AGAINST VOLUNTEER'S "EMPLOYER"

Lynch v. Waters, 82 A.D.3d 1719, 922 N.Y.S.2d 884 (4th Dep't 2011). Volunteer firefighter's widow brought wrongful death and GML 205-a action against County fire coordinator and County of Onondaga. County defendants then commenced a third-party action against some of volunteer firefighters and their municipal employers (fire districts and fire departments) for common-law contribution and/or indemnification. Motions and cross-motions were filed for summary judgment regarding, among other things, the viability of third-party defendants' GML 205-b defense ("Members of duly organized volunteer fire companies ... shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for willful negligence or malfeasance"). The third-party defendants argued that not only were the individual volunteer firefighter defendants immune from liability based on this Statute, but also their municipal employers were immune, since their liability was vicarious to that of the volunteer firefighters'. The Fourth Department dismissed the GML 205-b defense as to the municipal employers of the volunteer firefighters. The Court found that the public policy reasons underlying the immunity afforded to volunteer firefighters individually, i.e., to encourage individuals to volunteer for public service and to protect their personal assets from liability for ordinary negligence, did not extend to the entities that employ them.

V BUS AND SUBWAY LIABILITY

A. LIABILITY FOR SUDDEN AND VIOLENT MOVEMENT OF BUS

Phillipps v. New York City Transit Authority, 83 A.D.3d 473, 922 N.Y.S.2d 286 (1st Dep't 2011). In light of the unrefuted testimony of plaintiff's medical expert that a medical record entry, reflecting plaintiff's statement to hospital personnel that his injuries occurred when he fell on his back due to a sudden, violent movement of a bus he was exiting, was relevant to diagnosis and treatment, it was a proper exercise of discretion for the court to allow this record into evidence. Jury trial verdict in plaintiff's favor was thus sustained.

Vaz v. New York City Transit Authority, 85 A.D.3d 902, 925 N.Y.S.2d 587 (2nd Dep't 2011). While a pedestrian discharged by another bus was still crossing in front of the plaintiff's bus, the plaintiff's bus driver turned the engine on, the bus jerked forward, and then stopped suddenly.

The plaintiff testified that the force of the stop was so great that she was thrown from her seat to the floor, landing on her buttocks. During cross-examination of the plaintiff, the trial court permitted the defendant to introduce into evidence an MVA form prepared by the plaintiff at her physician's office shortly after the accident, but which had not been disclosed to plaintiff's lawyers, for the purpose of impeaching the plaintiff's credibility as to how the accident occurred. In the MVA form, the plaintiff stated that a pedestrian "dashed" in front of the bus as it was starting. After hearing testimony from the driver of the bus who, for the most part, could not recall the incident except that she applied the brakes harder than usual, but denied that the movement of the bus was unusual and violent or that any passenger on the bus was thrown to the floor, the jury found that the defendant was not negligent. The Appellate Division here held that the Supreme Court improvidently exercised its discretion in permitting the defendant to introduce the MVA form into evidence. The defendant came into possession of the MVA form prior to the commencement of the action. The defendant was required to disclose the MVA form, which constituted the plaintiff's "own statement" (CPLR 3101[e]), upon the plaintiff's demand prior to trial (*see* CPLR 3101[a], [e]). The defendant, however, withheld the document until the midst of trial, and proffered no excuse for its failure to produce the document earlier. The error was not harmless, and plaintiff would get a new trial.

B. DUTY TO PROVIDE SAFE PLACE TO ALIGHT

Barravecchio v. New York City Transit Authority, 83 A.D.3d 630, 922 N.Y.S.2d 96 (2nd Dep't 2011). Bus passenger whose foot was run over by a car after he alighted from the bus sued transportation authorities and the car's driver and owner. Although there was a sidewalk within a few feet of the door of the bus, plaintiff testified at his deposition that he chose not to step onto the sidewalk, but, rather, to cross the road in the crosswalk. He further testified that when he got off the bus, the pedestrian walk sign was in his favor, but at some point before the collision, it began to blink red. Defendant Transit Authority was grated summary judgment since plaintiff had a safe path available to him when he got off the bus. The car driver defendant was held in, though, because there were issues of fact as to whether he had proceeded through the intersection in violation of a traffic signal.

Kulaya v Metropolitan Tr. Auth. Bus Co., 82 A.D.3d 522, 918 N.Y.S.2d 443 (1st Dep't 2011). Plaintiff was injured when she fell on the stairs of a bus while attempting to disembark. Plaintiff was seventy-one and used a walker. She alleged that after the bus operator told her that she could not use her walker upon entering the bus, she requested that the bus operator lower the "lift" upon which she could wheel her walker and then be raised up into the bus. Plaintiff testified that the bus operator stated either that the bus did not have a lift or that it was not working. Defendant bus operator testified that plaintiff never asked to use the hydraulic wheelchair lift that was located in the middle of the bus. Court found a question of fact. If defendants were negligent in failing to provide plaintiff with access to the lift, thus forcing her to use the steps, the only other means of egress, a trier of fact may conclude that their conduct constituted a substantial factor in bringing about the harm to plaintiff.

C. SERIOUS INJURY THRESHOLD NECESSARY FOR BUS PASSENGER INJURED WHILE ALIGHTING BUS

Manuel v. New York City Tr. Auth., 82 A.D.3d 1059, 918 N.Y.S.2d 787 (2nd Dep't 2011). Plaintiff tripped in a hole in the street after she alighted from a bus. The hole was located at the curb line, next to the sidewalk. The plaintiff alleged that the bus driver parked the bus at an angle, so that the front of the bus was next to the sidewalk and the back of the bus was several feet from the curb. As the plaintiff descended the stairs of the rear exit of the bus, she stepped down with her left foot into a hole in the ground and fell. The plaintiff claimed that she did not see the hole before she fell. The bus driver also claimed that he did not see the hole before the accident, because it was near the curb, and he was scanning the street in front of the bus for pedestrians. After a trial on the issue of liability, the jury found that NYCTA was negligent and plaintiff was not. But defendant had argued that the plaintiff should be required to prove a "serious injury" because the accident happened from the "use or operation" of a motor vehicle. The Court held that defendant was right, and that the issue of "serious injury" should have been submitted to the jury.

D. BUS DOORS CLOSE ON PLAINTIFF

McKay v Manhattan & Bronx Surface Tr. Operating Auth. 84 A.D.3d 755, 923 N.Y.S.2d 330 (2nd Dep't 2011). The plaintiff was attempting to board a bus when the bus doors closed on him before he was completely on the bus and the bus began to move, dragging him and causing him to strike a bus-stop sign. Plaintiff got summary judgment on liability!

VI PRIOR WRITTEN NOTICE REQUIREMENT

A. WHO MUST HAVE PRIOR WRITTEN NOTICE?

Vardoulias v. County of Nassau, 84 A.D.3d 787, 923 N.Y.S.2d 577 (2nd Dep't 2011). Pedestrian injured in a trip and fall on a sidewalk sued county. The Nassau County Recreation and Parks Department received prior written notice of the alleged condition on two occasions, approximately 10 months and 4 months before the accident, respectively. But Nassau County's prior written notice statute required notice "in writing by certified or registered mail directed to the *Office of the County Attorney*". It was undisputed that the Office of the County Attorney, as statutory designee, did not receive prior written notice of the alleged defective sidewalk. At the completion of the plaintiff's case at trial, the County moved for judgment as a matter of law on the ground that the plaintiff failed to establish prior written notice of the alleged dangerous condition as required by the Nassau County Administrative Code. The Supreme Court denied the motion. The jury returned a verdict finding the County 70% at fault, but here the Appellate Division reverses. The fact that the Nassau County Recreation and Parks Department received prior written notice did not satisfy the statutory requirement that prior written notice be given to the *Office of the County Attorney.* Judgment for defendant must be entered.

B. ARE TELEPHONIC OR VERBAL COMPLAINTS REDUCED TO WRITING ENOUGH TO CONSTITUTE "PRIOR WRITTEN NOTICE"?

Politis v. Town of Islip, 82 A.D.3d 1191, 920 N.Y.S.2d 185 (2nd Dep't 2011), Police Officer tripped and fell into a pothole while on duty as he was walking back to his patrol car. He sued the Town to recover damages under a theory of common-law negligence and pursuant to GML

205-e. Town moved for summary judgment alleging no prior written notice, which the Town Code required. Town's computer database recording of telephonic complaints concerning defects in the street did not constitute prior written notice so as to satisfy the requirements of the Town Law or the Town Code of the Town. Contrary to the plaintiff's contention, he was required to comply with the prior written notice requirement to sustain a GML 205-e cause of action. Summary judgment granted to defendant.

Spanos v. Town of Clarkstown, 81 A.D.3d 711, 916 N.Y.S.2d 181 (2nd Dep't 2011). In this pothole trip-and-fall case, the defendant established its prima facie entitlement to judgment as a matter of law by submitting the affidavit of its Deputy Town Clerk stating that her search of the Town's records revealed no prior written notice of any hazardous condition in the roadway where the accident occurred. In opposition, plaintiff failed to raise a triable issue of fact. A verbal complaint reduced to writing by a municipality does not constitute prior written notice. Evidence indicating that the defendant undertook repairs to the subject roadway two months before the plaintiff's accident was insufficient to establish the applicability of the affirmative negligence exception to the prior written notice requirement, as the plaintiff failed to raise an issue of fact as to whether the defendant's repair immediately resulted in the existence of a dangerous condition.

C. IS CONSTRUCTIVE NOTICE ENOUGH?

Horan v. Town of Tonawanda. 83 A.D.3d 1565, 921 N.Y.S.2d 764 (4th Dep't 2011). In support of its motion for summary judgment, defendant established that it lacked prior written notice of the pothole that caused plaintiff to trip. Plaintiff, however, noted that Town Law 65-a, much like Highway Law § 139(2), which applies to counties, contains a provision that permits plaintiff to show only *constructive* notice of a dangerous highway condition. (The relevant part of Town Law 65-a provides that no cause of action may be brought against towns without a showing of prior written notice of the defect or that the defective "existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence"). Thus, argued plaintiff, the Town's own code, which required prior written notice only, must be read to comport with Town Law 65-a, which allows for constructive notice as well. The Court rejected plaintiff's argument because Municipal Home Rule Law § 10(1)(ii)(d)(3), which is also a general state law, specifically permits a town, as opposed to a county, to amend or supersede through its local laws any provision of the Town Law relating to the property of the town "notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law...." Because the Legislature has not expressly prohibited towns from enacting a more restrictive notice requirement than that contained in the Town's Code, defendant was entitled to do so. Summary judgment to defendant granted.

D. BIG APPLE MAP NOTICE

Connor v. City of New York, 29 Misc.3d 1208, 2010 WL 4008542 (N.Y. Co. Sup. Ct. 2010). Plaintiff fell at the southwest corner of the intersection of Lenox Avenue and West 125th Street and the Big Apple map reflected an "extended section of broken, misaligned or uneven curb" on the ***other side*** of the street and across the median, closer to the northeast corner. The City demonstrated, *prima facie,* that the defects identified in the search results and Big Apple map were not where plaintiff fell. The burden shifted to plaintiff, and he failed to meet it.

Sondervan v. City of New York, 84 A.D.3d 625, 924 N.Y.S.2d 54 (1st Dep't 2011). The City conceded that the Big Apple Pothole map on which plaintiff relied showed a sidewalk defect in the vicinity of where plaintiff fell, but claimed it was not the defect at issue. Defendant's motion for summary judgment denied. Disputes as to whether the location and nature of the defect are sufficiently portrayed so as to bring the condition to the municipality's attention involve factual questions appropriately resolved at trial.

Weissman v. City of New York, 29 Misc.3d 1064, 912 N.Y.S.2d 379 (Queens Co. Sup. Ct. 2010). Plaintiff tripped and fell on a raised and uneven sidewalk flag abutting premises on a street in Queens County. The City moved for summary judgment upon the ground that no prior written notice of the condition was filed as required by Administrative Code § 7-201(c)(2). The City argued that sidewalk defects are transient and, therefore, the Big Apple map depicting the sidewalk condition and location complained of by plaintiff served upon the City five years prior to the date of the accident, was too remote in time to serve as prior written notice of the actual condition alleged to have caused plaintiff's injuries and, thus, plaintiff failed to satisfy the prior written notice requirement. Court rejected this argument, as no case law has held that there is a backward time limit for when the prior written notice of a defect must be given. Sidewalk conditions may change over time, but the Court could not infer that a five-year-old Big Apple map may never, as a matter of law, serve as prior written notice even if it is the most current map on file.

E. THE SIX CATEGORIES OF STRUCTURES REQUIRING PRIOR WRITTEN NOTICE

Groninger v. Village of Mamaroneck, 17 N.Y.3d 125, 950 N.E.2d 908, 927 N.Y.S.2d 304 (). Slip and fall on ice in a parking lot owned and maintained by the Village, where issue on summary judgment motion was whether written notice requirement applied to municipal-owned parking lots. Plaintiff, relying on *Walker v. Town of Hempstead* (84 N.Y.2d 360 [1994]) (no prior written notice requirement for defect in paddleball court in the town's beach area, even though Town's prior written notice code purported to require prior written notice of defects in "beach area") argued that a publicly-owned parking lot does not fall within any of the six specifically enumerated locations in the written notice statutes, and as such is not subject to the written notice requirement. Court of Appeals rejects this argument, holding that "for nearly thirty years, the courts of this state have consistently found that a publicly-owned parking lot falls within the definition of a "highway" and therefore prior notice of defect is required". Court relied also on its prior case of *Woodson v. City of New York* (93 N.Y.2d 936 [1999]) in which it held that because a stairway "functionally fulfills the same purpose" as a standard sidewalk, save for the fact that the former is "vertical instead of horizontal", the prior written notice requirement applied to outdoor municipal stairways. Since here there was no prior written notice of the icy condition, summary judgment was granted to defendant. Chief Judge Lippman dissents, relying on *Walker,* and finding that "the intermediate appellate courts of this State have, in a handful of dubiously reasoned decisions perpetuated the pre- *Walker* notion that a parking lot is a kind of 'highway' as to which the prohibition of GML § 50–e (4) does not apply.

Seelinger v. Town of Middletown, 79 A.D.3d 1227, 913 N.Y.S.2d 376 (3rd Dep't 2010). Plaintiff brought negligence action against Town after he fell into a below-grade pit between a concrete abutment and dumpster at Town's waste transfer station, while disposing of old wall heaters. Defendant moved for SJ on grounds of no prior written notice. The question was whether defendant's waste transfer station fell within the categories of GML 50-e where prior written notice is required (highways, culverts, etc.). Defendant argued that the waste transfer site was a "parking lot" that, in turn, was a "highway" within the meaning of Town Law § 65–a and GML 50-e (prior case law established that a municipal parking lot may be considered a "highway" for the purposes of General Municipal Law § 50–e). The affidavit of the Town Clerk submitted in support of defendant's motion confirmed that no prior written notice of a defective condition had been received by his office for this site, and no other affidavit or proof was submitted by defendant concerning the physical layout or characteristics of the site to allow the Court to determine whether this was the functional equivalent of a "parking lot". Therefore, a question of fact on this issue remained for trial.

Giarraffa v. Town of Babylon. 84 A.D.3d 1162, 923 N.Y.S.2d 697 (2nd Dep't 2011). Plaintiff was injured when he stepped into what he described as a dirt-covered sinkhole immediately adjacent to the bulkhead for a slip where his boat was moored in Tanner Park, in the Town of Babylon. The defendant Town moved for summary judgment dismissing the complaint, principally on the ground that it had no prior written notice of the subject defect as required by the Code of the Town of Babylon § 158–2, pertaining to sidewalk defects. The Supreme Court denied the motion, concluding that prior written notice of the defect was required, but that Code of the Town of Babylon § 158–2 had been satisfied by a letter addressed to the Town Supervisor regarding an "erosion problem" in the area of the boat slips in Tanner Park. The Appellate Division here affirms, but on different grounds. It found this letter was insufficient to constitute the required prior written notice under Code of the Town of Babylon § 158–2, as that ordinance specifically requires that notice be given to the Town Clerk or the Commissioner of the Department of Public Works. Nonetheless, the Town failed to demonstrate its entitlement to summary judgment as because it did not show that the area where the plaintiff fell was within the scope of the applicable prior written notice provisions. Contrary to the Town's contention, the dirt-covered area providing access to boats moored at the slips within the Park was neither a boardwalk nor other functional equivalent of a sidewalk. As such, no prior written notice was required.

