MUNICIPAL LIABILITY
2015-2016 UPDATE

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A. LATE SERVICE OF NOTICE OF CLAIM

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

Chtchannikova v. City of New York, 138 A.D.3d 908, 30 N.Y.S.3d 233 (2nd Dep't 2016). The plaintiff's notice of claim, served on the City on or about January 11, 2011, contained an accident date of October 14, 2010. The plaintiff's counsel laesster learned from the plaintiff's medical records that the correct date of the accident was, in fact, October 12, 2010. Given the accident date of October 12, 2010, the plaintiff's service of the notice of claim was untimely by one day. A late notice of claim served without leave of court is a nullity. Where a claimant "fails to apply for leave to serve a late notice of claim or to deem the notice of claim served *nunc pro tunc* within one year and 90 days following the date that the claims accrued, the court is without authority to grant such relief". The Supreme Court lacked the authority to deem an amended notice of claim timely served *nunc pro tunc*, as the one–year–and–90–day statute of limitations period had expired.

Yessenia D. v. New York City Health & Hosps. Corp, 139 A.D.3d 454, 29 N.Y.S.3d 788 (1st Dep't 2016). The fact that plaintiff served a late notice of claim before the statute of limitations had expired, but without leave of the court, was of no moment. Further, the record was devoid of evidence of "affirmative wrongdoing" that would support the application of equitable estoppel against defendant. Contrary to plaintiff's contention, defendant was under no obligation to notify her before the statute of limitations had expired that her notice of claim was not timely. Case dismissed.

2. Court's Permission to Serve Notice of Claim Beyond SOL is a Nullity

Bayne v. City of New York, 137 A.D.3d 428, 26 N.Y.S.3d 77 (1st Dep't 2016). Thirteen days before the expiration of the one-year-and-ninety-day statute of limitations for commencing a personal injury action against the City, plaintiff sought leave to file a late notice of claim. The Court granted plaintiff leave to serve the late notice of claim "within 30 days of the date of the order". Plaintiff served a notice of claim within that time period, but beyond the SOL (even when calculating the tolling time for the petition to late-serve). The problem was that, even though the statute of limitations was tolled during the pendency of plaintiff's petition to late-serve, it began running anew on the date when Supreme Court granted plaintiff leave to serve a late notice of claim. Accordingly, plaintiff was required to commence an action against the City within 13 days, but failed to do so, relying instead on the 30 days the Court had "granted" him. The order granting plaintiff leave to serve a late notice of claim within 30 days of the order did not extend the statute of limitations. Plaintiff could have and should have filed the summons & complaint within the limitations period, or even before receiving leave to serve a late notice of claim (in which case the complaint would have been dismissed but plaintiff could have recommenced pursuant to CPLR 205).

Attallah v. Nassau University Medical Center, 131 A.D.3d 609 (2nd Dep't 2015). Plaintiff's failure to petition for leave to serve a late notice of claim within one year and 90 days of the date that his claim accrued deprived the Supreme Court of authority to permit late service of a notice of claim. Plaintiff's equitable estoppel claim was rejected because he failed to demonstrate that defendant engaged in any misleading conduct that would support a finding of equitable estoppel. There was no evidence that the defendant made any settlement representations upon which the plaintiff justifiably relied prior to the expiration of the statutory periods for serving a notice of claim or seeking leave to serve a late notice of

claim and, therefore, plaintiff could not have relied on any conduct by the defendants in discouraging him from serving a notice of claim or seeking leave. Case dismissed.

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

a. "Actual Knowledge" w/i 90 days or a Reasonable Time Thereafter

i. "Actual Knowledge" Gained from Prior Late Notices of Claim

Matter of Wooden v. City of New York, 136 A.D.3d 932, 25 N.Y.S.3d 333 (2nd Dep't 2016). Contrary to the plaintiff's contention, the timely notices of claim served by individuals with whom he was arrested did not identify the plaintiff, and, therefore, were not sufficient to show that the municipality acquired actual knowledge of the essential facts constituting the petitioner's claims. Plaintiff failed to establish that the delay in serving a notice of claim would not substantially prejudice the respondent. Application to late-serve denied.

Matter of Royes v. City of New York, 136 A.D.3d 1042, 25 N.Y.S.3d 368 (2nd Dep't 2016). Plaintiff was arrested for criminal possession of a weapon, then released as charges were dismissed. He then served a notice of claim on the City alleging false arrest, false imprisonment and fed civil rights violations, but without specifically alleging malicious prosecution, although the facts to support such a claim were all there. A few months after the 90-day statutory period expired, he moved to late-serve a new notice of claim specifically alleging malicious prosecution. He also sought to add new State law claims that were based on other actions by the City that occurred several months before his arrest that were not part of the original notice of claim. The Court granted permission to late-serve as to the malicious prosecution claim, as the firsts notice of claim was served within the 90-day statutory period, thus giving the City timely notice of the essential facts of that claim. But the Court denied permission to late-serve as to the newly alleged State-law claims. The City did not have actual knowledge of the essential facts constituting those state law claims within 90 days following their accrual or a reasonable time thereafter.

Corwin v. City of New York, 2016 WL 4016914 (1st Dep't 2016). Plaintiff suffered severe brain injury when the front wheel of the Citi Bike he was riding struck an unpainted concrete wheel stop placed at the entrance to the Citi Bike station located at East 56th Street near Madison Avenue, causing the bike to flip over. He had been riding his bike through the station to avoid car traffic. The notice of claim against the City alleged, inter alia, that plaintiff's injuries were a result of its "negligence, recklessness and carelessness" in maintaining the station, particularly in the placement of a wheel stop that was not visible. Petitioners commenced a federal diversity action in the Southern District of New York that set forth the same allegations as those in the notice of claim. In its answer in the federal action, the City asserted an affirmative defense that plaintiff's own culpable conduct contributed to his injuries, but it did not specify what that conduct was. Eventually the City clarified that the comparative fault defense was based on the fact that plaintiff had failed to wear a helmet. Plaintiffs amended their complaint in Federal Court, and then sought to amend their notice of claim to conform to the amended complaint in the federal action. Specifically, plaintiff sought leave to amend the notice of claim to include an allegation that the City had a duty to make helmets available as part of its bike rental City Bike program. But in addition, it also sought to change the initial theory of liability from one that focused on the camouflaged wheel stop to one that more broadly alleging that the City failed to design the station in a manner that provided adequate clearance between the station and vehicular traffic. The City opposed the motion to amend in part on the grounds that plaintiff was reinventing his case too late in the game, and further on the grounds that it had no such *duty* to provide plaintiff with a helmet. Regarding the helmet, plaintiff's attorney argued, among other things, that the City "could not have it both ways". It could not raise a comparative negligence defense for plaintiff

having failed to wear a helmet but at the same time oppose plaintiff's request to amend the notice of claim to allege that the City should have provided one. General Municipal Law § 50–e(6) permits amendments to correct "a mistake, omission, irregularity or defect" but does not usually allow for new theories of liability. There was no question that the proposed amendments went beyond the bounds of this subsection. But the Court also considered whether plaintiffs could allege the new theories by late-serving a new notice of claim under subsection (5). Ultimately, Supreme Court denied the motion, holding that the proposed amendment would introduce new theories of liability and that the passage of 16 months between the accident and the application, coupled with the fact that discovery was under way, constituted prejudice to the City. The Appellate Court reversed. It agreed with the City that the proposed amendments substantively changed the initial theories of liability and thus subdivision (5) (amending the notice of claim) was not available to plaintiff. However, leave to serve a new notice of claim would allow plaintiff to allege these new theories. The factors to be considered for granting permission to late-serve a notice of claim (actual knowledge, reasonable excuse, prejudice to defendant, etc.) favored plaintiff. To the extent that the allegations concerning the design of the station differed between the original notice of claim and the proposed amended notice of claim, the City had actual notice of the claims. Further, it was not prejudiced by plaintiff's amplification of the claims in the proposed amended notice, since the alleged defect was not transitory in nature. Plaintiff also established that the City was in possession of relevant documents concerning the implementation of the system, and that it did have access to former employees with relevant knowledge of the facts at issue. In contrast to the design claim, the City did not have actual knowledge of plaintiff's claim concerning the City's failure to provide helmets. But plaintiffs only raised the helmet issue in response to the City's decision to assert, as an affirmative defense, that petitioner's injuries would have been less severe had he worn one. Plaintiff's failure to use a helmet is akin to a plaintiff's failure to use a seatbelt in a motor vehicle case. Any such failure does not go to comparative liability but rather to how damages, if any, should be assessed. Further, the City bears the burden of proving that some or all of plaintiff's injuries would not have been received had he used a helmet. Accordingly, plaintiffs had no reason to make a claim concerning the lack of helmets until the City raised the issue. The Court agreed with plaintiff that the City could not "have it both ways." The City could not claim to be prejudiced where it chose to inject a mitigation defense into the federal action, and plaintiffs were merely trying to ensure that their notice of claim supported their effort to rebut that defense. It would be patently unfair if plaintiffs were unable to contest the City's affirmative defense that plaintiff should have worn a helmet. In addition, the City, which commissioned the Citi Bike program, was at all times aware of the unavailability of helmets to customers of the program and any claim of prejudice was tempered by the fact that, like with the design claim, the decision by the City not to make helmets available to riders should be reflected in documents maintained by the City and in the knowledge of witnesses within its control. There was also a dissent in part that would not have allowed the new claims regarding negligence in failing to provide access to helmets as part of the City Bike program.

b. "Actual Knowledge" through Police Reports

Matter of Morris v. City of New York, 132 A.D.3d 997, 18 N.Y.S.3d 702 (2nd Dep't 2015). The police accident report did not provide the City with actual notice of the plaintiff's claim that she was injured as a result of the City's negligence Moreover, the plaintiff failed to demonstrate that the delay of approximately four months after the expiration of the 90–day statutory deadline for serving a notice of claim would not substantially prejudice the City in maintaining its defense on the merits. Application to late-serve denied.