Selca v. City of Peekskill, 78 A.D.3d 1160, 912 N.Y.S.2d 287 (2nd Dep't 2010). Plaintiff tripped or slipped and fell while walking on a floating dock owned and operated by the defendants, and alleged the accident was caused by a design defect. The plaintiff correctly argued in opposition to defendant's motion for summary judgment that the defendants could not assert, as a defense, the lack of prior written notice of the defective condition, even though the Town Code required prior written notice for defects not only in a "street, highway, bridge, culvert, sidewalk or crosswalk" but also for "playgrounds or pathways". Even if the Town could add "playground or pathways" to the list of constructions requiring prior written notice (it cannot), a floating dock does not fall within the ambit of this prior written notice statute. Nevertheless, the evidence demonstrated that the defendants were entitled to qualified immunity with respect to the alleged improper design of the floating dock. The defendants demonstrated the design of the floating dock was adopted after adequate study and that there was a reasonable basis for that plan, and in

opposition, the plaintiff failed to raise a triable issue of fact. The complaint also asserted causes of action based on the alleged negligent maintenance of the dock, and although the doctrine of qualified immunity was not applicable to those causes of action, the plaintiff submitted no evidence in opposition to the motion to show any negligent maintenance. Thus, complaint dismissed.

F. AFFIRMATIVELY CREATED HAZARD OR DEFECT

1. Generally

Pennamen v. Town of Babylon, 86 A.D.3d 599, 927 N.Y.S.2d 164 (2nd Dep't 2011). Triable issue of fact as to whether town affirmatively created the tripping hazard consisting of a bent and damaged a storm drain grate located in a roadway when it removed the grate and put it back into place during cleaning.

Capasso v. Village of Goshen, 84 A.D.3d 998, 922 N.Y.S.2d 567 (2nd Dep't 2011). Pedestrian sued after she fell from edge of newly paved curb onto the adjoining lawn. The Village had instituted a repaving project, which included elevating the edge of the curb to address the local problem of inadequate storm drainage, which resulted in a curb 8–to–10 inches higher than the adjoining lawn where the plaintiff fell. Summary judgment was granted to defendant since there was no evidence that the differential between the edge of the curb from which the plaintiff fell and the adjacent lawn was inherently dangerous and was not readily observable by the reasonable use of one's senses.

Hubbard v. City of New York, 84 A.D.3d 1313, 924 N.Y.S.2d 533 (2nd Dep't 2011). Plaintiff sued the City of New York after her trip-and-fall over a downed lamppost that was lying in the gutter of a street and had not been visible to her due to significant snowfall. Her theory of liability was that the City was negligent in permitting the site where the accident occurred to remain in a dangerous condition. There was no allegation that the City caused the condition through an affirmative act of negligence. Almost six years later, this case preceded to trial, and following jury selection, the City made a motion to dismiss the complaint for lack of prior written notice. The Supreme Court denied the motion and allowed the case to proceed. During trial, the plaintiff for the first time presented evidence and argued that the City was liable under a theory of an affirmative act of negligence. Specifically, the plaintiff's daughter testified that 11 days prior to her mother's accident, she witnessed a New York City Sanitation Department snow plow truck knock over the subject lamppost and then saw two sanitation workers get out of the truck, pick up the lamppost, and move it into the gutter of the street. There was no evident of prior written notice. The jury returned a verdict finding the City 100% at fault. Here, Appellate Division reverses, finding that the trial court erred in allowing the plaintiff to proceed under an affirmative act of negligence theory of liability. This theory was not contained in either the plaintiff's pleadings or her bills of particulars. In fact, in its demand for a bill of particulars, the City explicitly asked the plaintiff to state if actual or constructive notice were claimed, and additionally, whether she alleged that the City created the condition. In her bill of particulars in response, she only stated that actual and constructive notice were claimed. She did not claim that the City created the condition. As this was a new theory not previously disclosed, the City had no opportunity to prepare a rebuttal. Accordingly, the trial court erred in allowing the plaintiff to assert this new theory of liability for the first time at trial.

2. The affirmative negligence must ""*immediately* result in the existence of a dangerous condition".

Beck v. Long Island Water Corp., 77 A.D.3d 780, 909 N.Y.S.2d 534 (2nd Dep't 2010). In trip-and-fall in pothole case, the Supreme Court correctly tweaked the PJI charge to comply with the recent law articulated by the Court of Appeals in *Oboler v. City of New York* (8 N.Y.3d 888, 889, 832 N.Y.S.2d 871, 864 N.E.2d 1270) (*see Bielecki v. City of New York,* 14 A.D.3d 301, 788 N.Y.S.2d 67), i.e., that the alleged defective condition caused by an affirmative act of the municipal defendant had to have existed immediately at the time the highway repair was finished.

Stride v. City of Schenectady, 85 A.D.3d 1409, 925 N.Y.S.2d 260 (3rd Dep't 2011). Plaintiff had tripped and fell over a parking meter post that had been severed near the surface of the ground leaving a metal stump. The City successfully moved for summary judgment and the complaint was dismissed against it on the ground that the City did not have prior written notice of the hazard or defect as required by the Schenectady City Charter, and that no exceptions to the notice requirement applied. In support of its motion for summary judgment, the City submitted an affidavit from the supervisor of the Bureau of Service, whose responsibilities include maintaining records and log books with respect to written notices received regarding defects, and who stated that the City had not received written notice of the broken meter post. Plaintiffs failed to meet their burden in opposition. They argued that an exception to the written notice requirement exists because the City created the hazardous condition, but relied solely on general assertions in the complaint and the bill of particulars that the City created the broken meter, or allowed it to exist. Plaintiffs did not allege any affirmative act of negligence that "immediately resulted in the existence of a hazardous condition," as required to fit the exception. In fact, at her deposition, plaintiff contradicted the assertion that the City created the hazard by some affirmative act, testifying that during the winter of 2002 or 2003, while at work, she heard a crash, and when she looked out the window, she saw that a car hit the parking meter in question and knocked it over.

Crespo v. City of Kingston, 80 A.D.3d 1124, 917 N.Y.S.2d 336 (3rd Dep't 2011). Plaintiff fell as she stepped from the sidewalk onto a storm drain that was lower than the surface of the roadway. It was uncontroverted that defendant received no prior written notice of the allegedly defective condition of the catch basin as required by Kingston City Code. In opposition to defendant's motion, plaintiff submitted, he noted that there was fresh paving material around the grating and it appeared that recent work had been done at that location. He further noted damage to the pavement and heaving of the curbing adjacent to the drain which he believed "had occurred over a prolonged period" and opined that "[t]he hazardous condition took a long period of time to develop." In a subsequent affidavit, he opined for the first time that the condition became dangerous when defendant re-paved the roadway surrounding the grate without raising the height of the grate, or removing the subject grate and filling in the depression and, thus, the unsafe height differential between the curb and the drain existed before the heaving of the curbing occurred and did not appear to have changed since the last street paving. But defendant's Superintendent of Public Works testified that he could not recall any repaving work having been done in the area where plaintiff fell since he started in his position in 1996, and the owner of a

nearby business stated that the road had not been repaved in at least nine years. The Court held that, even fully crediting plaintiff's engineer's report and affidavit, plaintiff offered insufficient evidence to create a question of fact as to whether defendant repaved the road or replaced the storm drain in the location where she fell, and thus failed to demonstrate that any affirmative act on defendant's part, as opposed to the act of a subcontractor or other third party, caused the alleged dangerous condition which resulted in her injuries.

3. New Exception: No "Immediacy" Requirement in Negligent Snow and Ice Removal Cases

San Marco v. Village/Town of Mount Kisco, 16 N.Y.3d 111, 944 N.E.2d 1098, 919 N.Y.S.2d 459 (2011). Pedestrian slipped and fell on accumulation of black ice on the ace of a public parking lot owned and maintained by village. The Village had treated the parking lot for ice conditions the day before. However, the Village did not employ a work crew on Saturdays and Sundays to monitor the parking lot for dangerous conditions. It was undisputed that in the interim between the Village's last inspection and salting of the lot and plaintiff's fall on Saturday morning, the air temperature had risen above freezing for approximately 19 hours and then dropped. Plaintiff alleged the patch of black ice was caused by the melting and refreezing of a pile of snow that the Village had plowed into a row of meters adjacent to the parking spaces. Plaintiff thus was arguing that defendant affirmatively created the hazard by its snow removal methods (leaving piles of snow that would re-melt and cause black ice.) On defendant's summary judgment motion, Supreme Court had found a question of fact as to whether the Village's snow removal procedure triggered an exception to the written notice statute, i.e., whether the Village had created the hazardous ice condition. The Appellate Division reversed and granted the Village summary judgment, concluding that the Court of Appeals' recent holdings in *Yarborough v. City of New York,* 10 N.Y.3d 726, 853 N.Y.S.2d 261, 882 N.E.2d 873 (2008) and *Oboler v. City of New York,* 8 N.Y.3d 888, 832 N.Y.S.2d 871, 864 N.E.2d 1270 (2007), which, in dealing with pothole cases, had held that the "affirmative negligence" exception to prior written notice statutes applies only where the action of the municipality "*immediately* results in the existence of a dangerous condition". The question then was whether this "immediacy" test extends to snow melting cases. The Second Department applied this test to the case, and found that the Village's action of snowplowing did not amount to "immediate creation" of the hazard that plaintiff allegedly encountered. Rather, the Court found, "the environmental factors of time and temperature fluctuations ... caused the allegedly hazardous condition". The Court of Appeals here reverses and denies defendant summary judgment. The Court concluded that the immediacy requirement for "pothole cases" should not be extended to cases involving hazards related to negligent snow removal. A municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.

Weed v. County of Orange, 82 A.D.3d 967, 920 N.Y.S.2d 100 (2nd Dep't 2011). Although it was undisputed that the County never received prior written notice of an alleged defect or hazardous condition on the road on which the subject accident occurred, as required by the Local Law, plaintiff raised a triable issue of fact as to whether the County affirmatively created the icy condition and whether the County's negligence at the time the road was repaired immediately resulted in the existence of the hazardous condition. An employee of the contractor which

repaired the road several years before the accident testified at a deposition that the County was responsible for determining how the road should be graded or banked. An engineer retained by the plaintiff submitted an affidavit specifying that the road was improperly banked at the rate of one-half inch per foot, which resulted in the road being improperly graded, and that the road lacked a “dip” or a “sag.” As a result, the road was susceptible to having water run from the driveways of abutting landowners, which would freeze in cold weather.

G. ABUTTING PROPERTY OWNER LIABILITY FOR DEFECTIVE SIDEWALKS

Holmes v. Town of Oyster Bay, 82 A.D.3d 1047, 919 N.Y.S.2d 207 (2nd Dep't 2011). Plaintiff tripped on a tree stump in a tree well located in a utility strip that runs parallel to a sidewalk in the Town of Oyster Bay. The abutting landowner here gets out on summary judgment since it did not affirmatively created the dangerous condition, negligently make repairs to the area, cause the dangerous condition to occur through a special use of the area, or violate a statute which expressly imposes liability on the property owner for failure to maintain the abutting sidewalk. Although Town Code imposed a duty on landowners to maintain the sidewalk abutting their properties in good and safe repair and free from obstructions, this duty did not extend to the subject tree well, located in the utility strip. The Town also demonstrated its prima facie entitlement to summary judgment because it established it had no prior written notice of the alleged defect as required by the Town Code.

VII NYC SIDEWALK LAW

A. “TREE WELLS” NOT INCLUDED IN NYC SIDEWALK LAW

Tucker v. City of New York, 84 A.D.3d 640, 923 N.Y.S.2d 525 (1st Dep't 2011). Bicyclist sued City after a defect in tree well caused him to be thrown from his bike. He alleged that Administrative Code of City of N.Y. § 7–201[c][2] requires a plaintiff to show that the City received prior written notice of the purported tree well defect that allegedly caused him to be thrown from his bike, notwithstanding the Court of Appeals' determination in Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 860 N.Y.S.2d 429, 890 N.E.2d 191 [2008] that tree wells are not part of the sidewalk within the meaning of section 7–210 of the Administrative Code. Court held that, given the distinct purposes of Administrative Code §§ 7–201(c)(2) and 7–210, and the different language employed therein, Vucetovic was not determinative of the issue and that the Pothole Law was applicable. While section 7–210 employs the phrase “shall include, but not be limited to,” this clause *applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk.* Given the statutory silence and the absence of any discussion of tree wells in the legislative history, Court found that City Council did not consider the issue of tree well liability when it drafted section 7–210. If the City Council desired to shift liability for accidents involving tree wells exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal. Section 7–201(c)(2), on the other hand, was enacted to address the problem of municipal street and sidewalk liability recognizing that the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways”. The section ensures that the City receives written notice of defects in the public way so that it may repair a problem before there is liability. In contrast to section 7–210, which is limited to sidewalks, section 7–201(c)(2) provides: specifically encompasses sidewalks “*including any encumbrances thereon or*

attachments thereto" being out of repair, etc. This broader language requires a plaintiff to show that the City received prior written notice of the alleged tree well defect. The Court rejected the argument that a tree well is not an "encumbrance" on or an "attachment" to the sidewalk Here, the alleged defect is a six-inch differential between the soil in the tree well and the surrounding sidewalk, which is sufficiently similar to a depressed manhole cover so as to require notice under the Pothole Law. Given the applicability of the Pothole Law, the lack of prior written notice of the alleged defect, and the absence of any evidence that the City created the alleged defect through an affirmative act of negligence or made a special use of the subject tree well, summary judgment granted to defendant.

Fernandez v. 707, Inc. 85 A.D.3d 539, 926 N.Y.S.2d 408 (1st Dep't 2011). Abutting landowner defendant hired contractors to improve sidewalk, instructing them to leave specified sections of the sidewalk open to accommodate tree wells. Abutting landowner also got a tree planting permit from the New York City Department of Parks & Recreation and hired another company to plant the trees. Plaintiff was injured when he stepped into a tree well that was not level with the sidewalk. At the time, the City had yet to sign off on the sidewalk, and no trees had been planted. Although Administrative Code of the City of New York § 7-210 imposes tort liability on property owners who fail to maintain abutting city-owned sidewalks in a reasonably safe condition, defendant could not be held liable here for plaintiff's injuries by virtue of its status as an abutting landowner because a property owner's responsibility for a sidewalk does not extend to tree wells. The Court rejected plaintiff's argument that the area where he fell was not a "tree well" because at the time of the accident the City had yet to "sign off" on the project and no tree had been planted. The area was a square or rectangular dirt area surrounded by cement designed to accommodate one or more trees. Further, there was no evidence the abutting owner affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of the area. Also, a property owner ordinarily is not responsible for the negligence of an independent contractor retained to work upon its property, unless the work is inherently dangerous, or the owner interferes with and assumes control over the work. Plaintiff did not submit any proof that would raise an issue that the abutting owner created the hazard or controlled the method and means of the contractor's work. The mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal.

Teitelbaum v. Crown Heights Ass'n for Betterment, 84 A.D.3d 935, 922 N.Y.S.2d 544 (2nd Dep't 2011). Pedestrian tripped and fell on brick protruding from tree well in front of building. Abutting owner moved for summary judgment alleging that the plaintiff tripped and fell within a tree well, which was not part of the sidewalk for purposes of Administrative Code of the City of New York § 7-210. The Court found that the evidence—particularly, the photograph of the accident site upon which the plaintiff marked the protruding brick from the tree well that allegedly caused her accident—plainly established that the brick was part of the tree well and not part of the sidewalk.

Kleckner v. Meushar 34th Street, LLC, 80 A.D.3d 478, 914 N.Y.S.2d 164 (1st Dep't 2011). Pedestrian tripped and fell when his foot became caught in gap between metal grate in tree well and adjacent sidewalk. Abutting owner and lesser motions for summary judgment denied since the record presented triable issues of fact as to which defendant installed the tree well and grate and which defendant was responsible for the care, maintenance and repair of the tree well and

grate, and which defendant was responsible for the care, maintenance and repair of the relevant area. Although the Court of Appeals has excluded "city-owned tree wells" from the definition of "sidewalk" as the term is used in Administrative Code of City of N.Y. § 7-210, a property owner may still owe a duty relating to a tree well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction. Here, neither the owner nor lesser produced any evidence that the City defendant owed or was responsible for the maintenance and repair of the tree well. Nor did they produce evidence that they did not own it. They allege only that they failed to find proof of ownership of the tree well, but this is not enough for summary judgment. Furthermore, even if the City were deemed owner of the tree well, these defendants failed to provide evidence showing that they did not create, negligently repair or otherwise cause the allegedly defective condition that resulted in plaintiff's fall.