Matter of Clark v. City of New York, 139 A.D.3d 849, 31 N.Y.S.3d 178 (2nd Dep't 2016). Police officer suffered injuries when a city bench collapsed while he was sitting on it. His application to late-serve a notice of claim was denied because he did not proffer any excuse for the delay of more than eight months in serving a notice of claim and in commencing this proceeding and he failed to demonstrate that the City had actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time. The line-of-duty injury report prepared by his supervising officer one day after the incident did not constitute actual knowledge of the claim. The injury report merely described the

circumstances of the accident without making a connection between the petitioner's injuries and the respondent's alleged negligent conduct and thus did not provide actual knowledge of the claim.

Bass v. New York City Transit Authority, 140 A.D.3d 449, 31 N.Y.S.3d 871 (1st Dep't 2016). Defendants had actual knowledge of the facts upon which their liability was predicated within 90 days after the claim arose because the accident/crime investigation report created on the date of the accident set forth the location and time of the accident, the identity of the bus operator who set up the ramp from which petitioner's wheelchair fell, a witness's identifying information, and the investigating supervisor's conclusion that the ramp was situated on the street and not on the curb when the accident happened. The fact that plaintiff had no reasonable excuse for the delay in moving to late-serve was not determinative.

c. "Actual Knowledge" through School Reports

Horn v. Bellmore Union Free School District, 139 A.D.3d 1006, 32 N.Y.S.3d 289 (2nd Dep't 2016). The plaintiffs failed to establish that the defendant had "acquired actual knowledge of the essential facts constituting the claim" within 90 days of the accident or a reasonable time thereafter (General Municipal Law § 50–e[5]). The school's principal prepared an accident claim form on the day of the accident, and the infant plaintiff's parents completed the medical claim portion of that form a couple of weeks after the accident. Contrary to the plaintiffs' contention, this form, which merely indicated that the infant plaintiff lost his left front tooth and part of his right front tooth when he hit his mouth on the gymnasium floor in an attempt to "duck from a ball" during physical education class, did not establish that the defendant had timely, actual knowledge of the essential facts underlying the claims that it was negligent in supervising the students, in failing to provide a safe play area, and in allowing the infant plaintiff to engage in an inappropriate activity. Thus, defendant had no reason to conduct a prompt investigation into the purported negligent supervision and alleged unsafe condition of the gymnasium floor. Motion to late-serve denied.

Matter of Regan v. City of New York, 131 A.D.3d 1064, 16 N.Y.S.3d 280 (2nd Dep't 2015). Student was confronted by two classmates who threatened her and attempted to start a physical altercation. The infant petitioner's mother immediately reported the incident to the principal and requested a meeting with the parents of the other two students. The principal failed to contact the parents of the other students, no meeting was ever organized, and no disciplinary measures were taken. Later she was attacked on school grounds and severely beaten by the same two classmates. Approximately one month after the expiration of the 90–day deadline to serve a notice of claim the petitioner served the application to late-serve a notice of claim. Court granted application, finding that defendants acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90–day period. Defendants' conclusory assertions of prejudice, based solely on the petitioners' one-month delay in serving the notice of claim, were insufficient to rebut the petitioners' showing.

Nevaeh T. v. City of New York, 132 A.D.3d 840, 18 N.Y.S.3d 415 (2nd Dep't 2015). Teacher engaged in inappropriate sexual contact with student over course of two school years while she was student in his elementary school class. Defendants failed to establish that the DOE had no specific knowledge or notice of the teacher's propensity to engage in the misconduct alleged in the complaint. There was some evidence he had done the same with a prior student. Further, plaintiff testified she once complained to the assistant principal about the ongoing sexual conduct.

d. "Actual Knowledge" gained through medical records

Wally G. ex rel. Yoselin T. v. New York City Health and Hospitals Corporation (Metropolitan Hosp.), 2016 WL 3188975 (Court of Appeals) (2016). Plaintiff was born prematurely by emergency cesarean section and

was brain-damaged allegedly by medical malpractice. The application to late-serve the notice of claim was filed five years later, and two years after plaintiff had filed a late notice of claim without permission from the court (which was thus a "nullity"). In support of the application, plaintiff submitted voluminous medical records along with affidavits from medical experts who, based on those records, opined that HHC's deviations from the standard of care resulted in plaintiff's injuries. Supreme Court denied the motion to late-serve, and a divided Appellate Division affirmed. The majority found unreasonable the excuse by plaintiff's counsel "that he waited to make the motion [for leave to serve a late notice of claim] until approximately three years and ten months after the filing of the untimely notice of claim because he needed to receive the medical records from HHC". It also held that plaintiff failed to establish timely actual knowledge of the essential facts of the claim. More specifically, plaintiff failed to show "that the medical records put defendants on notice that the alleged malpractice would subsequently give rise to brain damage as a result of birth trauma and hypoxia or that he would subsequently develop other deficits, delays and disorders". The dissenters, relying on the Court of appeals *Williams* case (Williams, 6 N.Y.3d at 537) asserted that HHC's hospital chart "demonstrate[d] that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter," stating that such records "***merely need to suggest injury attributable to malpractice***". The Court of Appeals here scrutinized the plaintiff's expert's affidavits and found that they "simply interpreted the medical records and posited that HHC could have engaged in alternative courses of treatment which, in their view, would have produced different results, and that plaintiff's health complications could have been avoided had HHC taken a different approach, however, mere assertions that a different course of treatment could have been followed does not address whether HHC had actual knowledge of the essential facts necessary to properly defend itself in the underlying action" . Thus, the Court refused to find that the lower courts had abused their discretion in denying service of a late notice of claim. The Court also clarified its *Williams* holding: "***Medical records must do more than 'suggest' that an injury occurred as a result of malpractice***". "Although we stated in *Williams* that there was "'little to suggest injury attributable to malpractice' in that particular case, our use of the word 'suggest' was not intended to deviate from our holding in that case that the medical records must 'evince that the medical staff, by its acts or omissions, inflicted an[ ] injury on plaintiff ...' in order for the medical provider to have actual knowledge of the essential facts" (Williams, 6 N.Y.3d at 537). A lone dissenting justice would have reversed, finding the courts below abused their discretion in holding that the medical records did not provide defendant with actual knowledge of the injury.

Matter of Khan v. New York City Health & Hosps. Corp., 135 A.D.3d 940, 24 N.Y.S.3d 163 (2nd Dep't 2016). Plaintiff contended that the defendants committed medical malpractice by failing to perform certain diagnostic tests and medical and surgical intervention to restore blood flow to his right foot and save it from amputation. The application to late-serve was granted because defendants acquired notice of the essential facts of this claim well within 90 days after the claim arose through the medical records showing that the petitioner's right foot had an ischemic injury with arterial blockage, and that the doctors determined that surgical or medical intervention at that time was unavailing and that amputation was likely. Application to late-serve thus granted even though plaintiff had no reasonable excuse for the delay.

Saponara v. Lakeland Cent. School Dist., 138 A.D.3d 870, 29 N.Y.S.3d 491 (2nd Dep't 2016). Plaintiff infant, during recess, jumped off the swings in the school's playground and hurt his wrists. More than 5½ months later, his father applied to late-serve a notice of claim. Plaintiff did not proffer any excuse for the failure to serve a timely notice of claim and there was no showing of a nexus between the infancy and the delay. As for "actual knowledge", the school nurse prepared a student incident report on the day of the incident, but it merely indicated the child was injured when he jumped off the swings and fell onto his hands, and did not provide the defendant with actual knowledge of the essential facts underlying the claim

that the appellants were negligent in their maintenance of the playground by failing to maintain an adequate depth of woodchips on the ground beneath the swings. Application to late-serve denied.

e. "Actual Knowledge" from Other Sources

Matter of Kim v. Dormitory Authority of the State of New York, 2016 WL 3324351 (3rd Dep't 2016). During a construction project on a residence dormitory owned or controlled by defendant, plaintiff was injured when he reportedly dropped a two-by-four board. A year later, in August 2014, plaintiff moved pursuant to General Municipal Law § 50–e (5) for leave to serve a late notice of claim against defendant, asserting liability under Labor Law §§ 200, 240(1) and 241(6). Plaintiff claimed defendant had sufficient notice of the essential facts since its representative prepared a report on the day of the incident. The report briefly related that plaintiff was holding a seven-foot long two-by-four board above his head, dropped it to his shoulder when distracted by a coworker, and he had a "sore shoulder." Given the general nature of the information in the cursory report, Court held defendant lacked sufficient notice of essential facts regarding a potential claim against it or that plaintiff had sustained the ostensibly significant injuries he now was claiming.