B. "PEDESTRIAN RAMPS" NOT INCLUDED IN NYC SIDEWALK LAW

Vidakovic v. City of New York, 84 A.D.3d 1357, 924 N.Y.S.2d 537 (2nd Dep't 2011). Plaintiff-pedestrian stepped on or in a triangular hole where a sidewalk met a pedestrian ramp and sued abutting landowner and City. Abutting landowner moved for summary judgment, submitting the affidavit of an engineer who stated that the hole was in a sloped, triangular piece of concrete that was *part of the pedestrian ramp*, not part of the *sidewalk*. The engineer based this conclusion on ATSM standard F 1637–95 entitled "Standard Practice for Safe Walking Surfaces". In opposition, the plaintiff submitted the affidavit of his own expert engineer, who, in relying on the same standard as Realty's expert, concluded that the area where the plaintiff tripped was actually *part of the sidewalk.* The City also moved for summary judgment. Court holds that the abutting landowner established that the area was part of the pedestrian ramp, and thus said was entitled to summary judgment. City was not entitled to summary judgment.

C. "COVERS" AND "GRATINGS" NOT INCLUDED IN NYC SIDEWALK LAW

Flynn v. City of New York, 84 A.D.3d 1018, 923 N.Y.S.2d 635 (2nd Dep't 2011). Firefighter-plaintiff responded to a call to fix a fire hydrant in the sidewalk. As he was testing the hydrant, he stepped into a three-to-four-inch deep indentation in the sidewalk. Inside the indentation was a gate box containing the fire hydrant's valve. The indentation caused him to lose his balance and fall to the ground. Abutting owner moved for summary judgment. Section 7-210 of the Administrative Code of the City of New York generally imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners. However, Rules of City of New York Department of Transportation (34 RCNY) § 2–07(b) provide that owners of covers or gratings on a street 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 street surface. 34 RCNY 2–01 includes a "sidewalk" within the definition of "street." Accordingly, the responsibility for maintaining the condition of the area where the firefighter fell lied with the City, and not the abutting property owner. Nothing in Section 7-210 of the Administrative Code indicates that the City Council intended to supplant the provisions of 34 RCNY 2–07(b) and to allow a plaintiff to shift the statutory obligation of the owner of the cover or grating to the abutting property owner. The abutting owner also made a prima facie showing that it did not create the alleged dangerous condition, negligently maintain the area, or use the sidewalk in a special manner for its own benefit. Summary judgment to abutting owner granted

D. "CURBS" NOT INCLUDED IN NYC SIDEWALK LAW

Ascencio v. New York City Housing Authority, 77 A.D.3d 592, 910 N.Y.S.2d 61 (1st Dep't 2010). Pedestrian-plaintiff slipped on a sidewalk that was abutting property owned by NYCHA. He alleged negligence in failing to maintain the "sidewalk/curb area." NYCHA met its burden on summary judgment with a prima facie showing that plaintiff did not slip on the sidewalk, but rather, on "the curb in between the street and the sidewalk" or "the edge of the sidewalk," and that it neither created the defect or made special use of the curb. Because the Administrative Code of the City of New York § 7-210 only requires that NYCHA maintain sidewalks abutting its property, and Administrative Code § 19-101(d) defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, *but not including the curb,* intended for the use of pedestrians", NYCHA was not obligated to maintain the curb. The affidavits of the Superintendent and Supervisor of Grounds for the premises, stating that neither employee knew of any repairs made by NYCHA to the curb, or any special use of the curb by NYCHA, sufficiently showed entitlement to summary judgment.

Nicoletti v. City of New York, 77 A.D.3d 715, 909 N.Y.S.2d 117 (2nd Dep't 2010). Pedestrian-plaintiff slipped and fell on snow and ice covering a sidewalk. The City met its prima facie burden of establishing that it was not liable pursuant to section 7-210 of the Administrative Code with evidence that the injured plaintiff slipped and fell on the sidewalk abutting the commercial owner's. The abutting owner's contention that the injured plaintiff may have slipped and fallen on snow and ice on the curb in front of its property, not on the sidewalk abutting its property, was based on mere speculation, and was therefore insufficient to raise a triable issue of fact.

E. WHETHER CITY CREATED THE DEFECT

Harakidas v City of New York, 86 A.D.3d 624, 2011 WL 3198184 (2nd Dep't 2011). Plaintiff tripped and fell on a depressed portion of the sidewalk abutting property of a private corporation defendant. Abutting owner moved for summary judgment, blaming the City for creating the defect, which was right next to a City fire hydrant. But abutting owner submitted no evidence that the City's repair work around the fire hydrant created the defects. In opposition, the plaintiffs relied upon the abutting owner's testimony that she regularly inspected the property to contend and had actual notice of the condition for more than two years yet failed to correct the defect, breaching its duty under Section 7-210 of the Administrative Code. Abutting owner's motion denied since abutting property owner failed to meet its burden of establishing that it did not create the hazardous condition nor have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.

F. "RESIDENTIAL PURPOSE" EXCEPTION

Sisler v. City of New York, 84 A.D.3d 638, 924 N.Y.S.2d 329 (1st Dep't 2011). abutting landowner failed to make a prima facie showing that she was exempt from liability under Administrative Code of City of N.Y. § 7-210(b) (residential exception). She testified that she regularly performed a variety of tasks pertaining to her shoe business from her home, such as processing orders, sending business-related faxes, and working on shoe designs. She also stated that for years preceding the incident she had employed two individuals who performed similar tasks; one of them worked there three times a week, while the other visited occasionally.

Defendant's tax forms showed that the business generated substantial revenues and that defendant listed her home address as her business address. This evidence fails to demonstrate the absence of a triable issue of fact whether defendant's real property was “used exclusively for residential purposes” (*see,* Administrative Code § 7-210[b]). Issues of fact also existed as to whether the defect in the sidewalk was caused by abutting landowner’s negligent repair.

Gilmartin v. City of New York, 81 A.D.3d 411, 915 N.Y.S.2d 556 (1st Dep't 2011). Defendants established that they were the owners of a single-family residential property and were therefore exempt from statutory liability for personal injury caused by the failure to maintain the sidewalk abutting their property but they failed to establish their freedom from common-law liability by showing that they did not affirmatively cause or create the alleged defect in the sidewalk. While defendants denied that they made any repairs to a raised portion of the sidewalk adjacent to a tree bench (which the parties agree is the site of plaintiff's fall), there was photographic evidence of a “patched” area on that portion of the sidewalk. In addition, while defendants claim to have observed that the elevation differential in the sidewalk was caused by the roots of the tree, as opposed to the tree bench, they also testified that the differential increased “slightly” after they installed the tree bench.

John v. City of New York, 77 A.D.3d 792, 909 N.Y.S.2d 142 (2nd Dep't 2010). Pedestrian slipped and fell on ice on public sidewalk abutting owners' two-story house. Abutting owner testified he had performed snow removal work a day or two before the accident. Since the appellants' property constituted a two-family house, was owner-occupied, and was used exclusively for residential purposes, the owner was exempt from liability imposed pursuant to section 7-210(b) of the Administrative Code for negligent failure to remove snow and ice from the sidewalk. The owner may be held liable for the hazardous condition on the sidewalk only if he either undertook snow and ice removal efforts that made the naturally-occurring condition more hazardous or caused the defect to occur because of a special use. An abutting landowner is not liable for the removal of snow and ice in an incomplete manner. Here the owner demonstrated that he did not create or increase an existing hazard by removing the snow and ice that had accumulated on the sidewalk, or cause such condition through the special use of the sidewalk, and thus defendant was entitled to summary judgment.

Boorstein v. 1261 48th Street Condominium, 30 Misc.3d 1241, 2011 WL 1106728 (Kings Co. Sup. Ct. 2011). Trip and fall on sidewalk in front of a condominium. Court found that the unambiguous language of § 7–210 allows a sidewalk-liability exception for properties abutting one or two or three family residential real property, whole or partially owner occupied and used exclusively for residential use, regardless of whether that property is owned by a corporation. Defendants' status as a condominium was irrelevant. § 7–210 is silent as to its application or non application to condominiums, corporations, or any other entities. A property, which is owned as a condominium or corporation or a coop, as long as the property is a one or two or three family residence, whole or partially owner occupied and used exclusively for residential purposes is clearly excluded from sidewalk liability under New York City Administrative Code § 7–210.

G. ABUTTING OWNER LIABILITY

Spector v. Cushman & Wakefield, Inc., --- N.Y.S.2d ----, 2011 WL 3332411 (1st Dep't 2011). Plaintiff slipped on a patch of black ice on the sidewalk abutting Citibank's premises. Because

Citibank did not refute plaintiffs' contention that the dangerous condition existed, it was required to establish that it did not cause or create the condition or have actual or constructive notice of it. The branch manager testified that he inspected the sidewalk on the day of plaintiff's accident and saw no ice, although he did not give the time of his inspection. He stated that he knew of no complaints concerning ice on the sidewalk, nor had Citibank received any complaints that water was dripping (as plaintiff had testified) from scaffolding erected in front of the adjoining building. He noted that snow and ice removal were the responsibility of co-defendant, the property manager. The majority of the Court here holds that Citibank failed to meet its burden with respect to having no actual or constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to *when* its employees last inspected the sidewalk or the sidewalk's condition before the accident. The majority here notes that this Court (First Department) has employed similar reasoning with respect to other summary judgment motions made under analogous facts in other cases. By contrast, the First Department has granted summary judgment in a case where the owner's president had testified that he had checked the area of the subject accident with more specificity as to the time frame. The majority here also distinguishes this type of case (abutting owner liability) from cases involving snow removal contractors. An owner, unlike a contractor, has a nondelegable duty to maintain the sidewalk abutting its premises. The dissent would have granted summary judgment to Citibank. Dissent finds that the testimony of its branch manager demonstrated that it did not create the alleged icy condition or have actual or constructive notice of it, shifting the burden to plaintiff to present evidence raising a triable issue of fact, which plaintiff failed to do. Specifically, plaintiff failed to present evidence from which it might be inferred that the ice on which she slipped was present on the walk for a long enough period of time to permit Citibank, as the party responsible for the sidewalk, to discover and remedy the dangerous condition.

Soussi v. Govin, --- A.D.3d ---, 2011 WL 3505703 (2d Dep't 2011). Plaintiff, a tenant in a two-family residence owned by the defendant landlord, tripped on a defect in a sidewalk under construction by defendant contractor hired by landlord. Despite her observations of the work in progress, plaintiff attempted to walk across an excavated area where a mesh grid was still exposed. The heel of one of her boots became stuck in the grid, causing her to fall. Defendant landlord got out on summary judgment by showing that he was exempt under 7-210(b) of the Administrative Code for the failure to maintain the sidewalk in a reasonably safe condition because he was an owner-occupied two-family residence and by showing that the condition which caused the accident was created not by him, but by an independent contractor hired to replace the sidewalk. In opposition, the plaintiff failed to raise an issue of fact. The contractor also got out on summary judgment by sowing that the condition that caused the fall was open and obvious, and not inherently dangerous .

H DOES EXERCISING CONTROL OVER AN AREA OF THE SIDEWALK YOU DO NOT OWN MAKE YOU LIABLE?

Montalbano v. 136 W. 80 St. CP, 84 A.D.3d 600, 923 N.Y.S.2d 489 (1st Dep't 2011). Pedestrian plaintiff tripped on a sidewalk flag raised on one side at an expansion joint. It was unclear which of two private property owners' property abutted the area of the sidewalk where plaintiff fell. Plaintiff sued both defendants. After discovery took place, defendant 1 moved for summary judgment after defendant 2 testified he had replaced the sidewalk in front of his property, including the elevated flag that caused plaintiff to fall, about 30 years before plaintiff's accident,

and then again afterwards. Also, a wall supporting defendant 2's steps abutted the area where plaintiff had fallen. Defendant 1 argued defendant 2 was thus the abutting owner, or alternatively that defendant 2 had caused the defect in the sidewalk to occur by his special use of the sidewalk. Specifically, after a gas line was installed for defendant 2's building, an oil cap was left in the flag so that conversion back to oil would be a viable future option. Defendant 2 cross-moved for summary judgment on the grounds that he was not the abutting owner, and did not affirmatively create the hazard, or have a special use of the area. Although defendant 2 had initially believed that he was the abutting owner, a survey prepared after his deposition revealed that the area of the sidewalk where plaintiff fell did not abut his property, even though a wall supporting defendant 2's stairway encroached on the area. The surveyor submitted a proper affidavit attaching the deeds, survey, etc. In opposition to the cross motion, defendant 1 argued that defendant 2 acquired the property through an easement or by adverse possession, pointing to the oil cap and the wall abutting defendant 2's steps. It further argued that defendant 2 affirmatively created the defect or had a special use of the sidewalk, i.e., retention of the oil cap. Additionally, defendant 1 argued that defendant 2 exercised continuing control over the sidewalk by replacing the defective sidewalk flag after the accident. The Court found that there was no evidence that the oil cap, the gas pipe underneath the sidewalk, or the repaving caused or even contributed to the defect. Accordingly, the argument that defendant 2 affirmatively created the hazard was pure speculation. Likewise, there was nothing to establish that defendant 2 assumed a duty to maintain and repair the sidewalk. The fact that he mistakenly believed that the entire sidewalk flag abutted his property did not create liability. The fact was that plaintiff did not fall on part of the sidewalk abutting defendant 2's property. The Administrative Code does not make persons who exercise control over the sidewalk liable—it refers only to *owners* of real property. Finally, the wall encroachment did not establish ownership of the property on which the structure encroaches.

I. ISSUES WHERE CITY LEASES SIDEWALK AREA TO PRIVATE OWNER

Provenzano v. City of New York, 79 A.D.3d 541, 915 N.Y.S.2d 29 (1st Dep't 2010). Trip-and-fall case where the defective condition upon which plaintiff fell was outside of the parking lot owned by the City and leased to a private entity. An issue of fact existed as to whether the defective condition was part of the parking lot or part of the public sidewalk. Even assuming that the area where plaintiff fell constituted a "sidewalk" under Administrative Code § 7–201(c), there was a triable issue of fact as to whether the City, as a landlord, made special use of that portion of the sidewalk to allow access to the parking lot, and thus whether prior written notice of the alleged condition was required. The lessee was not allowed out on summary judgment either because there was an issue of fact as to whether, under the maintenance agreement between the City and the lessee, the latter had agreed to displace the City's duty to maintain its property.

Anastasio v. Berry Complex, LLC, 82 A.D.3d 808, 918 N.Y.S.2d 216 (2nd Dep't 2011). Plaintiff-pedestrian slipped and fell on ice as she was walking on a sidewalk abutting premises owned by the defendant. The abutting premises were undergoing renovation, and a sidewalk shed had been erected. The defendant general contractor had contracted the defendant subcontractor to build the sidewalk shed. The plaintiff alleged that the ice had formed from water which was dripping from the sidewalk shed. Upon summary judgment motions by the abutting owner, his general contractor, and the subcontractor, Court found a triable issue of fact as to whether the subcontractor launched an instrument of harm by allegedly negligently erecting the sidewalk

shed and whether the general contractor exercised control over the construction site, as the general contractor, and whether it created or had actual or constructive notice of the alleged hazardous conditions. The abutting owner failed to establish, prima facie, that it lacked constructive notice of the alleged ice condition on the sidewalk abutting its property. Since none of the parties satisfied their prima facie burden as the movants, summary judgment denied to all.

J. WHO IS LIABLE TO INJURED PLAINTIFF: ABUTTING OWNER, OWNER'S TENANT, OR BOTH?

Collado v. Cruz, 81 A.D.3d 542, 917 N.Y.S.2d 178 (1st Dep't 2011). Plaintiff tripped and fell on a broken sidewalk in front of a building owned by abutting owner and leased by defendant-tenant for use as a grocery store. The lease provided that the tenant shall "make all repairs and replacements to the sidewalks and curbs adjacent thereto." The tenant asserted that the lease made the tenant responsible only for non-structural repairs. Since the sidewalk flag needed replacement, the tenant asserts that the necessary repair was structural, and it was not responsible to correct the condition. Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, and it was undisputed that the tenant did not create the condition or make special use of the sidewalk. Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff. Accordingly, the tenant's motion for summary judgment dismissing the complaint was granted. The Court noted, however, that the tenant may be held liable to the owner for damages resulting from a violation of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store. Thus the motion court correctly denied the tenant's motion to dismiss the owner's cross claims against it.

Kleckner v. Meushar 34th Street, LLC, 80 A.D.3d 478, 914 N.Y.S.2d 164 (1st Dep't 2011). Pedestrian tripped and fell when his foot became caught in gap between metal grate in tree well and adjacent sidewalk. Abutting owner and lesser motions for summary judgment denied since the record presented triable issues of fact as to which defendant installed the tree well and grate and which defendant was responsible for the care, maintenance and repair of the tree well and grate, and which defendant was responsible for the care, maintenance and repair of the relevant area. Although the Court of Appeals has excluded "city-owned tree wells" from the definition of "sidewalk" as the term is used in Administrative Code of City of N.Y. § 7-210, a property owner may still owe a duty relating to a tree well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction. Here, neither the owner nor lesser produced any evidence that the City defendant owed or was responsible for the maintenance and repair of the tree well. Nor did they produce evidence that they did not own it. They allege only that they failed to find proof of ownership of the tree well, but this is not enough for summary judgment. Furthermore, even if the City were deemed owner of the tree well, these defendants failed to provide evidence showing that they did not create, negligently repair or otherwise cause the allegedly defective condition that resulted in plaintiff's fall.

K. IS MORTGAGEE OF ABUTTING PROPERTY OWNER LIABLE?

Forbes v. Aaron, 81 A.D.3d 876, 918 N.Y.S.2d 118 (2nd Dep't 2011). Pedestrian brought action against mortgagor and mortgagee, alleging that he tripped and fell due to a broken sidewalk adjacent to a multiple dwelling in which mortgagor and mortgagee held an interest. Mortgagee

moved to dismiss. Since the subject property was a four-family multiple dwelling, Administrative Code of the City of New York § 7–210 shifted liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner. But here the mortgagee had, at the time of the accident, no ownership interest in the property. The entry of a judgment of foreclosure and sale does not divest the mortgagor of its title and interest in the property until the sale is actually conducted. Here, that had not yet happened, so the *mortgagor* retained her title and interest in the property, even after Mortgagee took a judgment of foreclosure and sale, and Mortgagor remained the owner until the date of the public auction, which took place after the accident. Only then did the mortgagee become "owner". Accordingly, summary judgment was granted to the mortgagee, who was not yet owner at time of accident.

L SIDEWALK LAWS IN OTHER CITIES

Huguens v. Village of Spring Val., 86 A.D.3d 593, 927 N.Y.S.2d 160 (2nd Dep't 2011). The Code of the Village of Spring Valley placed the duty to clear snow and ice from a municipal sidewalk on the owner and occupant of the abutting property, and imposed tort liability for injuries arising from noncompliance with the ordinance. But the Code also expressly provided that owners and occupants have eight daylight hours following the cessation of a snowfall within which to comply with the ordinance. Since the plaintiff's accident occurred well within the eight-hour period, the defendants could not be liable for any failure to clear the sidewalk at the time the plaintiff fell, and the plaintiff failed to raise any triable issue of fact as to whether the defendants attempted to clear the sidewalk prior to his fall and thereby made the conditions worse. Summary judgment to defendant granted.

VIII PRIMARY ASSUMPTION OF RISK

Palladino v. Lindenhurst Union Free School Dist., 84 A.D.3d 1194, 924 N.Y.S.2d 474 (2nd Dep't 2011). Eleven-year-old child was injured by a ventilation grate while playing handball on school premises (not during school hours). He was aware of the condition of the grate, having seen it prior to the incident on the date of the accident and on a prior date when he last played handball in the same area. The principle of primary assumption of risk extends to those risks associated with the construction of a playing field and any open and obvious condition thereon, and therefore the defendant was granted summary judgment. A concurring opinion states that, while summary judgment is compelled based on this Court's precedent, the result is not required by Court of Appeals precedent nor consonant with the narrow reach properly afforded the doctrine of primary assumption of the risk. This justice was impressed by last year's Court of Appeals case, *Trupia v. Lake George Cent. School Dist.,* 14 N.Y.3d 392, 395, 901 N.Y.S.2d 127, 927 N.E.2d 547, in which the Court stated that the consent-based theory is a "highly artificial construct," which has led to "a renaissance of contributory negligence replete with all its common-law potency" and instructed that the application of the doctrine "be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation". While the doctrine of primary assumption of risk usually has been applied where plaintiffs knew about the particular condition of the playing surface which caused the accident or contributed to the injuries, and elected to play on that surface anyway, this justice feels that such should be the result only where the risk is ***inherent*** in the sport, and not all such conditions can be considered risks that are ***inherent***. Here, even if the risk of injury arising from the presence of ventilation grates on the handball court were "inherent in playing on that court", the grates were

not in their proper condition, and may have unreasonably increased the risk of injury. The defective grate which collapsed when the plaintiff stepped on it was not "automatically" an "'inherent' part of the game ... in and of itself".

Ashbourne v City of New York, 82 A.D.3d 461, 918 N.Y.S.2d 88 (1st Dep't 2011). Plaintiff brought action against city and city housing authority when the wheels of her rollerblades became "stuck" on rise or bump in part of sidewalk, which was adjacent to public housing, causing her to fall. Court examined the "primary assumption of the risk" doctrine in light of the Court of Appeals recent *Trupia* decision, and held that plaintiff's activity did not constitute a sponsored sporting event or recreational activity for purpose of applying assumption of risk doctrine.

Custodi v. Town of Amherst, 81 A.D.3d 1344, 916 N.Y.S.2d 685 (4th Dep't 2011). On the day of the accident, plaintiff was rollerblading along a Town street when she encountered an ice cream truck that had stopped in the roadway. To avoid the truck, plaintiff rollerbladed onto the sidewalk and thereafter attempted to re-enter the roadway using a private driveway. As she rollerbladed down the driveway, plaintiff looked to her left and to her right for oncoming traffic. Her foot then struck or caught something, and she tripped and fell at the edge of the driveway. It turns out there was a 1 ½ inch differential between the edge of the driveway and the roadway. Although plaintiff was an experienced rollerblader and was aware that tripping and falling were risks inherent in the activity, plaintiff had not rollerbladed on this roadway before. Court held that primary assumption of risk did not apply because it could not be said that the height differential between defendants' driveway apron and the curb was a "known, apparent or reasonably foreseeable consequence" of rollerblading on a paved roadway, sidewalk, or driveway. The Court concluded instead that the height differential between defendants' driveway apron and the curb created a dangerous condition over and above the usual dangers that are inherent in the sport of rollerblading. The risk of falling on improperly maintained premises was not a risk that was inherent in the activity undertaken plaintiff. There was a triable issue of fact whether the height differential was open and obvious and whether it was a proximate cause of the accident and plaintiff's resulting injuries.

Simmons v. Saugerties Cent. School Dist., 82 A.D.3d 1407, 918 N.Y.S.2d 661 (3rd Dep't 2011). High School student was injured when he stepped into a large hole while playing touch football in the "bus circle" during recess at defendant's high school. Defendant's superintendent of buildings and grounds indicated that the bus circle was the area in front of the high school where the buses picked up the students and that students also played there, primarily during lunch time. Plaintiff testified that students were permitted to go outside to the bus circle during recess, as long as they remained within the sight of the adult monitors. Contrary to defendant's argument on summary judgment motion, the open and obvious nature of the large hole in the bus circle and plaintiff's allegedly long-standing knowledge of it did not bar inquiry into whether the allegedly dangerous condition resulted from defendant's negligent maintenance of its property. Defendant misapprehended the scope of the primary assumption of risk doctrine in arguing that a voluntary participant in a sport or recreational activity consents to all defects in a playing field so long as the defects are either known to the plaintiff or open and obvious. The doctrine, as defined by the Court of Appeals, does not extend so far. Rather, while "knowledge plays a role" in "determining the extent of the threshold duty of care," it is "inherency [that] is the sine qua non" (*Morgan v. State of New York*, 90 N.Y.2d at 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). As that Court has

emphasized, "[o]ur precedents do not go so far as to exculpate sporting facility owners of [the] ordinary type of alleged negligence" of failure to maintain their premises in good repair (id. at 488–489, 662 N.Y.S.2d 421, 685 N.E.2d 202). Here, plaintiffs presented evidence that the hole, which was approximately a foot in diameter and a foot deep, had been in existence for at least 18 months prior to plaintiff's accident. A hole of this size is not automatically an inherent risk of a sport as a matter of law for summary judgment purposes. Thus, there were questions of fact regarding whether defendant's negligent maintenance of the bus circle created a dangerous condition over and above the usual dangers that are inherent in the sport of touch football.

Gortych v. Brenner, 83 A.D.3d 497, 922 N.Y.S.2d 14 (1st Dep't 2011). Recreational cyclist brought action against city and triathlon club for injuries sustained when a bicyclist participating in a biathlon organized by the club collided with him on a park lane designated by city for joint use by participants and non-participants. Citing to the Court of Appeal's recent case of *Tupia v. Lake George Cent. School Dist.*, the Court rejected plaintiff's contention that the doctrine of primary assumption of risk was not applicable here because he was engaged in recreational, rather than competitive, cycling. Further, the blind curve in the roadway where plaintiff was struck by a cyclist competing in the biathlon did not constitute a defective condition that unreasonably heightened the risk of harm assumed by cyclists, thereby rendering the doctrine inapplicable; it was not concealed but was part of the natural topography of Central Park that was open and obvious to all users of the roadway. Plaintiff did, however, raise an issue of fact as to whether he "fully comprehended," and therefore "consented to," the risks inherent in bicycling in Central Park on the day of a biathlon. He testified that, although he was aware that some cycling event was being held in the park on the day of his accident, he did not know exactly where in the park the event was to take place, and he did not see any signs indicating that the cycling phase of the biathlon would occur in the same location where he was bicycling and at the same time.

Zelie v. Town of Van Buren, 79 A.D.3d 1801, 914 N.Y.S.2d 497 (4th Dep't 2010). Pedestrian sued town after he fell in drainage ditch while playing basketball in town park. Plaintiff ran and jumped while attempting to prevent the ball from going out of bounds, and he landed in the ditch approximately four to eight feet away from the outside boundary of the basketball court. Defendant failed to meet its burden of establishing that the ditch near the court was open and obvious and thus that the risk of injury from running out of bounds and falling into it was inherent in playing on the court. Plaintiff had testified that he had never been to the park before. Plaintiff was not asked, nor did he give any indication, whether he had seen or was otherwise aware of the ditch prior to his accident.

IX GOVERNMENTAL IMMUNITY

A. FALLOUT FROM *MCLEAN V CITY OF NY* --- DISCRETIONARY V MINISTERIAL ACTIONS

1. Foster Care, Child Placement, Temporary Housing, Welfare, etc.

Clarke v. City of New York, 82 A.D.3d 1143, 920 N.Y.S.2d 913 (2nd Dep't 2011). Mother of child sued City because of child's elevated blood lead level diagnosed after she had resided for one year in a temporary housing shelter. The City contended in its summary judgment motion that because the placement of families in temporary shelters is *discretionary* conduct, it was

immune from liability. Moreover, the City argued that even if its acts were *ministerial*, there was no special relationship between it and the child subjecting it to liability. The plaintiffs opposed the motion, asserting that there were triable issues of fact as to whether the City's placement of them in the shelter, as well as the City's biannual inspections of the premises, created a special relationship. The Court held that the City made a prima facie showing that the administration of its mandate to provide temporary housing for homeless families is *discretionary* conduct for which it cannot be held liable and thus the issue of whether a special relationship existed need not be reached.

Moore ex rel. Hill v. City of New York, 85 A.D.3d 623, 926 N.Y.S.2d 76 (1st Dep't 2011). Plaintiffs alleged that defendants were negligent in failing to properly investigate the foster home despite the biological parents' complaints that the foster home was overcrowded and lacked supervision, and in continuing the placement of the infant in the foster home. This Court found that, even if discretionary immunity doctrine did not apply to insulate city from tort liability, there was no evidence that city had sufficiently specific knowledge or notice of dangerous conduct which caused child in foster care to be burned by hot water from microwave placed on top of refrigerator, as would subject city to liability for child's injuries; accident was not proximately caused by a lack of supervision, but was the result of the foster mother's "momentary inattention," which was not foreseeable by city in the exercise of reasonable care. Defendant's motion for summary judgment granted

Kochanski v. City of New York, 76 A.D.3d 1050, 908 N.Y.S.2d 260 (2nd Dep't 2010). Administrator of estate of group foster home's neighbor brought wrongful death action against city and group-foster-home facility after decedent was killed by three teenaged facility residents. The three teenaged residents of the group home had broken into the nearby home and beaten and stabbed him to death. Plaintiff alleged the defendants breached a duty to the decedent by placing the three youths in the group home despite knowing of their vicious propensities. In reviewing defendant's summary judgment motion, the Court held there were triable issue of fact as to defendant's knowledge of the propensity of at least one of the three youths to engage in armed violent conduct against another person. But this issue was moot, really, because the Court found that governmental immunity applied. The City, under State mandate, fully assumed the responsibility (see Social Services Law §§ 62, 398) and performed the function of caring for children in need of foster care, often contracting with private entities such as SVS to provide services like group foster homes. The function of dealing with children in need of foster care is deemed best executed by government and is undertaken without thought of profit or revenue. Thus, under the circumstances of this case, the precise acts upon which the plaintiff sought to predicate the City's liability -- the placement of or leaving the three youths in SVS's group foster home -- qualify as the performance of a *governmental function*. Moreover, as there could be no claim here that, in placing or leaving the youths at SVS, the City undertook a special duty to the decedent as opposed to a general duty owed to the public, the question whether the conduct complained of was *discretionary* or *ministerial* did not even need to be addressed. Accordingly, case dismissed.

Rivera v. City of New York, 82 A.D.3d 647, 920 N.Y.S.2d 314 (1st Dep't 2011). Surviving children brought wrongful death action against city and child welfare administration, alleging that proximate cause of the murder of children's mother and sister by mother's live-in boyfriend was defendants' negligence in conducting child welfare investigation. At the time of the murders,

defendant Child Welfare Administration (CWA) was investigating plaintiffs' home. Family Court had ordered the investigation. But since the CWA caseworker who investigated the family was engaged in *discretionary* action, defendants could not be held liable for any negligence on her part, regardless of whether plaintiffs could establish a "special relationship". In any event, the record demonstrated no special relationship between the parties or special duty owed by defendants to plaintiffs. There was no evidence that defendants voluntarily undertook any obligation beyond those already required of them by law or that the caseworker was "clearly on notice of palpable danger", all of which might have established a special duty. Nor was there any evidence that plaintiffs relied on defendants to protect them and that their reliance induced them to forgo other possibilities of relief. In the absence of evidence suggesting that the caseworker engaged in "willful misconduct or gross negligence," defendants were also entitled to the immunity afforded by Social Services Law § 419 to those investigating allegations of child abuse.

2. Police Liability

Santos v. County of Westchester, 81 A.D.3d 710, 916 N.Y.S.2d 209 (2nd Dep't 2011). Plaintiffs were in a vehicle at an intersection in the Bronx, attempting to make a left turn. A City of New York traffic enforcement agent was in the intersection, directing traffic, and he directed the plaintiffs' vehicle to make the turn. However, a bus also entered the intersection, and collided with the rear passenger side of the plaintiffs' vehicle. City was sued, and moved for summary judgment on the ground that it was immune from liability because its traffic enforcement agent was performing a *discretionary* act. The Court granted the City's cross motion. The City met its burden of establishing that its traffic enforcement agent was performing a *discretionary* act for which it is immune from liability, regardless of "special relationship", under the *McClean* rule. In opposition, the plaintiffs failed to raise a triable issue of fact.