Luna v. City of New York, 139 A.D.3d 818, 31 N.Y.S.3d 180 (2nd Dep't 2016). Plaintiff tripped and fell on a cracked or raised section of a sidewalk in Brooklyn. The City did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The sidewalk defects indicated on a map filed with the New York City Department of Transportation by the Big Apple Pothole and Sidewalk Protection Corporation, approximately eight years prior to her accident, did not give the City actual knowledge of the essential facts constituting her claim.

2 "Reasonable Excuse" for Late service

a. Medical Condition as Reasonable Excuse

Matter of R.A. v. City of New York, 132 A.D.3d 878, 18 N.Y.S.3d 137 (2nd Dep't 2015). A call made to the 911 emergency number, an ambulance report, and hospital records submitted by the plaintiff showed only that the City had actual knowledge of the plaintiff's accident, but not that the City had actual knowledge of the essential facts constituting the plaintiff's claims. Further, the plaintiff's excuse that he was unaware of the severity of his injury "is unavailing without supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed". Finally, the delay in serving the notice of claim prejudiced the City, as it was prevented from conducting an investigation in which it could have examined the conditions and circumstances of the alleged incident within 90 days after the alleged incident or within a reasonable time thereafter, and could have interviewed witnesses while their memories were still fresh. Application to late-serve denied.

Diez v. Lewiston-Porter Central School District, 140 A.D.3d 1665, 34 N.Y.S.3d 283 (4th Dep't 2016). Supreme Court abused its discretion in granting claimant's application for leave to serve a late notice of claim almost three years and eight months after the accident. Claimant's excuse that she was "unaware of the severity of [her daughter's] injury" was unavailing without supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed. Thus, claimant's affidavit, without more, was insufficient to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. Further, claimant failed to establish that defendant had actual knowledge of the essential facts constituting the claim within the requisite time period. Defendant's knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim.

b. Mistaken Identity of Defendant-Entity

Matter of Richardson v. New York City Hous. Auth., 136 A.D.3d 484, 24 N.Y.S.3d 308 (1st Dep't 2016). After plaintiff's counsel realized that NYCHA, not the City of New York, owned the property abutting the badly broken sidewalk where plaintiff's accident occurred, plaintiff sought an extension of time to file a notice of claim under General Municipal Law § 50–e(5). Among the factors to be considered under that Statute is whether the failure to identify the proper party was an "excusable error". While the error of plaintiff's counsel concerning the identity of the responsible public corporation does not provide a reasonable excuse for the delay in giving notice, "the absence of a reasonable excuse is not, standing alone, fatal to the application". Although NYCHA did not receive actual notice of the accident until the petition was served, it did not contest plaintiff's assertion that the condition of the badly broken sidewalk remained unchanged since the time of the accident and that there were no witnesses to the accident, so that NYCHA would not be substantially prejudiced by the eight-month delay in providing notice. Thus, application to late-serve granted.

Fridman v. New York City Tr. Auth., 131 A.D.3d 1202, 17 N.Y.S.3d 467 (2nd Dep't 2015). After leaving his seat to exit, the bus came to an abrupt stop, propelling plaintiff forward and causing him to sustain a hip fracture and other injuries. Not long thereafter, plaintiff died. The transit defendants met their burden for SJ by submitting evidence that neither the MTA nor the NYCTA was responsible for the operation, maintenance, or control of the bus on which the decedent allegedly was injured. The subject bus was registered to MTA Bus Company, and while MTA Bus Company is a subsidiary of the MTA, the MTA is not vicariously liable for the torts of its subsidiaries. The Court also denied the plaintiff's cross motion for leave to amend the caption to substitute MTA Bus Company as the defendant and to deem the summons and complaint served upon MTA Bus Company, nunc pro tunc. Since the plaintiff brought the cross motion after the expiration of the statute of limitations, the plaintiff sought this relief nunc pro tunc pursuant to CPLR 305(c). However, such relief can be granted only where there is evidence that the correct defendant was served, albeit misnamed in the original process, and that the correct defendant would not be prejudiced by the granting of the amendment. CPLR 305(c) "cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served".

c. Miscellaneous Mistakes

Matter of Lawhorne v. City of New York, 133 A.D.3d 856, 20 N.Y.S.3d 155 (2nd Dep't 2015). Plaintiff's assertions that she mistakenly believed that another law firm which allegedly employed an unspecified investigator with whom she had spoken a few days after the accident was representing her and that she did not know that she had to serve a notice of claim upon the City were insufficient to excuse the failure to serve a timely notice of claim. Moreover, the plaintiff failed to rebut the City's assertion that the more than five-month delay between the expiration of the 90–day statutory period and the commencement of this proceeding would substantially prejudice its ability to conduct an investigation of the claim at this late date, given the transitory nature of the alleged sidewalk defect. Application to late-serve denied.

3. Merit Not Usually Considered, Unless Claim Patently Meritless

Matter of Abdul v. City of New York, 131 A.D.3d 1165, 16 N.Y.S.3d 743 (2nd Dep't 2015). While the merits of a claim ordinarily are not considered in connection with a request for leave to serve a late notice of claim, where the proposed claim is patently without merit, leave to serve a late notice of claim should be denied. Here, plaintiff alleged the City had wrongfully sold or transferred certain real property that he alleged to

have an interest in, notwithstanding a prior tax foreclosure ruling that this was not so. The merits of the claim were patently meritless. Thus, application to late-serve denied.

4. Prejudice to the Public Corporation – Whose Burden of Proof?

Matter of Newcomb v Middle Country Cent. Sch. Dist., 128 A.D.3d 701, 8 N.Y.S.3d 422 (2nd Dep't 2015) (**This case is going to the Court of Appeals this year**). High school student-pedestrian crossing at an intersection (not during school hours) is hit by a speeding hit-and-run car and dies. Five months or so after the accident, the father's lawyer finally gets police photos of the accident. These reveal that a sign advertising a high school musical may have played a part in causing the accident because they limited the site line between the student as he stepped off the curb and the driver of the car. It was unclear whether the school itself had placed the sign, or whether a parent or student had done so. The School had learned of the accident and death soon after it happened, but there was no direct evidence that the school knew about the sign or that it would be claimed that the sign caused the accident. Court held plaintiff failed to establish actual knowledge of the essential facts constituting the claim within 90 days after the accrual of the claim or a reasonable time thereafter. Court held that School District did not have actual knowledge within the statutory period that claimant would claim the sign was a cause of the accident. Moreover, "***the petitioners failed to demonstrate that their delay in serving a notice of claim would not substantially prejudice the School District's ability to defend against the claim on the merits.***". This is likely to be a big issue in the Court of Appeals because the Departments are split on whether plaintiff has the burden of showing a lack of prejudice to the public corporation or rather the public corporation has the burden of showing it is prejudiced by the late service of the notice of claim. The District did not put in any affidavits from school officials explaining why it would be prejudiced. The Court did not require them to do so because plaintiff had the burden on the issue of prejudice. Because there was no actual knowledge of the claim within 90 days or a reasonable time thereafter, and because there was no showing that the District would not be prejudiced by the late-service, the motion to late-serve was denied.

II. AMENDING THE NOTICE OF CLAIM

Doe v. Rochester City School District, 137 A.D.3d 1761, 28 N.Y.S.3d 175 (4th Dep't 2016). A special-needs student in a Rochester school was assaulted and raped by another student. She reported the crime the same day. She described her assailant as an African–American student. She also reported that the attack occurred at lunchtime in the girls' restroom adjacent to the cafeteria. Using video surveillance footage, the District determined that the accused rapist could not have committed the acts. The victim thereafter reported to the police that her assailant was a white student with brown hair, green eyes, and a small scar on his neck and the rape occurred in a locker room. The District, again using video surveillance recordings, investigated the allegations. Following the commencement of the action, Doe testified at her deposition that her assailant was an adult African–American male who wore a name tag and she believed that he was a janitor employed at the school. She testified that he raped her under the bleachers on the athletic field after school hours. Plaintiffs thereafter moved for permission to amend their notice of claim, complaint, and bill of particulars to conform to the child's deposition testimony. The Fourth Department reverses Supreme Court's denial of the motion and allows the amendment. This is a somewhat surprising result, since section 50–e (6) of the GML allows for amendments of the notice of claim only where there has been a 'mistake, omission, irregularity or defect made in good faith ..., provided it shall appear that the other party was not prejudiced thereby. The Court here concluded that the child's documented delays in cognitive and social functioning, together with her fear of the assailant and post-traumatic stress disorder allegedly resulting from the attack, provided a good faith basis for the amendment sought by plaintiffs and that the District was not prejudiced by the proposed amendment. The amendment sought by plaintiffs did not make "substantive changes in the

theory of liability". Plaintiff's claim remained that defendant was negligent in failing to supervise plaintiff, regardless of the identity of her assailant or the precise location of the attack. The Court also rejected defendant's claim of prejudice based upon its loss of video surveillance footage of the location of the assault and rape specified by plaintiff at her deposition. Defendant was on notice that plaintiff was at the school the entire day that the incident occurred. Any prejudice suffered by the District when its video surveillance recordings were overwritten was the consequence of its own failure to preserve evidence that it knew or should have known was potentially relevant.