Johnson v. City of New York, 15 N.Y.3d 676, 942 N.E.2d 219 (2010). Plaintiff and her infant daughter received minor bullet injuries from a police vs armed robber gunfight. She sued the City claiming the cops discharged their firearms in violation of department guidelines, specifically a Department Procedure titled "Deadly Physical Force", which sets forth that police officers shall "not use deadly physical force against another person unless they have probable cause to believe that they must protect themselves or another person present from imminent death or serious physical injury" and "police officers shall not discharge their weapons when doing so will unnecessarily endanger innocent persons." (Note: violation of such guidelines is often tantamount to violating a "ministerial" responsibility, which means plaintiff can hold defendant liable if plaintiff shows a "special relationship. Defendant can never be held liable for "discretionary" actions under the *McLean* case). The City moved for summary judgment on the ground that the officers exercised their professional judgment and acted reasonably in returning fire once fired upon. The Appellate Division, in a 3–2 decision, dismissed the complaint, holding that plaintiff failed to show that the officers violated any of the guidelines. The court pointed to the uncontradicted testimony of the officers that there were no pedestrians in sight as the officers "sought to protect themselves and their fellow officers by returning fire". It concluded that, absent any proof that there were pedestrians in view, the report from plaintiff's expert that there were questions of fact as to whether the officers violated police guidelines was without merit. The dissenters, on the other hand, pointed to the deposition testimonies of officers, where they testified that they did not look for bystanders while they were shooting at the suspect, They

opined that this raised an issue of fact as to whether those officers violated police guidelines "by failing to even ascertain whether innocent persons were unnecessarily endangered at the time they discharged their weapons". ***The Court of Appeals*** hear sides with the majority of the Appellate Division, holding that the professional judgment rule insulated the officers from liability because their conduct "involved the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions". The Court reiterated the *Haddock* rule that governmental immunity presupposes that the judgment and discretion are exercised in compliance with the municipality's procedures, because "the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion". The guideline here called for such judgment, i.e., the police must not discharge their firearms if doing so would "unnecessarily endanger innocent persons." It did not prohibit officers from discharging their weapons when innocent bystanders were present in every instance. Rather, the guideline granted officers the discretion to make a judgment call as to when, and under what circumstances, it was necessary to discharge their weapons. As such, defendants could not be held liable.

Sorrentino v. Mayerson, 82 A.D.3d 955, 918 N.Y.S.2d 579 (2nd Dep't 2011). Plaintiff tow truck operator was injured while attempting to remove a disabled vehicle following a motor vehicle accident. He backed his tow truck into a driveway where the disabled vehicle and the vehicle of the defendant police officer had been parked. As the plaintiff exited his truck and stood next to it, another car collided with the front of the plaintiff's truck, causing the truck to strike the plaintiff. Plaintiffs sued the County, alleging that the County police officer failed to properly secure the accident scene by placing road flares or cones in the roadway. Court granted summary judgment to defendant. The officer's actions in securing the accident site constituted a governmental function and, therefore, even assuming that the actions or inactions were *ministerial,* the municipality and officer could not be held liable absent the existence of a special relationship. There was none shown.

Wood v. Nigro, 81 A.D.3d 1453, 916 N.Y.S.2d 869 (4th Dep't 2011). Plaintiff alleged police officers were negligent in failing to protect him from being assaulted after his friend had called 911 during an altercation and requested assistance. Court dismissed the case on summary judgment. Court reiterated the law that "it is well settled that a municipality may not be held liable for its alleged negligence in failing to provide police protection in the absence of a special relationship between the municipality and the injured party, and that one of the essential elements of that special relationship is "some form of direct contact between the municipality's agents and the injured party". Here, plaintiff admitted that he did not call 911, and thus "there was no evidence that plaintiff contacted the municipalities' agents" to satisfy the direct contact element of the special relationship exception to the general rule with respect to the non-liability of a municipality.

Lance v. State, 29 Misc.3d 1232, 920 N.Y.S.2d 242, 2010 WL 5022844 (Ct. Cl. 2010). Plaintiff was murdered by her husband who was out on parole. He had threatened her first. Plaintiff then communicated the threat to the NY State Department of Parole. An officer there told decedent that her husband *may* either be taken into custody, or given a parole condition ordering him to stay away from her residence. None of this was done, and then plaintiff was murdered. In Plaintiff's estate's administrator alleged that, after receiving information of the threat, the State

was negligent in failing to immediately attempt to apprehend the husband and take him into custody, and in failing to place decedent under protection. Defendant moved for summary judgment on the ground that its actions or inactions were discretionary the State owed no special duty to decedent. Construing the law in the light most favorable to plaintiff, and accepting *Valdez's* proposition that the *McLean* Court did not intend to eliminate the special duty exception in the context of *discretionary* police action or nonaction, or even accepting plaintiff's contention that this was a *ministerial* case, the Court noted that plaintiff had to at the very least show a "special relationship". Plaintiff failed to demonstrate that the first or fourth elements of a "special relationship" had been satisfied, i.e., there was an affirmative promise or undertaking by the defendant, and that decedent justifiably relied on it. At most, defendant had told decedent that her husband *may* either be taken into custody, or given a parole condition ordering him to stay away from her residence. In view of the highly contingent nature of this statement, there was no assumption of an affirmative duty to act, or *reasonable* reliance on it. Summary judgment to defendant granted.

3. School Liability

Rivera v. Board of Educ. of City of New York, 82 A.D.3d 614, 919 N.Y.S.2d 154 (1st Dep't 2011). Plaintiff teacher was injured while attempting to restrain a disruptive student whom she had previously asked defendant to remove from her classroom. Recognizing that a discretionary government action may not be a basis of liability, plaintiff argued that, since defendant's director of special education exercised her discretion in referring the troubled student for an evaluation, any follow-up action became mandatory and thus ministerial. This argument was unavailing. The decision to change a student's classroom placement was within the discretion of the Board of Education. Moreover, ministerial actions may be a basis of liability, "but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean,* 12 N.Y.3d at 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167). As plaintiff neither alleged nor testified that defendant assured her that the student would be removed from her classroom or that she would be provided with any particular security there, she did not satisfied the requirement of pleading a special duty owed to her by defendant.

4. Inspector Liability

Delanoy v. City of White Plains, 83 A.D.3d 773, 923 N.Y.S.2d 116 (2nd Dep't 2011). Injured plumber brought action against city and city plumbing inspector under Labor Law and common law liability theories. The City failed to demonstrate, prima facie, that the actions of the City plumbing inspector, in connection with his inspection of the plaintiff's plumbing work, were discretionary, and not ministerial, in nature. And there was an issue of fact as to whether there was a "special relationship" existed between the City inspector and the plaintiff because the inspector allegedly "affirmatively acted to place plaintiff in harm's way". Furthermore, the City failed to show, prima facie, that its adoption of a testing protocol applicable to the work at issue was not the "product of inadequate study" or without a "reasonable basis". Questions of fact for trial on all these issues.

5. Department of Social Services Liability

Post v. County of Suffolk, 80 A.D.3d 682, 915 N.Y.S.2d 124 (2nd Dep't 2011). A registered nurse and medical services specialist employed by the Suffolk County DSS permitted decedent to be discharged from the hospital to receive 26 hours per week of home health aide services for assistance in such daily tasks as bathing, dressing, meal preparation, and household cleaning. While at home, she fell, struck her head, and died. The plaintiff contended that the County was negligent in permitting decedent to be discharged from the nursing home without a home health care aide. The Court granted the County summary judgment on the governmental immunity defense, reasoning that the conduct targeted here — the evaluation of the decedent's needs for assistance with the acts of daily living, made by a nurse employed by the County, as well as the nurse's authorization of the provision of services to meet those needs — involved "reasoned judgment" and, consequently, constituted a "discretionary act." "A public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent" (and even if there is a "special relationship") (*McLean v City of NY*).

6. Liability for Sewage, Water, etc.

Carson v. Town of Oswego, 77 A.D.3d 1321, 908 N.Y.S.2d 482 (4th Dep't 2010). Property owners brought action against town for failure to build an adequate sewage treatment plant for the subdivision in which real property owned by plaintiffs was situated and that, as a result, potential sales were "lost," thus resulting in an indirect taking. Town moved for summary judgment. Even assuming, *arguendo*, that defendant's actions in question were *ministerial*, and thus plaintiffs could hold defendant liable if they showed a "special relationship", defendant met its burden of establishing that it did not "violate a special duty to them, apart from any duty to the public in general, a necessary element for the imposition of liability against a municipality with respect to ministerial actions (*McLean,* 12 N.Y.3d at 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167).

Azizi v. Village of Croton–on–Hudson, 79 A.D.3d 953, 914 N.Y.S.2d 232 (2nd Dep't 2010). Suit against Village for sewage effluent that flooded the plaintiffs' residence. While a municipality is immune from liability arising out of claims that it negligently *designed* the sewerage system, it is not entitled to governmental immunity arising out of claims that it negligently *maintained* the sewerage system as these claims challenge conduct which is ministerial in nature. But a municipality cannot be held liable for negligent sewer maintenance unless it is shown that the injury was caused by active negligence in the maintenance of the system. In support of its motion for summary judgment, the defendant submitted, inter alia, the affidavit and deposition testimony indicating that the defendant maintained the sewer system by annually running a sewer jet hose throughout the entire system and that annual inspections had not detected any sewage backup problems. Therefore, the defendant established, prima facie, that it had no notice of a dangerous condition and did not have reason to believe that the pipes have shifted or deteriorated or were likely to cause injury. Plaintiff failed to raise a triable issue of fact as to whether the defendant either affirmatively breached a duty owed or ... was actively negligent and the negligence caused the flooding. Summary judgment granted to defendant.

Bertacchi v. City of New York, 30 Misc.3d 567, 912 N.Y.S.2d 864 (Richmond Co. Sup. Ct. 2010). Homeowner brought suit against city and its department of environmental protection for water damage to home and personal property in a sudden storm. Plaintiff alleged the flooding

was caused by negligent failure to inspect and maintain its storm water drainage system, which overflowed during storms. In moving for summary judgment, defendant conceded that the maintenance and repair of municipal sewers and/or drainage systems is a *ministerial* duty for which a municipality may be held liable for any negligence in the performance thereof, but argued that, here, there were no such systems in existence in plaintiff's neighborhood. Instead, the City relied on a natural wetland to buffer against storms. The Court here took note of the *McClean v City of NY* case, which had held that a municipality can be held liable for ministerial acts or omissions if a special relation is proved, but can never be held liable for discretionary actions or omissions. The Court then held that that the governmental management, maintenance and allocation of resources to safeguard and maintain public wetlands within is a governmental function that involves the exercise of discretion which may not be the basis for tort liability. Further, even if they were ministerial in nature, plaintiff made no claim that the City and/or DEP undertook a special duty to the plaintiff/homeowner as opposed to a general duty to public with regard to the maintenance and care of drainage system. Thus, the motion for summary judgment dismissing the complaint was granted.

7. Transit Authority Liability

Jackson v City of New York, 85 A.D.3d 685, 926 N.Y.S.2d 487 (1st Dep't 2011). Plaintiff's decedent transit worker was fatally shot by her estranged husband while in a restricted area of a subway station. Plaintiff alleged that the Transit Authority employees were negligent in directing the husband, a non-employee, to the employees-only area without ascertaining his identity, and violated a work policy prohibiting employees from giving out such information. Plaintiff also asserted that the Transit Authority's failure to adequately secure the locker room proximately caused the decedent's death. A jury apportioned liability between the Authority and the transit worker's husband who killed her (not a party). Court held that Transit Authority's security measures involved a governmental function (the Court declined to say whether this was "ministerial" or "discretionary"), and therefore it was immune from liability for the husband's attack, absent facts establishing a special relationship between the Authority and the decedent. Court then held that Transit Authority's adoption of a policy against divulging information regarding employees to outsiders did not establish special relationship between the Authority and worker sufficient to overcome the Authority's governmental function immunity, and that, in any event, the transit worker did not justifiably rely to her detriment on defendant's policy against divulging information regarding employees to outsiders, as required for defendant to be held liable under special relationship exception to governmental function immunity. Judgment for defendant was thus to be entered.

8. Division of Criminal Justice Service Liability

Anderson-Haider v. State, 29 Misc.3d 816, 907 N.Y.S.2d 817 (Ct. Cl. 2010). Claimant brought negligence action against state, alleging that Division of Criminal Justice Services (DCJS) wrongfully disclosed his youthful offender history to his employer. State moved for summary judgment. Court held that the Claim should be dismissed because, among other things, of governmental immunity. When *ministerial* failures are alleged - such as here, the failure to keep confidential records confidential - liability attaches "only where a special duty is found", and here there was none. Note (Discretionary governmental acts "may never be a basis for liability"

according to Court of Appeals in *McLean v City of NY*). There was no special duty flowing from defendant to plaintiff *via* a private right of action contemplated by any Statute, and there was no "special relationship" established by plaintiff himself since he was not asserting that the State either voluntarily assumed a duty directly toward him.

9. Failure to Exercise Discretion

Metz v. State, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3rd Dep't 2011). Injured persons and representatives of those who died as result of tour boat ("Ethan Allan" in Lake George) accident brought action against state, alleging that state was negligent in certifying boat to carry more than 14 passengers. The Court of Claims denied plaintiffs' motion to dismiss state's affirmative defense of sovereign immunity and denied state's cross motion for summary judgment. The Ethan Allen had been inspected annually by inspectors appointed by the Commissioner of the New York State Office of Parks, Recreation and Historic Preservation. A certificate of inspection was issued after each inspection setting forth, among other things, the maximum number of passengers that could be safely transported on the vessel. Since the Ethan Allen was first inspected when it entered New York State in 1979, the maximum number of passengers permitted was fixed at 48. Following an investigation into the 2005 accident, the National Transportation Safety Board concluded that the probable cause was insufficient stability of the vessel due to carrying 48 passengers, rather than 14, which the NTSB determined should have been the maximum permitted. The Court here first determined that defendant was acting in its governmental rather than proprietary capacity. The inspection and certification of public vessels in general, and the Ethan Allen in particular, is a classic governmental function inasmuch as it is a regulatory activity undertaken for the protection of the public at large. Having concluded that defendant was acting in a governmental capacity in inspecting and fixing the number of allowable passengers on the Ethan Allen, the Court next determined whether defendant had established that such inspections were discretionary in nature. If so, and if the government exercised that discretion, under *McClean,* the government would be immune from liability. On the other hand, if the inspections were "ministerial", the government could be held liable for its negligence if it violates a special duty owed to the claimants apart from any duty to the public in general. Here, the deposition testimony of the inspectors who had inspected the Ethan Allen established that they had discretion, during the course of an inspection, to exercise independent judgment and consider the circumstances of each vessel when determining whether the vessel was safe to operate. Although they were generally trained to rely on the prior year's capacity determination, they could have required the performance of a stability test, etc. Thus, the Court concluded, the inspections and the approval of capacity ratings were discretionary, not ministerial. The next issue was whether the State inspectors actually exercised the discretion they had available to them. Where a government actor is entrusted with discretionary authority, but fails to exercise any discretion in carrying out that authority, defendant will not be entitled to governmental immunity from liability (*Haddock v. City of New York*). Here the State failed to show that it exercised its discretion. The inspectors testified that, although they could have taken various actions to review the initial capacity rating, they instead relied -- in accordance with their custom and policy -- on the previous year's certificate of inspection as to the maximum passenger capacity. This practice continued notwithstanding a substantial modification to the Ethan Allen in 1989 (which caused the ship to be "top heavy" and less stable). There was no evidence in rhe record that the inspectors ever independently verified the appropriate number of passengers who

could safely travel on the vessel or engaged in any exercise of reasoned judgment to determine whether such verification was necessary or appropriate. Claimants thus proved that the defense of sovereign immunity was without merit, and summary judgment was granted to claimants dismissing that defense.

B. QUALIFIED IMMUNITY FOR SEARCH AND SEIZURE

Delgado v. The City of New York, 86 A.D.3d 502, 2011 WL 3188287 (1st Dept 2011). This was an action to recover compensatory and punitive damages for personal injuries and property damage arising from the execution of a "no knock" search warrant at plaintiffs' apartment in Bronx County. The officers actually entered the wrong apartment, looking for a drug dealer, based on shoddy information supplied by an untrustworthy informant. The plaintiffs, a mother and her six children, suffered mental trauma as the police used heavy-handed interrogation techniques and destroyed their property. The officers did not conduct an investigation to corroborate the information provided by the informant prior to seeking a search warrant, did not conduct surveillance of the subject apartment, they did not attempt to supervise the informant or to make controlled buys from the apartment, or even try to confirm the identity of the apartment's occupants by speaking to the superintendent or other residents of the building. A justice of the Supreme Court, Bronx County, granted the application for the no-knock warrant. The warrant gave the police authority to enter the apartment without first announcing their presence based upon the allegations in the affidavit that the drugs were easily disposable and the alleged presence of two guns in the apartment. The issuing court found that adequate grounds existed for authorizing any executing officer to enter the subject premises without giving notice of his authority or purpose. In the subsequent lawsuit filed by plaintiffs, the Court concluded that the information furnished by the confidential informant did not meet the two-prong test of reliability set forth in Aguilar-Spinelli. Defendants moved for summary judgment on the ground that they were protected by qualified immunity when executing a valid search warrant. To be entitled to qualified immunity for a search and seizure, it must be established that it was objectively reasonable for the police officer to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper. the individual officers who entered the apartment in reliance on the facially valid warrant were granted summary judgment, the officers who sought and got the warrant based on the unreliable information from the unreliable informant were not.