Lewis v. New York City Hous. Auth., 135 A.D.3d 444, 24 N.Y.S.3d 16 (1st Dep't 2016). Plaintiff alleged he slipped and fell on liquid on the third step of a staircase owned and maintained by defendant. The notice of claim stated that the accident was caused "as a result of a liquid substance" being on the third step of the subject staircase and that defendant was reckless and/or negligent in its "ownership, operation, design, creation, management, maintenance, contracting, subcontracting, supervision, authorization, use and control" of the steps. After the 50-h hearing, plaintiff attempted to amend the notice of claim to allege that the defendant failed to provide a skid or slip-resistance surface on the stair treads and that defendant's employees were improperly trained. Court disallowed the amendment because "it cannot be fairly inferred from the [notice of claim] that plaintiff would later assert that the third step itself was in a defective condition or that the building's porter was improperly trained". The Court did not allow plaintiff to rely on his testimony at his GML § 50–H hearing to rectify the deficiencies in the notice of claim because he never testified there that there was an issue with the step itself and traditionally such testimony has only been "permitted to clarify the location of an accident or the nature of injuries" and "may not be used to amend the theory of liability set forth in the notice of claim where, as here, amendment would change the nature of the claim". Motion to serve amended notice of claim denied.

Avery v. New York City Transit Authority, 138 A.D.3d 770, 29 N.Y.S.3d 499 (2nd Dep't 2016). Plaintiff was injured when, after exiting a bus operated by the defendant, she stepped onto a broken and uneven portion of the roadway and fell to the ground. Her notice of claim alleged that she fell in "the vicinity of the bus stop located on Fulton Street near its intersection with Lafayette Avenue, Brooklyn, N.Y." At the 50-h, she testified the accident happened when she got off of the B–25 bus by the Lafayette Avenue train station. She alleged the same in her Complaint. She then moved for leave to serve an amended notice of claim to reflect that "the location of the occurrence was the vicinity of the B–25 bus stop and the Lafayette train station, located on Fulton Street near its intersection with Greene Avenue, Brooklyn, N.Y." The plaintiff asserted that the purpose of the proposed amendment was to give a more detailed description of the location of her fall. The amendment was allowed because plaintiff had not acted in bad faith or attempted to change the location of her fall. In fact, the plaintiff gave a consistent description of the location of her fall in her notice of claim. Any inconsistency between the original description of the location of the plaintiff's fall and the description provided in the amended notice of claim did not prejudice the defendant.

Thomas v. New York City Hous. Auth., 132 A.D.3d 432, 17 N.Y.S.3d 130 (1st Dep't 2015). Plaintiff, who faced with a motion to dismiss his case, apparently realized that his slip-and-fall premises theories of liability in the original notice of claim and complaint were not going to prevail. To survive the motion, he needed to allege that the handrail on the stairway was defective. He thus cross-moved for leave to "amend" the notice of claim pursuant to GML § 50–e(6) to add the new theory of liability, but did not specifically seek leave to late-serve a notice of claim pursuant to GML § 50–e(5). But such a game-changing amendment was too substantive to qualify as a mere "amendment" of the notice of claim. Although plaintiff did not specifically invoke General Municipal Law (GML) § 50–e(5) in the cross motion, the motion court should have exercised its discretion under CPLR 2001 to treat the motion as having been made under GML § 50–e(5) to late-serve a new notice of claim. (Note that, while there is no time-limit for seeking leave to

"amend" the notice of claim under GML § 50–e(6), new theories of liability cannot be alleged in an "amended" notice of claim. Only technical defects can be corrected). Here plaintiff's cross motion was made eleven months after the accident, well within the one-year-and-ninety-day limitation period for seeking permission to late-serve a notice of claim. The Court thus examined the various "factors" for deciding whether to grant such a motion, and found that the defendant had actual knowledge of the essential facts of the claim within 90 days of the accident, and was not prejudiced by the late-serving of the new notice of claim. Specifically, plaintiff had testified about the defective handrail at the 50–h hearing within 90 days of the accident. Thus, defendant was aware by the time of the hearing that plaintiff was claiming that the railing was defective. Permission to late-serve a new notice of claim granted.

Frankel v. New York City Tr. Auth., 134 A.D.3d 440, 19 N.Y.S.3d 739 (1st Dep't 2015). Defendant demonstrated that the notice of claim was insufficient to comply with the requirements of General Municipal Law § 50–e(2), because it failed to give notice of plaintiff's present contention that the accident involving a slip on a staircase was caused by a missing portion of a handrail, instead of by water and/or liquid and debris. Plaintiff could not amend the notice of claim pursuant to General Municipal Law § 50–e(6) because the allegation that the accident was caused by a portion of missing handrail was a new theory of liability, which is not within the purview of this provision, which is only for technical changes. Further, plaintiff could not seek leave to file a late notice of claim asserting a new theory of liability because the one–year–90–day statute of limitations has expired.

Weiss v. City of New York, 136 A.D.3d 575, 25 N.Y.S.3d 210, (1st Dep't 2016). The Court here held that the original notice of claim, together with the photographs provided by plaintiff showing broken cement barriers strewn over the sidewalk and roadway at the accident location, sufficiently set forth the location and manner of his accident to satisfy the requirements of General Municipal Law § 50–e(2), since they provided "information sufficient to enable the city to investigate the claim". The amended notice of claim, clarifying the location and manner of the alleged accident, was properly permitted pursuant to General Municipal Law § 50–e(6), since the City did not show any prejudice, or assert that plaintiff acted in bad faith.

Robinson v. City of New York, 138 A.D.3d 1093, 30 N.Y.S.3d 311 (2nd Dep't 2016). Plaintiff fell on a sidewalk adjacent to property owned by the defendant and then filed a notice of claim alleging the sidewalk was "broken, jagged, uneven, depressed and in a trap-like condition." The complaint later alleged that the sidewalk was "slippery and slick with an accumulation of ice and frozen water" at the time of the accident, and that the defendant was liable due to negligent snow/ice removal. At his 50-h hearing, he testified that the accident happened when he "slipped on ice." After the statute of limitations expired, defendant moved for summary judgment dismissing the complaint on the grounds that the notice of claim did not properly notify it of the allegations. Plaintiff cross-moved to either amend the notice of claim or for leave to serve a late notice of claim. The Court denied the motion to amend the notice of claim because "amendments to notices of claim are appropriate only to correct good faith and nonprejudicial technical mistakes, defects or omissions, not substantive changes in the theory of liability". Here the proposed notice of claim included a substantive change to the facts and added a new theory of liability. "Such changes are not technical in nature and are not permitted as late-filed amendments to a notice of claim". And since the statute of limitations had expired, it was too late for plaintiff to be granted permission to serve a late (new) notice of claim. Case dismissed.

Cruz v. City of New York, 138 A.D.3d 634, 28 N.Y.S.3d 870 (1st Dep't 2016). Court denied motion to amend the notice of claim pursuant to General Municipal Law § 50–e(6) and to amend the complaint because "plaintiff's inconsistency as to the location of the accident and his failure to move timely to correct

the notice of claim prejudiced defendant's ability to investigate the incident while the surrounding facts were still fresh".

Hollman v. 480 Assocs. Inc., 138 A.D.3d 637, 31 N.Y.S.3d 471 (1st Dep't 2016). Plaintiff's amended notice of claim satisfied the statutory notice of claim requirement by providing the City with "information sufficient to enable [it] to investigate" her claim, within 90 days after the claim arose. Although plaintiff initially identified the wrong cross street, within 90 days of the accident she served an amended notice of claim, with photographs of the correct location, and the City was not prejudiced by the initial mistake since it never investigated the wrong location.

Mendoza-Jimenez v. New York City Transit Authority, 140 A.D.3d 522 (1st Dep't 2016). In her notice of claim, plaintiff attributed her injury to an improperly operated or defective lift mechanism on a bus she had boarded. Her deposition testimony, however, made it clear that the lift mechanism of the bus was never engaged and played no role in her injury, but that her injury was caused when "the bus driver took off," causing the bus to "jerk" abruptly. Although plaintiff could have moved, pursuant to General Municipal Law § 50–e(5), to amend the theory of liability contained in her notice of claim by serving a new but late notice of claim, the one-year-and-ninety-day time period in which to do so has expired. As for amending the notice of claim, General Municipal Law § 50–e(6) permits such amendments at any time, but plaintiff never sought such relief, and, in any event, "this provision merely authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability".

III. ISSUES WITH THE 50-H EXAMINATION

Anderson v. Liberty Lines Transit, Inc., 140 A.D.3d 479, 31 N.Y.S.3d 882 (1st Dep't 2016). Motion to dismiss the complaint on the ground that plaintiff failed to attend a General Municipal Law § 50–h hearing was properly denied. The record established that defendant granted plaintiff an adjournment of the hearing, did not set a subsequent date, and never sought to reschedule the hearing.