C. QUALIFIED IMMUNITY FOR ALLEGED DEFECTIVELY DESIGNED ROADWAYS – WEISS V. FOTE

1. No Adequate Study Conducted – No Qualified Immunity

Kuhland v. City of New York, 81 A.D.3d 786, 916 N.Y.S.2d 637 (2nd Dep't 2011). Pedestrian's mother sued City for injuries sustained when her daughter was struck by a motor vehicle while crossing street at an intersection. Jury found in favor of pedestrian, and City appealed. It was undisputed that, at the time of this accident, the City had not conducted any pedestrian safety studies which included that intersection. Therefore, the City was not entitled to judgment as a matter of law on the ground of qualified immunity. Moreover, on the evidence presented, there was a rational process by which the jury could have found (as it did) that the intersection was

unreasonably dangerous for pedestrians, that the City had notice of the dangerous condition, and that the City's negligence was a proximate cause of the accident.

Betts v. Town of Mount Morris, 78 A.D.3d 1597, 911 N.Y.S.2d 537 (4th Dep't 2010). Plaintiff was involved in a head-on collision on a road owned and maintained by defendant Town. According to plaintiff, the Town was negligent in failing to design the road in a manner safe for public travel and in failing to post adequate signage and warnings. With respect to its defense of qualified immunity, the Court concluded that the Town failed to meet its initial burden of demonstrating that its decisions regarding design, maintenance and signage were "the product of a deliberative decision-making process, of the type afforded immunity from judicial interference". The Court also concluded that the requirement in Town Law § 65-a that the Town receive prior written notice of a defect did not apply to plaintiff's claims against the Town concerning the design of the road and the failure to post adequate signage and warnings.

Kuhland v. City of New York, 81 A.D.3d 786, 916 N.Y.S.2d 637 (2nd Dep't 2011). Pedestrian's mother sued City after her son was struck by a motor vehicle while crossing street at an intersection. The issue before the jury was whether the intersection of Queens Boulevard and 55th Avenue presented an unreasonable risk to pedestrians, and the evidence was undisputed that, at the time of this accident, the City of New York had not conducted any pedestrian safety studies which included that intersection. Therefore, the City was not entitled to judgment as a matter of law on the ground of qualified immunity. Moreover, on the evidence presented, there was a rational process by which the jury could find that the intersection was unreasonably dangerous for pedestrians, that the City had notice of the dangerous condition, and that the City's negligence was a proximate cause of the accident.

Gardner v. State, 79 A.D.3d 1635, 914 N.Y.S.2d 537 (4th Dep't 2010). This was a wrongful death action where vehicle decedent was driving slid across the roadway while passing over a highway bridge, struck a snow bank packed against the concrete barrier guard at the edge of the bridge, and vaulted off the bridge onto a roadway below. Another fatal accident had previously occurred in approximately the same manner and the same location 36 hours prior to decedent's accident. Defendant removed the snowbank from the bridge only after decedent's accident. Plaintiff alleged negligence in creating the dangerous condition of the snowbank, which rendered the concrete barrier guard ineffective, failing to maintain the bridge in a safe condition, failing to warn of that dangerous condition, and failing to close the bridge in the event that it could not be made safe for travelers. Following a trial, the Court of Claims determined that the snow piled against the highway's concrete barrier guard constituted a dangerous condition of which defendant had notice. Nevertheless, the court concluded that, based on the continuing weather pattern, defendant did not have "resources and manpower" to remedy the dangerous condition between the time of the first fatal accident and decedent's accident, and the court therefore dismissed the claim. Fourth Department here reverses. The Court noted that, while defendant argued at trial that its response to the first fatal accident, i.e., continuing its regular snow and ice removal operations on the bridge, was reasonable because it was in conformity with New York State Department of Transportation guidelines for snow and ice removal, those guidelines were "evolved without adequate study or lacked reasonable basis" inasmuch as they provided for the correction of a *dangerous* condition, such as a slippery roadway, before the correction of a *deadly* condition, such as the snowbank "ramp" at issue. Although defendant's expert witness testified that defendant had no option following the first fatal accident other than to continue

regular snow and ice removal from the traveling lanes of the bridge, the Court here concluded that his testimony was not supported by the meteorological evidence. Only 2.1 inches of snow fell between the two accidents, including 0.2 inches of snow that fell on the day of decedent's accident. Court concluded that the relevant conditions and circumstances, including defendant's failure to remedy the snowbank once it had actual notice of that condition, establish that defendant was negligent and that its negligence was a proximate cause of decedent's accident.

Brown v. State, 79 A.D.3d 1579, 914 N.Y.S.2d 512 (4th Dep't 2010). According to claimant's pleadings, the right angle intersection at issue had a long history of motor vehicle accidents due to a negligent and improper design of the intersection; excessive speed limit (for one of the two intersecting roads) and inadequate posting of signs and/or lack of signs, including but not limited to flashing warning signs. Claimant further alleged that defendant had been warned of the dangerous nature of the intersection. In its answer to each claim, defendant asserted the affirmative defense of governmental immunity. Following a trial, the Court of Claims concluded that defendant was not entitled to governmental immunity pursuant to *Weiss v. Fote* inasmuch as defendant abandoned its study of the intersection that began approximately four years prior to the accident. Nevertheless, the lower court concluded that claimant was required to establish that defendant's "failure to complete the intersection safety study was a proximate cause of the accident forming the basis of the claim." The court determined that claimant failed to meet that burden and dismissed the claims. Court held that this was error. The claimant's burden at trial was limited to establishing that the intersection presented a dangerous condition of which defendant had notice and that the dangerous condition was a proximate cause of the accident, claimant's injuries and the death of decedent. The lower Court incorrectly applied elements of the *Weiss v. Fote* doctrine to the negligence and proximate cause analysis after determining that defendant was not entitled to the benefits of that doctrine. Thus, the matter was remitted to the Court of Claims to use the proper standard. The two-member dissent would have affirmed the judgment dismissing the claims on the grounds, in their opinion, claimant was required to show more than that the potentially dangerous condition of the intersection was a proximate cause of her injuries and decedent's death. Rather, she was required to show what corrective action should have been taken by defendant and that such corrective action would have been completed before and would have prevented the accident.

2. Question of Fact Regarding Whether Adequate Study Conducted

Turturro v. City of New York, 77 A.D.3d 732, 908 N.Y.S.2d 738 (2nd Dep't 2010). Infant plaintiff was struck by an automobile while riding his bicycle. There had been a lot of speeding reported in that area in the past. Plaintiff alleged the City was negligent in failing to perform proper and adequate studies of the speeding problem in response to these complaints and in failing to timely implement a specific plan to control or resolve the speeding problem. The City moved for SJ on the governmental immunity defense, showing that, in response to complaints, it had conducted traffic studies at several intersection and, based on those studies, had determined that additional traffic signals, which plaintiff claimed would have slowed traffic, were ***not*** warranted, but the City failed to establish the absence of any triable issue of fact as to whether it undertook an ***adequate*** study to determine what reasonable measures might be necessary to address the risks presented by vehicles traveling at excessive rates of speed along the overall length of the street. The testimony indicated that while the City had performed intersection studies to make intersections safer, it would not perform a "mid-block" analysis unless a

complaint specifically mentioned a traffic control device, and that, since this did not happen, the City was not involved in the implementation of “traffic calming” measures. There was no study to evaluate a speeding condition on the street in the general area where the subject accident occurred prior to the accident date. Further, the evidence indicated there were other traffic calming measures besides traffic signals that could be used to reduce speeding, and that the installation of traffic signals was not an effective means of controlling speeding. Triable issues of fact remained on the issue of whether the City had conducted an adequate study so as to invoke the immunity doctrine.

3. Study Was Adequate – Qualified Immunity Applied

Selca v. City of Peekskill, 78 A.D.3d 1160, 912 N.Y.S.2d 287 (2nd Dep’t 2010). Plaintiff tripped or slipped and fell while walking on a floating dock owned and operated by the defendants, and alleged the accident was caused by a design defect. The plaintiff correctly argued that the defendants could not assert, as a defense, the lack of prior written notice of the purportedly defective condition, even though the Town Code required prior written notice for defects not only in a “street, highway, bridge, culvert, sidewalk or crosswalk” but also for “playgrounds or pathways”. In any event, a floating dock does not fall within the ambit of this prior written notice statute. However, the evidence demonstrated that the defendants were entitled to qualified immunity with respect to the improper design cause of action. Here, the defendants demonstrated the design of the floating dock was adopted after adequate study and that there was a reasonable basis for that plan, and in opposition, the plaintiff failed to raise a triable issue of fact. The complaint also asserted causes of action based on the alleged negligent maintenance of the dock. Although the doctrine of qualified immunity is not applicable to those causes of action, the plaintiff submitted no evidence as to negligent maintenance. Complaint dismissed.

4. Regardless of Adequacy of Study, Design Was Not Negligent

Estate of Hamzavi ex rel. Farrell v. State, 79 A.D.3d 1689, 914 N.Y.S.2d 544 (4th Dep't 2010). Claimant’s decedent died when the vehicle he was driving left the highway, struck a guiderail and collided with a concrete bridge pier on Interstate 81 near Syracuse. In a prior appeal, the Appellate Division had affirmed summary judgment dismissing the negligent roadway *maintenance* claim and failure to warn claim, but had found a question of fact regarding the negligent *design* and construction case. Following a trial, the Court of Claims determined that a normal longitudinal drainage ditch did not exist near the guiderail and thus that section 10.01.04 of the New York State Department of Transportation Highway Design Manual (Highway Design Manual) did not apply. The court further concluded that defendant did not breach its duty to decedent to adequately design and construct its roadways in a reasonably safe condition, and the court therefore dismissed the claim. The Appellate Division here affirms.

5. Whether the Defective Design Was a Proximate Cause of the Accident

Bailey v. County of Tioga, 77 A.D.3d 1251, 910 N.Y.S.2d 230 (3rd Dep't 2010). Plaintiff was traveling northbound on a County road when she crested a hill and collided with another vehicle who was attempting to execute a left-hand turn. The County argued that the alleged inadequate design and lack of appropriate warning signs on the road could not be considered proximate causes of the accident because of the parties' admitted familiarity with the intersection. The

Court rejected this argument. While it is generally true that the failure to provide additional warnings regarding a road condition will not be deemed a proximate cause of an accident where the drivers in question are "well acquainted" with the intersection, familiarity will not preclude liability as a matter of law where there is evidence that additional, binding traffic control devices would be appropriate and would, if followed, prevent the accident. Here, plaintiffs came forward with expert proof that the design of the intersection did not allow northbound drivers sufficient time to react to vehicles turning left onto the side road and that the 35 miles-per-hour advisory sign in place for northbound traffic, even if followed, was inadequate to prevent the accident because of the limited sight distances and the resulting insufficient time to react. A question of fact for trial.

X. **MENTAL HEALTH INSTITUTIONS' LIABILITY FOR ATTACKS ON PUBLIC**

Williams v. State, 84 A.D.3d 412, 924 N.Y.S.2d 23 (1st Dep't 2011). Plaintiff was attacked by a voluntary mental patient who had, two years prior to the attack, left an Office of Mental Health (OMH) facility without consent. After a nonjury trial, Court dismissed the claim. The majority of the Appellate Division panel reversed, and granted judgment to plaintiff. Patient had eloped from the facility for the eighth time in a 29–month period. This time, he eloped when his escort permitted him to use a bathroom out of her sight, in violation of proper procedure for an escorted patient. When the patient did not return, defendant classified him as on "LWOC" (leave without consent) as opposed to an "escape." In the case of an escape, the police must receive notification. Police notification is legally required for an LWOC. Under Sc*hrempf v. State of New York*, 66 N.Y.2d 289, 496 N.Y.S.2d 973, 487 N.E.2d 883 [1985], the State has a duty to protect the public from persons whose mental illness renders them dangerous. The patient had a long history of assaultive behavior, especially against women, including convictions for attempted assault in the second degree and assault in the second degree. Here, the Court found that defendant's carelessness in supervising the patient was the proximate cause of claimant's injuries. It was defendant's negligent supervision that allowed him to escape, and defendant was on notice of his assaultive history, and of his habit of eloping. Defendant added insult to injury by failing to report to the police that a dangerous, violent and mentally unstable individual was loose somewhere in New York City. Given the patient's history, it was a near certainty that he would attack someone, most likely a woman. The bottom line is, had defendant not allowed Joseph to abscond, plaintiff would not have been injured. The two-member dissent would have affirmed the dismissal of the case because they found that the failure to prevent the patient from sneaking out of the psychiatric center did not support a legal nexus to his assault on plaintiff *nearly two years later*. This was too remote in time to be proximately caused by the State's negligence in allowing him to elope.

XI. EMERGENCY AND HIGHWAY MAINTENANCE VEHICLES --QUALIFIED IMMUNITY

A. V&T 1103-B – RECKLESS DISREGARD STANDARD FOR HAZARD VEHICLES ENGAGED IN HIGHWAY WORK

Faria v. City of Yonkers, 84 A.D.3d 1306, 924 N.Y.S.2d 147 (2nd Dep't 2011). Defendants met their burden in support of the motion showing that the City street sweeper being operated at the time of the accident was a hazard vehicle engaged in highway work, and was not being operated

in reckless disregard for the safety of others. However, the evidence submitted in opposition to the motion, which included the plaintiff's testimony at a 50-h hearing and at a deposition, was sufficient to raise a triable issue of fact as to whether the operator was operating the street sweeper in reckless disregard for the safety of others.

B. V&T 1104 – RECKLESS DISREGARD STANDARD FOR EMERGENCY VEHICLES

1. Reckless Disregard Standard Applies Only in Four Categories of Privileged Driving Conduct.

Kabir v. County of Monroe, 16 N.Y.3d 217, 945 N.E.2d 461, 920 N.Y.S.2d 268 (2011). The question for the Court of Appeals was whether defendant was to get the benefit of the "reckless disregard" standard where, while responding to a burglary call, the deputy sheriff rear-ended a stopped car after glancing down at his GPS. The Court of Appeals affirms the Fourth Department's re-reading of V&T Law 1104, holding that the "reckless disregard" standard only applies when an emergency responder is engaged in one of the four categories of privileged driving conduct set forth in V&T Law 1104(b), to wit:"1. Stopping, standing or parking where it is illegal to do so; 2. Proceeding past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation; 3 Exceeding the maximum speed limits so long as doing so does not endanger life or property; 4 Disregarding regulations governing directions of movement or turning.

Tatishev v. City of New York, 84 A.D.3d 656, 923 N.Y.S.2d 523 (1st Dep't 2011). In accordance with *Kabir v County of Monroe,* the reckless disregard standard of care in V&T Law 1104(e) did not apply here because the inury-causing conduct of the police driver, who made a left turn at a green light, within the speed limit, and not contrary to any restriction on movement or turning, did not fall within any of the four categories of privileged conduct exempted from the rules of the road for drivers of emergency vehicles. Thus, the ordinary negligence standard was to applied regardless of whether defendant was involved in an "emergency operation". There was a question of fact as to the police officer's negligence.

Wenger v. Incorporated Village of Rockville Centre, 29 Misc.3d 1086, 909 N.Y.S.2d 333 (Nassau Co. Sup. Ct. 2010). Vehicle owner filed small claims complaint against village for damage to his car when the rear compartment door on village fire truck en route to location of an emergency unlatched and swung open, striking his vehicle while it was stopped near the intersection. The Village moved for summary judgment, which was denied because Court held that the "reckless disregard" standard did not apply, and there was an issue of fact regarding negligence. *Citing* to *Kabir,* the court found that the "reckless disregard" standard did not apply because the alleged negligence in allowing the compartment door to swing open from the fire truck did not involve any of the four driving activities that would trigger the "reckless disregard" standard enumerated in V&T 1104(e), i.e. (1) stop, stand or park illegally; (2) proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation; (3) exceed the maximum speed limits so long as he does not endanger life or property; and (4) disregard regulations governing directions of movement or turning.