IV. GOVERNMENTAL IMMUNITY

A. Governmental v Proprietary Function

Drever v. State of New York, 134 A.D.3d 19, 18 N.Y.S.3d 207 (3rd Dep't 2015). Claimant's mother filled out a driver's license renewal application and submitted it to the DMV. The application contained a donor consent box in which a person could sign his or her name to indicate that he or she "consent [ed] to the donation of all organs and tissues." On Lanza's application, a straight line was drawn in the space provided for the signature. Employees of DMV apparently interpreted the mark as Lanza's consent to be an organ donor and processed her application accordingly. This information was electronically transferred to the DOH, which then enrolled the mother into defendant's Donate Life Registry (see Public Health Law § 4310[1]). On the effective date, DOH mailed a letter to her confirming her registration as an organ donor. But prior to receiving the letter, she died and her organs and tissues were harvested. Claiming that her mother did not consent to be an organ donor, claimant sued the City for unlawful interference with her common-law right of sepulcher, negligence and negligent and intentional infliction of emotional distress. Following joinder of issue, defendant moved for summary judgment dismissing the claim on the basis of, among other things, governmental immunity, and claimant cross-moved for partial summary judgment on the issue of liability. The issue here was whether the City had acted within a proprietary or governmental capacity. If the former, no governmental immunity. Courts look to the allegations of negligence to see whether the government action at issue is proprietary or governmental. Here, the alleged negligence

centered on defendant's role in the *establishment and management of the Donate Life Registry*, particularly its act of enrolling individuals as donors via DMV applications. The enrollment of organ and tissue donors in New York was, at least prior to 1975, performed largely by private enterprises and private organizations, who also continue to enroll a small percentage of organ donors. Thus, plaintiff argued the governmental actions were proprietary, not governmental. On the other hand, the need for government involvement in the organ and tissue donation process was recognized almost a half-century ago with the enactment of the Uniform Anatomical Gift Act (hereinafter UAGA). The act was designed to "encourage the making of anatomical gifts" and to serve the need of several competing interests including, among others, "the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation". New York has employed DMV applications as a means of encouraging anatomical donations and facilitating the timely identification of organ and tissue donors. By establishing the Donate Life Registry and facilitating the identification of organ and tissue donors and the making of anatomical gifts through DMV applications and renewals, defendant was protecting and promoting the health and welfare of the public through the exercise of its general police powers. It is axiomatic that protecting health and safety is one of municipal government's most important duties, and thus it is a governmental function. For these reasons, the Court concluded that defendant's enrollment of individuals into the Donate Life Registry constituted a governmental function. Since there was no special duty (direct contact, etc.) to plaintiff here, case was dismissed on governmental immunity grounds.

Heeran, etc., et al. v. Long Island Power Authority, 2016 WL 3704666 (2nd Dep't 2016). Plaintiffs sued for property damage caused by a hurricane and alleged improper preparation for the event by the Long Island Lighting Company, a State-run and owned entity. The issue was whether the government acted in its governmental or its proprietary function when it owned and ran this utility. In deciding the issue, the majority of the Court noted first that electric utilities have been "traditionally private enterprises". The Legislature enacted the Long Island Power Authority Act for the express purpose of "replacing" the Long Island Lighting Company (LILCO), a private utility, with LIPA, a public one. The Legislature cited a "lack of confidence" in LILCO. It also expressed its expectation that LIPA would do a better job than LILCO of providing electricity. Thus, the Legislature clearly intended that LIPA to substitute for a traditionally private enterprise in the performance of a proprietary function". Thus, there was no governmental immunity. The dissent disagreed because the alleged negligence involved the LILCO's failure to properly prepare for a hurricane, which is a natural disaster and an emergency. Preparing for and responding to such public emergencies is a traditional governmental function. The functions of electric utilities in the ordinary course of providing electricity would be proprietary, but in responding adequately to a hurricane it would be a dual function, including governmental function. The dissent would have ruled against plaintiff on governmental immunity grounds.

Billera v. Merritt Construction, Inc., 39 A.D.3d 51, 828 N.Y.S.2d 381 (3rd Dep't 2016). A leaking main valve caused property damage to several citizens, who sued, among others, the Village who maintained the water system for having failed to timely repair the leak. On SJ motion, the Village submitted the affidavit testimony of the foreperson of the Village Water Department who participated in the decision not to immediately attempt to repair a leak in the water supply when it was first observed. He stated that attempting immediate repairs to the faulty valve would have required shutting down the Village's water supply from the main, which would then deprive all of the Village fire hydrants of a water supply and "shut down the Village's ability to fight fires." Therefore, those on the scene collectively "weighed the existence of a slight drip of limited duration against a lack of water to the Village fire hydrants and the collective decision was the leak was the better alternative." Since this decision involved public safety, it was ***governmental*** rather than ***proprietary*** in nature, and governmental immunity applied. The Court noted that many of plaintiffs' allegations of negligence also involved actions and omissions of a ***proprietary*** nature—

such as the Village's failure to adequately maintain the water main over the years, investigate the source of the leak, or supervise the work being performed by a private contractor —that were unconnected to the Village's decision not to shut off the water main to protect the public (which was ***governmental*** in nature). Moreover, there were factual issues relative to the claimed justification for declining to shut off the water supply (to protect the public from of having no water in the hydrants should a fire erupt). For instance, there was no evidence of similar concern as to maintaining firefighting capability when the Village shut off the water supply during the initial excavation and hydrant removal. Further, there was testimony suggesting that the decision to not undergo immediate repairs to the leak may have been based, at least in some part, by the need to order additional supplies and budgetary concerns, rather than on firefighting concerns. Accordingly, there were factual issues relative to the application of the affirmative defense of governmental immunity asserted by the Village, as well as the reasonableness of other actions that were strictly proprietary in nature, barring an award of summary judgment.

B. Discretionary v. Ministerial

Rugova v. City of New York, 132 A.D.3d 220, 16 N.Y.S.3d 233 (1st Dep't 2015). Plaintiffs sued the City for failing to timely notify them of the death of their family member, who had died in a car accident, and for performing an autopsy on him without permission, and related causes of action. The duty to notify a family of the death of a loved one was deemed *ministerial* in nature, not *discretionary*. Thus, governmental immunity did not automatically apply. Still, plaintiff needed to show a *special duty* from the City—particularly the police or the Medical Examiner—toward plaintiffs. Court held that the function of informing the family of a death is a special duty that runs to the next of kin and not the public at large. Existing case law imposing liability against a municipality for an inaccurate report of the death of a close relative reflects a policy that a municipality's duty of accurate communication is both ministerial and owed directly to the next of kin. Thus, there was a special duty. Likewise, interference with the next of kin's right to immediate possession of a decedent's body may arise from the municipality's failure to notify them of the death presumes a ministerial duty owed directly to the immediate family. As to plaintiffs' claim of loss of sepulcher, whether the approximately 36–hour delay in informing the next of kin that they could take possession of decedent's remains caused any interference with the family's burial rights, which the City disputes, is an issue that presents a clear question for the trier of fact.

C. "Special Duty" by Virtue of a "Special Relationship"

Holloway v. City of New York, 2016 WL 4007319 (2nd Dep't 2016). Plaintiff's decedent suffered from kidney failure, collapsed in the bedroom of her Brooklyn apartment in a pool of blood she lost via a shunt in her arm used to receive dialysis. Decedent's adult son was visiting her at the time of the incident and called the 911 emergency number. The 911 operator told him that an ambulance would be there as soon as possible. A few minutes later, a municipal fire engine and crew arrived at the decedent's apartment building and proceeded to knock at the door of a ground floor apartment pursuant to the directions of the 911 operator. The resident of that apartment informed the firefighters that she had not called 911 and surmised that the firefighters had responded to a prank call. After asking people on the ground floor of the apartment building if they knew of a medical emergency inside the building, and seeking additional guidance from the dispatcher, the firefighters left the building. As the fire engine pulled away from the building, two paramedics in a municipal ambulance arrived at the building, approximately six minutes after the 911 call. The firefighters did not stop to speak with the paramedics. As soon as the paramedics exited the ambulance, a man ran from the apartment building and told them that they were needed on the fourth floor. The paramedics went to the fourth floor, where the decedent's son directed them to the decedent's bedroom. Volunteer emergency medical technicians (hereinafter EMTs) arrived at the apartment two or three minutes

later and took over performing CPR on the decedent, freeing the paramedics to engage in advanced medical care. At some point, municipal basic life support EMTs arrived at the apartment and assisted the volunteer EMTs in providing CPR care to the decedent. Despite the efforts of the paramedics and the EMTs, the decedent passed away inside the apartment. This case was controlled by the recent Court of Appeals *Applewhite* case, which held that "when a municipality provides ambulance service by emergency medical technicians in response to a 911 call for assistance, it performs a *governmental function* and cannot be held liable unless it owed a 'special duty' to the injured party. The principle way to establish a "special duty" is by showing the municipality voluntarily established a "special relationship" with the plaintiffs : "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking". Here, the defendant demonstrated on its SJ motion that it had no special relationship with the decedent and that the firefighters did not assume an affirmative duty to act on the decedent's behalf. Moreover, even assuming that the 911 operator's assurance that an ambulance was on its way constituted an assumption by the defendant of an affirmative duty to act on behalf of the decedent, the decedent and her son did not rely to their detriment on that assurance. The record did not show that the plaintiffs were lulled by any assurance made by the 911 operator into a false sense of security that caused them to forego other available avenues of protection.