2. What Constitutes "Emergency Operations"

Rusho v. State, 76 A.D.3d 783, 906 N.Y.S.2d 836 (4th Dep't 2010). Claimants, a driver and his passenger, were struck by a State-owned vehicle operated by a parole officer and partner. Appellate Division reversed motion court, and granted defendants' motion for summary judgment. Appellate Division found that the parole officers were NOT protected from liability by the qualified privilege afforded by V&T Law 1104 because the parole officers were not engaged in an "emergency operation" at the time of the collision. Rather, the parole officer who was driving the vehicle was attempting to turn the vehicle around to determine whether a person he observed operating a vehicle in the opposite lane of traffic was a parole absconder. In addition, the parole officers admitted that, if they determined upon further investigation that the person observed was in fact the absconder, they would not have attempted to arrest him but instead would have called the police to assist in his apprehension. It thus follows that, at the time of the accident, the parole officers were still engaged in an *investigatory* role and were not in pursuit of an actual or suspected absconder. With respect to claimants' motion, the Court conclude that claimants established their entitlement to partial summary judgment on liability by submitting evidence that the parole officer who was driving the State-owned vehicle was negligent when he turned the vehicle into the opposing lane of traffic, and that such negligence was the sole proximate cause of the accident. A lone dissenter disagreed, and would have affirmed on the grounds that the parole officers were engaged in an emergency operation. "The practical effect of the majority's analysis is to require certainty in the identification of the absconder or "violator of the law" in order to be engaged in an emergency operation within the meaning of V&T 114-b and, thus, V&T 1104". Also, the dissenter found that "the momentary judgment lapse" of the parole officer operating the unmarked police vehicle does not constitute "reckless disregard for the safety of others".

Hemingway v. City of New York, 81 A.D.3d 595, 916 N.Y.S.2d 167 (2nd Dep't 2011). Motorist struck by fire truck responding to emergency fire call sued city and driver of fire truck. The fire fighters were responding to an emergency fire call with the horns and sirens of the fire truck activated. Defendants established their prima facie entitlement to judgment since they showed they were engaged in an "[e]mergency operation" and that that the driver slowed down as he entered the turn at the intersection with the fire truck's horn and sirens activated." In opposition, the plaintiffs failed to raise a triable issue of fact regarding "reckless disregard".

3. What Constitutes "Reckless Disregard"

Perez v. City of New York, 80 A.D.3d 543, 915 N.Y.S.2d 77 (1st Dep't 2011). Police car struck and killed plaintiff's decedent, and administrator of estate sued. Defendants established their prima facie entitlement to judgment by showing they were responding to a radio call of an officer in need of assistance and by showing that the driver did not act with reckless disregard for the safety of others by submitting, inter alia, the testimony of both the driver and his partner that, after passing through an intersection, where they had a green light in their favor, the patrol car struck the decedent pedestrian. The driver's failure to see the decedent prior to impact was "not the type of conduct that has been found to be reckless". In opposition, plaintiff failed to raise a triable issue of fact. The discrepancies cited by plaintiff surrounding the happening of the accident, i.e. that the vehicle was going 60 mph instead of 40 mph and that it was traveling north

in a southbound lane, would not constitute evidence of recklessness on the part of officers responding to an emergency. Further, the affidavit of plaintiff's accident investigation specialist lacked probative value since it consists of speculative assertions unsupported by adequate foundational facts and accepted industry standards, and failed to identify any reckless conduct on the part of the driver.

Woodard v. Thomas, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2nd Dep't 2010). Motorist brought action against ambulance owner and operator after his vehicle collided with ambulance. Defendants established their prima facie entitlement to judgment by demonstrating that defendant was "engaged in transporting a sick ... person," such that he was engaged in an "[e]mergency operation" as defined by statute, and further demonstrated that, even assuming that the ambulance entered the intersection in which the accident occurred against the traffic light, the ambulance driver's conduct did not rise to the level of reckless disregard for the safety of others. The ambulance driver testified he slowed down and looked both ways as he approached the intersection with the ambulance's emergency lights and siren activated.

XII STORM IN PROGRESS DEFENSE

Wood v. Schenectady Mun. Housing Authority, 77 A.D.3d 1273, 909 N.Y.S.2d 587 (3rd Dep't 2010). Plaintiff slipped and fell on ice on a sidewalk in defendant's apartment complex. Defendant moved for summary judgment based on the "storm in progress" defense. The parties' conflicting testimony and meteorological evidence demonstrate that questions of fact exist as to whether a storm was in progress at the time of plaintiff's accident, which, if there was, would have suspended defendant's duty to remedy any alleged dangerous conditions for a reasonable period of time after the storm had ceased, and there was also a question of fact as to how long the ice upon which plaintiff slipped was in existence prior to the accident, whether defendant had actual or constructive notice of any alleged dangerous condition, and whether defendant had sufficient time to remedy any such condition.

XIII SCHOOL LIABILITY

A. ASSAULTS ON TEACHERS AND OTHER NON-STUDENTS: MUST SHOW "SPECIAL RELATIONSHIP"

Peta–Gaye Blackstock v. Board of Educ. of City of New York, 84 A.D.3d 524, 921 N.Y.S.2d 858 (1st Dep't 2011). Plaintiff, a special education speech therapist employed by defendant, suffered personal injuries as the result of an assault by one of her students. Plaintiff alleged that defendant failed to, among other things, properly supervise its students. Plaintiff had to show that defendant owed her a special duty of protection. Plaintiff failed to provide a factual predicate for the special relationship theory in her notice of claim or complaint, and thus complaint dismissed.

Rivera v. Board of Educ. of City of New York, 82 A.D.3d 614, 919 N.Y.S.2d 154 (1st Dep't 2011). Plaintiff teacher was injured while attempting to restrain a disruptive student whom she had previously asked defendant to remove from her classroom. Recognizing that a discretionary government action may not be a basis of liability, plaintiff argued that, since defendant's director of special education exercised her discretion in referring the troubled student for an evaluation, any follow-up action became mandatory and thus ministerial. This argument was unavailing. The

decision to change a student's classroom placement was within the discretion of the Board of Education. Moreover, ministerial actions may be a basis of liability, "but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean,* 12 N.Y.3d at 203, 878 N.Y.S.2d 238, 905 N.E.2d 1167). As plaintiff neither alleged nor testified that defendant assured her that the student would be removed from her classroom or that she would be provided with any particular security there, she did not satisfied the requirement of pleading a special duty owed to her by defendant.

B. ASSAULT ON STUDENT: DUTY TO INFORM PARENT OF PRIOR ASSAULT

Stephenson v. City of New York, 85 A.D.3d 523, 925 N.Y.S.2d 71 (1st Dep't 2011). The issue before the Court upon defendant's motion for summary judgment was whether defendants, who were deemed (because of discovery sanctions) to have had prior notice of an assault on the almost 14–year–old plaintiff, were liable for negligently failing to prevent the second assault. Plaintiff and the other boy had a fistfight on the school grounds (first assault), and neither boy was significantly injured. School authorities punished plaintiff with a one-day, in-school suspension, ***without notifying his parents,*** and the other boy, who was found to have started the incident, received a one- to two-week suspension. While plaintiff was serving his one-day suspension and was still on school grounds, he ran into the other boy, who told him he was "going to get you jumped." Plaintiff did not tell the school or his parents about this threat. Days later, the other boy with three accomplices attacked plaintiff off of school grounds. Plaintiff sued the school, alleging it failed to take action to prevent the assault by notifying plaintiff's mother about the earlier fistfight. In an affidavit, the mother stated that, if the school had notified her about the fight, she would have asked to meet with the school and the other boy's parents to iron out the differences between the two boys, and would have either kept plaintiff at home or had him escorted to school until "the problem had been resolved." The lower court acknowledged that a school normally has no duty of care to a student injured off school grounds, but found that, while plaintiff was in the school's custody, the school breached its duty to notify his mother about the fistfight. By breaching this duty, the lower court concluded, the school "failed to prevent a further escalation of the incident" and accordingly was liable for plaintiff's injuries. The majority of the Appellate Division disagreed, finding no liability on defendants' part, and thus granting the motion for summary judgment. The majority found that the mother's claim that she could have prevented the assault was entirely speculative. The other boy could have attacked plaintiff at any time, possibly weeks later, or at any place, and the mother's presence would not necessarily have been a deterrent to the targeted attack. The suggestion that the assault could have been prevented by plaintiff's mother's accompanying him to school every day did not rise above speculation. The Court also found it unreasonable to impose a duty on the school to notify a parent about a fight between two students when the school had already affirmatively addressed the misconduct. The dissent writes a lengthy opinion, relying on case law in which schools have been held liable for failure to comport with a duty arising while a student is in its custody that results in foreseeable injuries to the student while he or she is outside its custody. Notably, in *Anglero v. New York City Bd. of Educ.* (2 NY3d 784 [2004]), the Court of Appeals held that liability could be found for an assault outside school custody when school employees witnessed and failed to react to an assault upon the same victim earlier that day during school. The Court of Appeals made clear that the school can be found to have

breached a duty to supervise if "intervention might have averted the second assault, which occurred off the school grounds". Although the Dissent agreed that the school had no ***statutory*** legal obligation to inform parents about assaults on their children while in school custody, the lack of a specific statutory duty requiring schools to inform parents about acts of violence against students does not preclude a ***common-law*** obligation. In the dissent's opinion, the school here had a duty "to take energetic steps to intervene" because the initial acts of violence against plaintiff occurred while he was in the school's custody. It is reasonable to impose on the school a duty to inform plaintiff's mother about the risks of a future assault on her son. The question of whether the school breached its duty to supervise should be addressed by the trier of fact, rather than decided as a matter of law, since it depends on the particular circumstances.

C. LACK OF ADEQUATE SUPERVISION

1. "Sudden and Spontaneous Events" – Generally No Liability for Failure to Supervise

Benavides v. Uniondale Union Free School Dist., 31 Misc.3d 1240, 2011 WL 2347607 (Nassau Co. Sup. Ct. 2011). During lunch time recess, the second-grader plaintiff was pushed down a slide by an unidentified student in the school playground. The unidentified student then slid down the slide and landed on top of the plaintiff. Defendant moved for sj on the grounds that the accident was a "sudden and spontaneous event that could not have been prevented no matter what the level of supervision was", that supervision was adequate in any event, and the accident was "in no way caused by any act or omission by the District". There was no evidence that the District had knowledge, or could have anticipated, that the the unidentified student would push plainiff down the slide and then slide on top of him. Thus, irrespective of whether school aides were present on the playground at the time of the accident, the unidentified student's act of pushing plaintiff down the slide and then sliding on top of him was a sudden and unforeseen event which no amount of supervision would have prevented.

Moffat v. North Colonie Cent. School Dist.., 82 A.D.3d 1311, 917 N.Y.S.2d 754 (3rd Dep't 2011). Plaintiff high school student, not a student in the defendant school, was at a high school basketball game when he was assaulted by a student from the defendant high school. Plaintiff alleged defendant provided inadequate security at the game and negligently supervised the students. The evidence offered by defendant in support of its motion for summary judgment established that the aggressor did not have any serious disciplinary problems at school, he generally enjoyed a good reputation with students and administrators and he had no prior interaction with plaintiff. Absent evidence that the alleged aggressor had a history of engaging in dangerous or violent conduct, or that he presented "an imminent foreseeable danger" to plaintiff, his impulsive and spontaneous attack on plaintiff could not have been reasonably anticipated by defendant. A minor argument between the aggressor and his girlfriend on the night of the incident, during which he struck a trophy case, did not put defendant on notice that the aggressor's subsequent behavior would escalate to the assault on plaintiff. Further, for liability to arise out of defendant's allegedly inadequate provision of security, which is a governmental function, it must be established that defendant owed " 'a special duty of protection' " to plaintiff, and there was none.

Walley v. Bivins, 81 A.D.3d 1286, 917 N.Y.S.2d 461 (4th Dep't 2011). Plaintiff, a ninth grade student, was stabbed by a seventh grade student attending the same school. It was undisputed that defendant had notice of three altercations between the two prior to the stabbing. The first incident occurred approximately two weeks earlier, when the two students were verbally arguing and a teacher had to restrain one of them (not the plaintiff) in order to prevent a physical altercation. Approximately one week later, a volleyball coach interceded during a physical altercation between the two students on a school bus. The third incident occurred the following morning, as soon as plaintiff and the other student entered the school. They were engaged in a physical altercation and had to be separated by teachers. As a result of the third incident, both students were suspended for three days. On the first day upon returning from her suspension, the other student exited the bus, proceeded to plaintiff's locker, and stabbed plaintiff in the leg with a knife. Although defendant did not dispute that it breached its duty of supervision, it contended that its alleged negligence was not a proximate cause of plaintiff's injuries (apparently because the attack happened so quickly that no amount of supervision would have prevented it). Based on the circumstances of this case, including the recent incidents of physical contact between the two students, the school's own failure to comply with its practice of counseling a student in the event that the school was concerned that the student had a violent nature as well as its failure to comply with its own security plan, and the fact that the incident occurred on the first day on which both students had returned to school following their suspensions, the Appellate Division concluded that there was an issue of fact whether the undisputed breach by defendant of its duty of supervision was a proximate cause of plaintiff's injuries, thus precluding summary judgment.

Lizardo v. Board of Educ. of City of New York, 77 A.D.3d 437, 908 N.Y.S.2d 395 (1st Dep't 2010). The infant plaintiff, a fourth grader, was injured during a kickball game in physical education class, when another student collided with him. Even accepting as true every factual assertion made by the infant plaintiff, there was no evidence that the collision was anything other than a sudden, impulsive act that could not reasonably have been foreseen or prevented. Even assuming that the opinion of plaintiff's "Sports Liability Consultant" could appropriately be treated as that of an objective expert, his assertions would not justify a finding of liability. The assertions that the incident might have been prevented by closer supervision and that it might have been prevented by instructions specifically informing the children that it is against the rules to run directly into an opposing player are valid only in retrospect. Nothing in the record supports the notion that the teacher had any reason, before the incident, to think that the students needed to be reminded that the game of kickball, which they had been playing for years, does not include full contact or tackling. Nor was there any reason to believe that reducing the number of players in the field would have prevented the base runner from charging into the infant plaintiff. The conduct that caused the injury here was simply too impulsive to permit the teacher to take action to prevent it.

O'Brien v. Sayville Union Free School Dist., --- N.Y.S.2d ----, 2011 WL 3505787 (2nd Dep't 2011). Student was waiting his turn to use a bathroom in his kindergarten classroom when he placed his hand inside the hinged side of the bathroom door. A fellow student entered the bathroom and closed the door on the infant plaintiff's finger. The infant plaintiff's teacher testified at an examination before trial that the incident occurred during "rest time," when the approximately 22 students were resting their heads on their tables. The teacher then permitted one table at a time, each with approximately four students, to leave the table and stand in line for the bathroom. The teacher further testified that the kindergartners had been instructed at the

beginning of the school year to stay on a carpet placed a sufficient distance from the bathroom door while waiting their turn and that she would generally give individual instruction to any student failing to comply with the rule. There was no proof that the infant plaintiff had previously violated the rule or that he was in need of supervision to assure his compliance with classroom rules. The teacher testified that, at the time of the incident, she was at her desk on the other side of the room from the bathroom, watching the students resting at their tables and not watching the students lining up at the bathroom. She did not observe the incident and first knew something was wrong when the infant plaintiff screamed and came over to her. Court granted summary judgment to defendant school district with respect to the cause of action alleging negligent supervision by eliminating all triable issues of fact. Further, although the plaintiffs alleged that certain defects in the bathroom door rendered it inherently dangerous, they offered no proof of this in opposition to the motion, and thus summary judgment was granted on this cause of action as well.

2. Lack of Supervision in Science Lab

Nash v. Port Washington Union Free School Dist., 83 A.D.3d 136, 922 N.Y.S.2d 408 (2nd Dep't 2011). Mother, on student's behalf, sued school district after her son was severely injured in an explosion in high school science laboratory. It was undisputed that the teacher assigned to supervise the plaintiff and another student departed from school premises, leaving the two students completely unsupervised. Among the primary issues presented on this appeal was the applicable duty of care when an incident occurs *after the formal end of classes for the day, but in an academic setting on school premises involving a course completed for academic credit*. . Although during school hours the standard of care for a school is that of the reasonably prudent parent, a lesser standard, that of the reasonable and prudent person, is applicable in the context of a student's voluntary participation in an intramural or extracurricular school sport. The accident occurred after the high school's classes were formally over for the day, during a program that, while not a required class, was one that students wishing to participate in had to apply and qualify for, and for which they would receive a grade. The Court rejected defendant's contention that these facts made the program "an extracurricular activity" to which the less rigorous "reasonably prudent person" standard applied. It was not in any sense an "intramural or extracurricular school sport," which is the context in which the lower standard has generally been found to apply. Thus, the Court concluded that the applicable duty of care owed to the plaintiff by the school district was to exercise such care ... as a parent of ordinary prudence would observe in comparable circumstances. The Court also addressed the foreseeability of the circumstances leading to the explosion, and whether the accident occurred in so short a span of time that the teacher could not have prevented the plaintiff's injury regardless of the level of supervision. Here, the school district exercised no supervision whatsoever over the plaintiff and his classmate at the relevant time. The classmate's dangerous conduct commenced with his use of the ethyl alcohol, which was later ignited when the same student sparked a lighter. There is no support in the record for the conclusion that the student's use of the ethyl alcohol prior to his ignition thereof by the spark lighter occurred in so short a span of time that no amount of supervision on the teacher's part could have prevented the explosion. Therefore, summary judgment on liability was granted to plaintiff.