Miles v. Town/Village of East Rochester, 138 A.D.3d 1465, 30 N.Y.S.3d 778 (4th Dep't 2016). Plaintiff alleged that the building inspector was negligent in issuing a certificate of compliance for an addition to plaintiff's residence that a contractor had installed. Defendant established on SJ that it had no "special duty" toward plaintiff, i.e., that it did not assume an affirmative duty to act on plaintiff's behalf with respect to the dispute he was having with the roofing contractor and that plaintiff did not justifiably rely on defendant's alleged actions. Although the building inspector indicated to plaintiff that he "had some issues" with the contractor's work, he also indicated that he wanted to review the matter further and that he would investigate plaintiff's complaints. That communication did not "constitute an action that would lull a plaintiff into a false sense of security or otherwise generate justifiable reliance" that defendant would refuse to issue a certificate of compliance. Plaintiff did not in fact "relax his own vigilance or ... forego other available avenues of protection" inasmuch as he attempted to resolve the dispute with the roofing contractor and retained an independent inspector to determine whether the contractor's work violated State or local building codes.

Stanciu v. Bilello, 138 A.D.3d 824, 29 N.Y.S.3d 482 (2nd Dep't 2016). The New York City DOT issued a notice of violation to the private defendants for a sidewalk defect that was adjacent to their property. The defect was caused by tree roots that had raised a sidewalk flag. The private defendant testified at trial that after receiving the notice he called "311," and was advised that, before he could repair the sidewalk, the Department of Forestry needed to inspect the sidewalk around the tree and create a design plan. The DOT would then issue a permit to replace the sidewalk. Said defendant testified that the 311 operator told him that he could not repair the sidewalk before the inspection was conducted and the permit was issued, not to "touch anything," and to wait for the Department of Forestry to contact him or to inspect the sidewalk. Over the next 10 months, no one from the City contacted him to facilitate the inspection and permit, though he testified that he made repeated telephone calls seeking to schedule the inspection. Plaintiff later tripped and fell on the sidewalk defect. After trial, the Supreme Court granted the plaintiff's application for a directed verdict against the private defendant on the issue of his breach of a duty to her. The jury found that said defendant's breach was a substantial factor in causing the plaintiff's accident, and also that the City had formed a special relationship with the private defendant such that the City was liable for negligently failing to timely inspect the sidewalk and issue a permit. The jury assigned 35% fault to the private defendant and

65% fault to the City. It was undisputed that the City did not owe a direct duty of care to the plaintiff, because the 2003 enactment of Administrative Code of City New York 7–210 shifted liability for injuries arising from sidewalk defects from the City to the abutting property owner. However, if the City owed an independent, special duty to the private owner, it could be held liable for the portion of the damage attributable to its negligence, despite the fact that the duty violated was not one owing directly to the injured person. Court held that the jury's determination that a special relationship existed between the City and the private landowner was supported by legally sufficient evidence.

Moore v. City of New York, 132 A.D.3d 644, 17 N.Y.S.3d 189 (2nd Dep't 2015). A 15-year old student was walking home from school at dismissal time when he was assaulted by a group of boys near PS 262. When the injured plaintiff heard the sound of police sirens, his assailants fled. Plaintiff testified that that when he saw a police officer exit a police vehicle, he ran after one of his assailants and attempted to hold him so that the police officers could apprehend him. As he tried to hold the assailant against the gate of the school, they began hitting each other. Then, the injured plaintiff observed a crowd of people running toward him, and he turned and ran away, followed by the crowd. He stopped running when two police vehicles pulled up to the crowd with their lights flashing. From inside their vehicles, the officers directed the crowd to disperse, and then drove away. Immediately thereafter, the injured plaintiff was shot in the back and, as a result, he was paralyzed from the waist down. To get past the governmental immunity defense, plaintiff alleged that the City defendants assumed a special duty to him by providing heightened police protection to public school students generally in the vicinity at the time of dismissal, and that the responding officers assumed special duties to plaintiff in particular by providing physical protection to him after witnessing the assault. Court granted summary judgment to defendant as no special relationship was created through the voluntary assumption of a duty to the injured plaintiff, either individually or as a member of a specific class. Further, even if there had been a duty here, the evidence submitted by the City defendants established that the injured plaintiff did not justifiably rely upon an affirmative undertaking by the City defendants.

Kinsey v. City of New York, 2016 WL 3582397 (1st Dep't 2016). New York City police officers and emergency medical technicians [EMTs] responded to a 911 call regarding plaintiff, who suffered from bipolar disorder. When they arrived, plaintiff appeared calm but wanted help. The police convinced plaintiff to enter an ambulance, but after he was seated and his vital signs were taken, he opened the ambulance door, ran up five flights of stairs of a nearby building and, while attempting to climb down the fire escape, fell to the ground. Defendants proved on sj that they owed no special duty to plaintiff other than "that owed the public generally". In opposition, plaintiff failed to raise an issue of fact. Moreover, since the decisions of the City's police officers and EMTs were discretionary ones and thus governmental immunity applied.

Graham v. City of New York, 136 A.D.3d 747, 24 N.Y.S.3d 754 (2nd Dep't 2016). Plaintiff wife went to a police precinct station house in Brooklyn and made a complaint against her husband for violating an order of protection. As a result, her husband was arrested. Two days later, upon learning that her husband had been released, plaintiff returned to the station house and requested a police escort to accompany her and her children to her apartment. She explained that her husband had been released from jail and she "was afraid for her life." She was told that "all the cars were out and the best thing for [her] to do was to go home and if he showed up or called ... to call 911 because they would get to her faster." She waited about 30 minutes at the station house and was given the same response by two other police officers. Plaintiff then returned to her apartment and was attacked by her husband, who was in the apartment waiting for her. Her friend was present and telephoned 911. The police responded to the location and shot and killed the husband while he was attacking plaintiff with a knife. Court gave SJ to defendants because they demonstrated that the police did not assume an affirmative duty to act on plaintiff's behalf.

Guerrieri v. New York City Dept./Bd. of Educ., 132 A.D.3d 949, 18 N.Y.S.3d 697 (2nd Dep't 2015). School bus driver sued City after he was assaulted by student that he was transporting. Defendant demonstrated in its summary judgment motion that it did not owe the injured plaintiff a special duty and thus summary judgment granted.

Jacobs v. New York City Transit Authority, 138 A.D.3d 779, 30 N.Y.S.3d 645 (2nd Dep't 2016). Generally, the New York City Transit Authority owes no duty to protect a person on its premises from assault by a third person, absent facts establishing a special relationship between [the NYCTA] and the person assaulted. A "special relationship" requires justifiable reliance by a plaintiff upon an affirmative undertaking by the municipal defendant to act on the plaintiff's behalf. Nevertheless, the Court of Appeals has recognized that an NYCTA employee's unreasonable failure to summon aid upon observing an injury being inflicted "from a vantage point offering both safety and the means to summon help without danger" may fall "within the narrow range of circumstances which could be found to be actionable". Here, in support of its motion, the defendant NYCTA demonstrated that it had no special relationship with the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's claims that an NYCTA employee observed another passenger injuring her on NYCTA property and failed to summon emergency assistance in a timely manner from a position of safety is based on speculation and conjecture, and thus, was insufficient to defeat the

D. Special Duty by Virtue of Statute Protecting "Class" of Plaintiffs

Bynum v. Camp Bisco, LLC, 135 A.D.3d 1060, 22 N.Y.S.3d 677 (3rd Dep't 2016). Parents of festival attendee brought negligence action against town and county where music festival was held after daughter ingested a harmful substance at festival. They claimed defendants negligently issued the permits for the event because they knew or should have known that the permit applications significantly underestimated the anticipated number of attendees, resulting in a level of medical staffing at the festival inadequate to promptly respond to medical conditions. Both defendants moved for summary judgment on their governmental immunity defenses immediately after joining issue. The Court granted the motions. To prove a "special duty" to plaintiff, plaintiff had to establish direct contact between the municipal agents and herself, which she could not do. Plaintiff claimed only that she relied upon the representations "contained in any and all applications for permits," which were completed by the festival organizers, not by defendants. Plaintiff relied on the theory that she was a member of a class of plaintiffs specifically protected by a statutory scheme that imposed a duty upon the government to protect them. The Court disagreed, finding that the statutes regarding issuing permits were not intended to give a cause of action to plaintiffs.

Giordanella v City of New York, 134 A.D.3d 894, 20 N.Y.S.3d 658 (2nd Dep't 2015). The plaintiff, an employee of the City of New York Department of Sanitation, allegedly was injured when a participant in a community service program working with him assaulted him with a rake. The gravamen of his allegations involve the failure to provide proper security. The provision of security against physical attacks by third parties as alleged in this case was deemed a governmental function, and no liability arises from the performance of such a function absent, among other things, a special duty owed to the plaintiff. Since plaintiff failed to raise a question of fact regarding a special duty to plaintiff, SJ granted to defendant. The defendants established that the City did not owe a statutory duty to the plaintiff pursuant to Labor Law § 27–a, which applies to "recognized hazards that are causing or are likely to cause death or serious physical harm to its employees" and directs the employer to comply with health and safety regulations. The purpose of this provision is to extend the protection of the Federal Occupational Safety and Health Act to public employees and it was not applicable to these facts.

E. Duty to Public for Release of Dangerous Persons Who Assault Members of Public

Oddo v. Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc., 135 A.D.3d 211, 21 N.Y.S.3d 53 (1st Dep't 2015). The issue here was the extent of the duty of a care of a residential substance abuse treatment facility to the public to prevent third party assaults by its residents. Under the facts of this case, Court found as a matter of law that defendant properly discharged that duty. The facts are: Plaintiff was stabbed in the right shoulder by an ex-resident. Shortly before the incident, the assailant had been a patient living in a drug treatment facility. The program is considered as an alternative to incarceration and a resident's sentencing does not take place until he or she actually completes the program. When a resident is discharged from the program for violating a rule, or leaves against clinical advice, the entity that referred him or her is contacted. If the agency is a probation or parole agency, someone from the agency comes to pick up the discharged resident. Here the resident was being dismissed from the program because he had violated a "cardinal rule" by pushing another resident to the ground. Since these incidents occurred during a weekend, defendant's employees began to fill out the necessary paperwork to transfer the resident to an intermediary facility, where he would "be held until he could report to TASC." However, during this process, the resident "became enraged and was acting out of control." 911 was called. When the police arrived, the resident was escorted off the premises. He was not taken into custody by the police and defendant did not advise the police he needed to be taken to the intermediary facility. He attacked plaintiff approximately a half-hour after he was escorted off the premises. The defendant took the position that it owed no duty of care to plaintiff and that, while its employees did not advise the police that the resident assailant should be taken to the intermediary facility, or held until TASC could be advised of his dismissal from the program, the police should have known what to do. The majority noted that, with respect to mental health care providers, New York has "no bright line-rule" regarding whether those individuals or facilities "treating a patient on a voluntary basis owe a duty of care to the general public." Instead, the courts have examined the issue on a case-by-case basis and the existence of such a duty turns on the facts of a particular case. ***The key factor in determining whether a defendant will be liable for the negligent acts of third persons is whether the defendant has sufficient authority to control the actions of such third persons.*** There was no question here that the facility had "an existing relationship" with the resident and sufficient authority to control his actions. Although the residents were "not prisoners", that degree of authority or control is not required to meet the standard of authority set forth in the case law. The residents were not free to leave the facility without permission and without an escort. While a resident could leave against clinical advice, the result would be a termination of the program, notification to the referring agency and criminal court, and the resident's return to the criminal justice system. Summary judgment to defendant thus denied. The dissent stated that since the facility had the right to discharge its residents for rule violations, it had no duty to protect the general public from a discharged resident's subsequent violent acts. Further, the dissent stated that the facility turned over the resident to the police, and more was not needed.

V. DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Designs – Qualified Immunity

Iacone v. Passanisi, 133 A.D.3d 717, 19 N.Y.S.3d 583 (2nd Dep't 2015). Motorist alleged that view of oncoming traffic at intersection in which accident occurred was obstructed by sensor station cabinet owned by county and by hedges which county had failed to trim. The County failed to demonstrate qualified immunity, inter alia, that its placement of the sensor station cabinet and its decision to refrain from trimming the hedge were highway safety planning decisions resulting from a deliberative decision-making process of the type afforded immunity from judicial interference.

Lewis v. City of New York, 131 A.D.3d 1134, 16 N.Y.S.3d 621 (2nd Dep't 2015). Police officer brought action against city after he was shot while apprehending a suspect. He alleged the city was liable under GML § 205–e for negligently failing to provide him with a bulletproof vest that covered a larger area of his torso. Case dismissed upon summary judgment because decision-making process regarding the particular type of vests it issues to police officers was a discretionary governmental function and the City demonstrated that its decision in this case was not irrational or arbitrary.

Kelley v. State of New York, 133 A.D.3d 1337, 20 N.Y.S.3d 289 (4th Dep't 2015). Infant victim of automobile accident (passenger) and alleged that State was negligent in failing to conduct proper evaluations of traffic patterns and failing to install necessary traffic control devices at intersection where accident occurred. The intersection was controlled by a flashing yellow signal for traffic on State Route 11 and a flashing red signal for traffic on Mud Mill Road. Prior to the accident, in 1996, the New York State Department of Transportation (DOT) determined that a flashing light should be installed at the intersection. Thereafter, in 1998, 2000, 2005, and 2007, the DOT determined that the flashing signal was still appropriate and that a three-color signal was not necessary. After a study in March 2009, however, the DOT determined that a three-color signal was needed. Despite this approval, the three-color signal was not installed prior to the subject accident, which occurred on May 20, 2009. The Court of Claims granted defendant's motion in part, determining that defendant was entitled to qualified immunity insofar as claimants alleged that defendant was negligent in its decision-making process. Defendant met its initial burden by establishing that it conducted a total of five traffic studies of the intersection before the May 2009 accident, and claimants failed to raise a triable issue of fact. It is well established that "something more than a mere choice between conflicting opinions of experts" is required to raise an issue of fact with respect to defendant's liability for its traffic planning decisions. The Court rejected the plaintiff's contention that defendant's failure to conduct a study of the intersection in 2002 demonstrated that defendant did not adequately study the intersection. Defendant established that it completed studies of the intersection in 1998, 2000, 2005, 2007, and 2009, all prior to the subject accident. Additionally, it would have been improper to speculate what such a study in 2002 might have revealed "with the benefit of hindsight". The Appellate Court affirmed. Claimants' contention that defendant's 2005 "Highway Safety Investigation" of the intersection should be discounted because it did not include a "signal warrant study" and did not consider whether "the flashing light was adequately performing its intended function" was improperly raised for the first time on appeal and, in any event, lacked merit. Even discounting the 2005 study, defendant's other studies of the intersection were adequate.

Land v. County of Erie, 138 A.D.3d 1462, 31 N.Y.S.3d 333 (4th Dep't 2016). Plaintiff alleged that the County was negligent in, inter alia, the design, construction, maintenance and operation of the intersection where the accident occurred. In support of its motion, the County failed to establish either that it was not negligent or "that the accident would have occurred regardless of the condition of the" allegedly dangerous road. The County further contended that it owed a duty of care only to those persons who obey the rules of the road and, because the court previously determined that plaintiff was negligent, it owed no duty of care to plaintiff. The Court rejected that contention. "No meaningful legal distinction can be made between a traveler who uses [an intersection] with justification and one who uses it negligently insofar as how such conduct relates to whom a duty is owed to maintain the [intersection]. The comparative fault of the driver, of course, is relevant to apportioning liability".

Dodge v. County of Erie, 140 A.D.3d 1678, 33 N.Y.S.3d 628 (4th Dep't 2016). Defendant's duty to maintain the highway was not negated by plaintiff's failure to heed the stop sign controlling his lane of travel and his failure to yield the right-of-way to the other vehicle. The negligence of a plaintiff in violating

the rules of the road will not relieve a municipality of liability for its negligence in the design, construction, or maintenance of a highway. There were triable issues of fact concerning whether defendant was negligent and, if so, whether such negligence was a proximate cause of the accident, or whether plaintiff's negligence in running the stop sign was the sole proximate cause of the accident. Defendant failed to establish on its motion its entitlement as a matter of law to the qualified immunity set forth in Weiss v. Fote, 7 N.Y.2d 579, 585. Defendant may have demonstrated that the placement of the "stop ahead" sign near the intersection, and possibly also the decision not to reposition the stop sign itself, were the product of an informal study and a resultant plan, but defendant failed to demonstrate that the overall design of the intersection was in fact "the product of any prior study or plan" as necessary to be accorded qualified immunity.

Langer v. Xenias, 134 A.D.3d 906, 23 N.Y.S.3d 261 (2nd Dep't 2015). Mother and infant brought action against, inter alia, the City, when a two-vehicle collision resulted in a van being pushed onto sidewalk injuring the infant pedestrian. Plaintiffs alleged that the City failed to maintain the intersection in a reasonably safe condition in that there were an unusually high number of accidents and the intersection warranted installation of an all-way stop sign. The City failed to establish, prima facie, its entitlement to judgment as a matter of law on its defense of qualified immunity. The City's submissions established that the May 2007 determination of the New York City Department of Transportation (DOT) that a stop sign was not warranted at the intersection was based on an adequate study which "included an on-site inspection, vehicle and pedestrian counts, a listing of warrants issued (including those for automobile accidents) and review by certified engineers". The DOT, however, received another request for traffic control signals on Avenue V at the intersection in April 2008. In response, the DOT indicated that it would re-evaluate its previous study by reviewing the latest accident data. The DOT reviewed an updated accident summary, which showed sufficient recent accidents for it to seek accident reports to determine whether there were sufficient preventable accidents at the intersection for the intersection to meet the "crash experience" criterion used to determine whether there is a need for a traffic control device on Avenue V at the intersection. However, when the local police precinct was unable to provide more than three of the eight requested accident reports, the DOT took no further action to obtain the necessary data in order to complete its re-evaluation. Due to insufficient data, no "considered determination" was made on the issue of whether a stop sign was or was not warranted on Avenue V in light of the new accident data. The City also failed to get summary judgment on the issue of proximate cause because it failed to demonstrate that the absence of a stop sign on Avenue V did not contribute to the happening of the accident by materially increasing the risk.