D. OBLIGATION TO PROVIDE CROSSING GUARDS

Rosado v. Alhati, 83 A.D.3d 593, 922 N.Y.S.2d 42 (1st Dep't 2011). A father dropped off his daughter (infant-plaintiff) at the "barricades," a cordoned-off area where the children could play near the school, as he usually did, which did not require her to cross the street at all, and instructed her to stay inside the barricades. He then left, fully aware that the crossing guard was not at his post. The City established its entitlement to judgment on plaintiffs' claim that it negligently failed to ensure that a crossing guard was present at the crosswalk at the time she was struck by a car. In opposition, plaintiffs failed to raise a triable issue of fact as to whether they justifiably relied on the City to provide a crossing guard where infant plaintiff's use of the crosswalk was unanticipated and her father did not think it unusual that the crossing guard was not present. Under these circumstances, the special relationship necessary to trigger a duty toward plaintiffs was not demonstrated.

E. PREMISES LIABILITY CLAIMS AT SCHOOL – MUST SHOW NOTICE OR CREATED HAZARD

Walker v. City of New York, 82 A.D.3d 966, 918 N.Y.S.2d 775 (2nd Dep't 2011). Mother of student who slipped or tripped on an allegedly defective condition on a concrete playground playing game of tag at city playground during school recess sued city and department of education. Court here held that the doctrine of primary assumption of risk was not applicable on these facts, but that defendants established they did not negligently supervise the child with evidence demonstrating sufficient supervision by teachers and that the child was engaged in normal play at the time of the occurrence. Defendants also established they did not have actual or constructive notice of the condition, i.e., the presence of a tar-like substance, that allegedly caused the child's accident with evidence showing that they had recently inspected the playground before the accident and the inspection did not reveal the allegedly hazardous condition. In opposition do defendants' motion, the plaintiff failed to raise a triable issue of fact

Thomas v. Pleasantville Union Free School Dist.. 79 A.D.3d 853, 913 N.Y.S.2d 702 (2nd Dep't 2010). Twelve year-old student ran from his school cafeteria toward a field located on school grounds during his lunchtime recess. His chosen route took him to a staircase that led down to a short macadam path, which ended at a running track that encircled the field. He was injured when he ran into a rope strung between two stanchions across the intersection of the path with the running track, at a height of about four feet. The plaintiff testified at his deposition that, as he was running down the staircase, he turned to look back at a friend who was chasing him, and at that point ran into the rope. The Supreme Court granted the defendants' motion for summary judgment dismissing the complaint. Court here held that defendants established their prima facie entitlement to summary judgment by demonstrating that the rope which allegedly caused the plaintiff to fall was an open and obvious condition that was readily observable by the reasonable use of one's senses, and was not inherently dangerous. There was no merit to the contention that the plaintiff's injury resulted from the defendants' negligence or inadequate supervision.

Bloomfield v. Jericho Union Free School Dist., 80 A.D.3d 637, 915 N.Y.S.2d 294 (2nd Dep't 2011). The infant plaintiff allegedly sustained personal injuries as she attempted to step down from one of the mats used in the sport of high jump during her gym class. The gym class was being covered by a substitute teacher who took the class outside to a football field surrounded by a track. The substitute teacher gave the students the option of walking around the track or playing touch football. Most of the students opted to play touch football at one end of the

football field. However, the infant plaintiff and three of her friends opted to walk around the track. After walking one lap around the track, the infant plaintiff and her friends approached the substitute teacher and asked if they could go on mats at the other end of the football field. The substitute teacher said yes, but did not give the infant plaintiff or her friends any warnings or instructions about the mats. The infant plaintiff's foot became caught in a hole or tear in the mat. As the infant plaintiff attempted to untangle her foot, she fell to the ground. The substitute teacher was "half the football field" away from the infant plaintiff when the accident occurred. Defendant failed to establish, prima facie, that it did not have notice of the tear in the mat which proximately caused the infant plaintiff to fall. A jury could reasonably infer from the photographs in the record that the condition existed for a sufficient period of time for it to have been discovered and remedied by the defendant in the exercise of reasonable care. The defendant also failed to establish, prima facie, that it adequately supervised the infant plaintiff or that its alleged negligent supervision was not a proximate cause of the accident. Summary judgment motion denied.

F. SPORTS INJURIES AT SCHOOL--- PRIMARY ASSUMPTION OF RISK DOES NOT ALWAYS APPLY

Larson v. Cuba Rushford Cent. School Dist., 78 A.D.3d 1687, 912 N.Y.S.2d 827 (4th Dep't 2010). Student cheerleader fell while performing a stunt during cheerleading practice. Defendant moved for summary judgment on the primary assumption of risk doctrine, but motion denied because said doctrine does not shield defendants from liability for "exposing [the student] to unreasonably increased risks of injury". While it was true that the student voluntarily participated in the stunt and that the risk of falling during the stunt was obvious, plaintiff raised a triable issue of fact with respect to the inexperience of the defendant coach, as well as her alleged failure to utilize proper coaching techniques and to monitor the activities of the team members during practice. There was an issue of fact as to whether defendant failed to provide proper supervision of the student.

Zelouf v. Great Neck Union Free School Dist.,78 A.D.3d 690, 909 N.Y.S.2d 650 (2nd Dep't 2010). Plaintiff-student waiting for his mother to pick him up from school after wrestling practice, when he and his schoolmates decided to participate in a foot race. The plaintiff and his schoolmates were just outside of the school building in a designated waiting area. For the foot race, the infant plaintiff and his schoolmates ran from one entrance and exit door to another entrance and exit door on the opposite side. The infant plaintiff's his hand crashed into a glass panel on the second entrance and exit door. Triable issues of fact exist as to whether the infant plaintiff was within the orbit of the defendants' authority at the time of the accident and, if so, whether the defendants adequately supervised the infant plaintiff and, if not, whether their negligent supervision of the infant plaintiff proximately caused his injuries.

G. NEGLIGENT PLAYGROUND DESIGN

Carrasquillo v. City of New York, 78 A.D.3d 635, 910 N.Y.S.2d 526 (2nd Dep't 2010). The infant plaintiff, then six years old, was injured when she fell from a six-foot ladder at a municipal playground. The accident occurred on a piece of playground equipment that was located approximately 60 feet away from a series of spray sprinklers. Just before the infant climbed the ladder, a group of children, who had previously been playing in the sprinklers, ascended the

structure and dripped water onto the rungs of ladder. According to the plaintiffs, the ladder then became wet and slippery, a condition which ultimately led to the infant plaintiff falling off the ladder. At trial, the plaintiffs contended that the defendants were negligent in failing to install or maintain a ladder that was slip resistant under wet and dry conditions. The plaintiffs' theory of negligence was based on a recommendation found in the 1981 edition of the CPSC guidelines. Jury found in plaintiff's favor, but Appellate Division overturned the verdict. The Court found that while the 1981 guidelines did call for certain components to be finished with a surface that was slip resistant under wet and dry conditions, the subject playground was designed in 1996 and constructed in 1998, and the plaintiffs' own expert acknowledged, on cross-examination, that the 1981 guidelines had been superseded by editions published in 1994 and 1997. The plaintiffs' expert further acknowledged that neither of the subsequent editions of the CPSC guidelines recommended that ladders be finished with a surface that was slip resistant under wet and dry conditions and that the revised editions called instead for steps and ladders that prevented the accumulation of water. The plaintiffs did not demonstrate, or even allege, that the design of the ladder permitted the accumulation of water, or that the design violated any other section of any other applicable guideline. Moreover, the defendants' expert, who explained that the 1981 guidelines had been revised after the CPSC had discovered that slip-resistant materials on certain surfaces generated different risks, demonstrated that the subject ladder was indeed designed so that it did not permit the accumulation of water, and that it otherwise met the "latest requirements" promulgated by the CPSC. Disregarding the CPSC guidelines that had been superseded, the plaintiffs' sole basis for establishing liability was a specification, set forth in the construction contract, which called for the ladder to be "slip resistant under both wet and dry conditions." That single specification was inconsistent with numerous other provisions in the contract, which explicitly called for the playground to meet the most recent CPSC guidelines, and under the circumstances, could not be a basis for liability.

H. SCHOOL BUS LIABILITY

Smith v Sherwood, 16 N.Y.3d 130, 944 N.E.2d 637, 919 N.Y.S.2d 102 (2011). Student's father brought action against vehicle driver, city, school district and its board of education, regional transportation authority ("Centro"), and bus driver, for injuries suffered by a private school student when he was struck by a vehicle while crossing the street after he was dropped off on the wrong side of the street by a bus. The bus company, a regional transportation authority for the Syracuse area known as "Centro", had contracted with the Syracuse City School District to provide students in the District with bus transportation to and from various schools. The child did not get off when the bus passed his stop, but got off on the way back, on the other side of the street. Thus he had to cross the street after being let off, something he did not usually do. He started to cross, but was struck, apparently because the bus blocked his view of oncoming traffic. In allowing the negligence claim to proceed against Centro, the Appellate Division relied, in part, case law involving yellow school buses subject to the mandated use of specific safety equipment under V&T law 375(20). Such school buses are statutorily required to stop "with red signal lights flashing" until a passenger needing to cross a street does so (Vehicle and Traffic Law § 1174[b]). The Appellate division found a question of fact as to whether the bus driver should have made other vehicles stop while student crossed the street. The Court of Appeals here reverses, holding that the driver did not have the legal authority (or the necessary safety equipment) to make other vehicles stop while the student crossed the street. It held that Centro

satisfied its duty to the student by allowing him to exit the bus at a safe location, and that it did not have a special duty to make other vehicles stop while the student crossed the street.

XIV WRONGFUL POST-RELEASE SUPERVISION TERMS

Donald v. State, --- N.Y.3d ---, --- N.E.2d ----, 2011 WL 2471551 (2011). Claimants in four cases were convicted of crimes for which they received determinate sentences. A statute required that such a sentence include a period of post-release supervision (PRS), but in each claimant's case the sentencing judge failed to pronounce a PRS term. The sentencing judge pronounced only a term of imprisonment, not a term of PRS, a practice held to be improper in *People v. Sparber* (10 N.Y.3d 457 [2008]) and *Matter of Garner v. New York State Dept. of Correctional Servs*. (10 N.Y.3d 358 [2008]). Claimants were nevertheless subjected to PRS, and in three of the four cases were imprisoned for PRS violations. The claimants sought damages from the State of New York, asserting that they were wrongly made to undergo supervision and confinement. All claimants asserted, in substance, that they are entitled to damages from the State because DOCS, acting without court authority, administratively added PRS to their prison terms. The Court rejected all the claims. One of them was dismissed because in that case DOCS did not err; in entering a PRS term; DOCS was merely carrying out the mandate of the sentencing court, as recorded by the court clerk in a commitment sheet. The only error in that case was by the sentencing judge, who failed to pronounce the PRS term orally. Any claim against the State based on the judge's error would be barred by judicial immunity. In three of the claims, claimants sued only for for false imprisonment (also known as wrongful confinement), but "a detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction" and none of the claimants alleged a defect in the *process*. Furthermore, the State is immune from liability for the discretionary acts of its officials and DOCS's actions in recording PRS terms as part of claimants' sentences were *discretionary* in that sense. In each of these cases, DOCS was presented with a prisoner sentenced to a determinate prison term, for whom PRS was mandatory under State law. DOCS made the "reasoned judgment" that it should interpret their sentences as including PRS, though the sentences rendered by the courts did not mention it.

XV COURT OF CLAIMS

A. FAILURE TO SUFFICIENTLY ALLEGE CLAIM IN NOTICE OF INTENTION OR CLAIM (§ 11[b]),

Young v. State, 82 A.D.3d 972, 918 N.Y.S.2d 777 (2nd Dep't 2011). In this wrongful death and medical malpractice claim, Court held that so much of the claim as sought to recover damages for the conscious pain and suffering of the claimant's decedent failed to comply with Court of Claims Act § 11(b), in that the claimant failed to sufficiently particularize the nature of her claim with respect to decedent's alleged conscious pain and suffering. This constituted a jurisdictional defect mandating dismissal. Further, in determining whether to deem the late claim to have been timely served and filed, the Court of Claims correctly considered the proper factors, inter alia, whether the delay in filing the claim was excusable and whether the State of New York had notice of the essential facts constituting the claim (Court of Claims Act § 10[6]).

B. FAILURE TO SUFFICIENTLY ALLEGE CLAIM UNDER COURT OF CLAIMS ACT § 8-b (Wrongful Conviction and Imprisonment).

Warney v. State, 16 N.Y.3d 428, 947 N.E.2d 639, 922 N.Y.S.2d 865 (2011). Claimant had spent nine years in jail for a murder he did not commit. He was convicted and sentenced based in large part on his confession (coerced according to claimant). The plaintiff had an IQ of 68, was in special education until he dropped out of school in eighth grade, and was suffering at the time of the murder investigation from AIDS-related dementia. The officers were aware of his mental condition when they began questioning him about the murder, as the officers had transported him to a psychiatric facility two weeks earlier for pulling fire alarms and reporting false incidents to the police. When DNA evidence proved that someone else had committed the crime, he brought action against State, seeking damages under Unjust Conviction and Imprisonment (Court of Claims Act § 8–b). The Appellate Division affirmed the dismissal of his claim pursuant to CPLR 3211, reasoning that a criminal defendant who gave an uncoerced false confession that was presented to the jury at trial could not subsequently bring an action under section 8-b claim and that claimant failed to adequately allege in his claim that his confession was coerced. The Court of Appeals here reverses, holding that he adequately pled his claim. His confession and other statements did not warrant dismissal at this stage of the proceedings on the ground that he caused or brought about his own conviction confession. In sum, the Court here holds that the courts below inappropriately made credibility and factual findings, dismissing the claim without giving claimant the opportunity to prove the detailed allegations that he did not cause or bring about his conviction.

C. FAILURE TO SUFFICIENTLY ALLEGE TIME OR PLACE WHERE CLAIM AROSE (§ 11[b])

Acee v. State, 81 A.D.3d 1410, 917 N.Y.S.2d 476 (4th Dep't 2011). Pursuant to Ct of Claims section 11(b), a notice of intention to file a claim must set forth, inter alia, “the time when and place where such claim arose.” While the statute does not require “absolute exactness”, the notice of intent must set forth the time and place where the claim arose with “sufficient definiteness to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances.” Here, the notice of intent satisfied the requirements of section 11(b) inasmuch as it states that claimant “fell at Groveland Correctional Facility in its parking lot by reason of broken pavement,” and that “the incident occurred on August 5, 2007 between 8:30AM and 9:00AM near the gate to the entrance of the facility.” Although it was later determined that claimant did not fall in the parking lot but instead fell on Perimeter Road, which encircles the correctional facility, that road was adjacent to the parking lot where claimant parked her vehicle, in an area in which handicapped parking was permitted. Moreover, the parking lot was contiguous to the road, with no delineation between the two.

D. MUST CLASS ACTION CLAIMANTS COMPLY WITH CT CLAIMS ACT § 11(b) REQUIRMENT REGARDING GIVING NAMES OF CLAIMANTS?

Weaver v. State, 82 A.D.3d 878, 918 N.Y.S.2d 192 (2nd Dep't 2011). Former inpatients at state psychiatric facilities brought class action against state, alleging violations of their property rights. The main issue presented on this appeal is whether, in a class action brought in the Court of Claims, each class member must satisfy the substantive pleading requirements of Court of

Claims Act § 11(b) and be a named claimant in a filed claim. Court here held that class actions brought in the Court of Claims must satisfy all of the jurisdictional requirements set forth in section 11(b) and that each member must be a named claimant in a filed claim.