Chang v. City of NY, 2016 WL 4131815 (1st Dep't 2016). The intersection at Park Avenue and East 65th Street lacked a "stop here on red sign" and a stop bar. Ten years before the accident, had determined that "stop here on red" signs, with a stop bar, should be placed at the intersection. Although those signs were present at the intersection less than two months prior to the accident, they were not present on the date of the accident and a stop bar was never installed. Both the dissent and the majority here appear to have agreed that the City had a duty to replace the sign, and to place a stop bar, but they disagreed on causation. The majority felt there was a question of fact as to whether the lack of the sign and the stop bar caused the motorist to get into the accident. Plaintiff, who had never been to the intersection before, testified that, when he started to turn across the Park Avenue median at the intersection, he was "confused" as to whether or not the lights facing eastward traffic on E. 65th Street controlled plaintiff's movements, and he then went forward into the intersection. The dissent argued that plaintiff had all the notice of danger that a "stop here on red" sign and stop bar would have afforded him, because plaintiff had in fact stopped before entering the intersection but continued to proceed knowing that he needed to yield to oncoming traffic.

B. **Highway Maintenance – No Qualified Immunity**

Chavez v. State of New York, 139 A.D.3d 994, 30 N.Y.S.3d 846 (2nd Dep't 2016). The claimant's

decedent died from injuries allegedly sustained when his car skidded on ice on a section of Route 17M in Orange County, causing his vehicle to crash into a bus. At trial, a supervisor for the New York State Department of Transportation testified that he patrolled the area at issue at around 6:00 a.m. or 7:00 a.m. on January 29, 2009. He testified that there was an icy condition at the location of the accident which was similar to an icy condition in photographs taken after the accident. The supervisor sent salt trucks out, and told the drivers to "blast" their "cold spots" if needed. The salt truck driver who patrolled the area that included the accident location testified that the accident location was a known "cold spot," which he would always "hit" with extra salt. An expert witness for the claimant testified, based on his review of photographs of the accident scene, that there was no evidence that salt was spread at the accident scene. He noted the lack of salt on the dry part of the roadway. An expert witness for the State testified, based on his review of the photographs, that there was proof that the area was salted, because there was discoloration in the ice, the ice was pock-marked from where the salt kernels melted into it, and the area was not smooth. Two New York State Police investigators testified that the ice at the scene of the accident had areas of discoloration, as well as pock marks. Court of Claims trial verdict for defendant was upheld on appeal.

Watt, et al. v. County of Albany, 140 A.D.3d 1260, 33 N.Y.S.3d 511 (3rd Dep't 2016). Homeowners brought action against county, who was owner and maintainer of roadside drainage ditch, following hurricane and resulting flooding of their home. Plaintiffs alleged that the flooding and resulting property damage were caused by defendant's negligent failure to provide proper drainage and to properly maintain the existing drainage ditch. To the extent that plaintiffs' negligence claim alleged that defendant failed to adequately design or redesign the drainage system, court held it could not be maintained. Decisions "determining when and where [drainage ditches] shall be built, of what size and at what level, are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion ... [which] is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land". The act of *maintaining* a drainage system, on the other hand, is *ministerial* in nature and, thus, governmental immunity could not insulate defendant from plaintiffs' alternative claim that it did so negligently. Here, plaintiff's allegations had to do with negligent *maintenance* rather than decisions concerning when and where to build the ditch. But defendant offered proof that they had properly maintained and inspected the drainage. Plaintiff then failed to raise a triable issue of fact as to whether defendant "made reasonable efforts to inspect and repair the defect". Thus, defendant was granted summary judgment.

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

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

Tortorici v. City of New York, 131 A.D.3d 959, 16 N.Y.S.3d 572 (2nd Dep't 2015). Contrary to the plaintiff's contention, a prior "311" call nor the records generated by the City's Department of Parks and Recreation from that call provided the City with prior written notice of the sidewalk defect. A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement. Nor did the "open request" generated from that "311" call, which was received by the DPR clerk on the computer system, constitute a "written acknowledgment" by the City of a defective condition. Moreover, to the extent that the DPR's inspection notification satisfied the "written acknowledgement" alternative of Administrative Code of the City of N.Y. § 7–201(c)(2), the accident occurred within the 15–day grace period allowed to the City to repair or remove the defect.

Factor v. Town of Islip, 134 A.D.3d 984, 22 N.Y.S.3d 230 (2nd Dep't 2015). Pedestrian tripped and fell on raised portion of public sidewalk and filed personal injury suit against town. The town clerk assistant

testified that her search of the Town's records maintained by the Town Clerk revealed no prior written notice of a defective condition, as was alleged in the plaintiff's notice of claim, on the sidewalk where the accident occurred. Prior to the accident, however, a letter was sent to the Town Supervisor by a woman whose husband allegedly had tripped and fallen over the defect. With respect to that incident, a Town accident/incident report was eventually forwarded to the Town Safety Officer with a copy to the Town Attorney. The plaintiff's reliance on the letter as the basis to satisfy the statutory prior written notice requirement was misplaced, since there was no evidence as to whether it was sent to the Town Clerk or Commissioner of Public Works, as required by the Town of Islip Code § 47A–3A.

Prucha v. Town of Babylon, 138 A.D.3d 1083, 30 N.Y.S.3d 671 (2nd Dep't 2016). Plaintiff tripped and fell on a sidewalk that had been raised by the roots of a curbside tree. The plaintiff alleged that, prior to her accident, she made numerous telephonic complaints to the Town regarding the condition of the curbside tree and the raised sidewalk. The Town has conceded that, in response to these complaints, an employee of the Department of Public Works inspected the condition and prepared a written "Foreman's Inspection Report," which indicated that the tree would be removed and the sidewalk would be replaced. A copy of the report was left in the plaintiff's mailbox. According to the deposition testimony of a supervisor from the DPW, the original of the written report was handed in to the DPW, was entered into the Town's computerized records, and resulted in the issuance of work orders for the removal of the tree and the replacement of the sidewalk. The tree was removed approximately one week after the inspection was performed, and the sidewalk was removed approximately two months later. However, before the sidewalk was removed, the plaintiff allegedly tripped over it. The Town failed to establish its prima facie entitlement to judgment as a matter of law. The evidence submitted by the Town in support of its motion demonstrated that an entity designated by the Town's prior written notice code provision received the requisite prior written notice of the alleged sidewalk defect. The undisputed evidence in the record, including the preparation of the written inspection report by a DPW employee, the delivery of that written report to the DPW, and the entry of that report into the Town's computerized records for the purpose of generating a work order to remedy the alleged defect, supported the conclusion that written notice was timely provided to an appropriate entity under the Town Code. Accordingly, the trier of fact must determine, inter alia, whether the Town adequately addressed the allegedly defective condition within a reasonable time after the notice was received.

Bachvarov v. Lawrence Union Free Sch. Dist., 131 A.D.3d 1182, 17 N.Y.S.3d 168 (2nd Dep't 2015). The County established its entitlement to SJ by submitting, inter alia, the affidavit of a County employee, which indicated that she had conducted a search of the relevant records covering the period of five years prior to the date of the accident and had found no prior written notice of a defective condition corresponding to the condition alleged by the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. The fact that the Nassau County Department of Public Works received prior written notice did not satisfy the statutory requirement that prior written notice be given to the Office of the County Attorney.

Fisher v. Town of N. Hempstead, 134 A.D.3d 670, 20 N.Y.S.3d 167 (2nd Dep't 2015). Defendant submitted the affidavits of the Town Clerk and the Assistant to the Town Superintendent of Highways, which indicated that they conducted a search of the records in their respective offices, covering the period of five years prior to the date of the accident, and found no prior written notice of a defective condition corresponding to the condition alleged by the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact. The fact that the Town's Department of Public Works received certain prior written notice did not satisfy the requirement in Town Code § 26–1 that prior written notice be given to either the Town Clerk or the Town Superintendent of Highways.

Rockenstire v. State of New York, 135 A.D.3d 1131 (3rd Dep't 2016). Motorcyclist brought personal injury action against State of New York for negligence in construction and maintenance of roadway, which allegedly was littered with loose stone and gravel that caused motorcyclist to lose control of his motorcycle and collide with another vehicle, and the State brought a sj motion to dismiss. Several weeks prior to the accident, DOT workers repaved the subject roadway. As part of this project, DOT deposited a loose stone and gravel material known as "crusher run" along the shoulder in order to provide a more level surface between the asphalt and the side of the roadway. The crusher run was then smoothed and tamped into place by a steel drum roller. A few days after this work had been completed, a police officer notified DOT that there was loose gravel on the subject roadway, which was creating a skidding hazard for vehicles. Two DOT supervisors visited the site thereafter to investigate the complaint and discovered crusher run scattered on the roadway. One of the supervisors who responded to the scene testified that, based upon his observations, he determined that the crusher run had been deposited on the roadway as the result of "vehicles [that] were cutting the corner too short and running off the road onto the shoulder and then dragging stone [from the right side of the roadway] back onto the road." The other supervisor testified that it was foreseeable that vehicles exceeding the speed limit would stray off the shoulder and pull crusher run onto the roadway, posing a hazard to motorists. The Court found this evidence was sufficient to defeat the SJ motion regarding defendant's actual notice of a hazardous condition on the roadway, thus triggering a duty "to take reasonable measures to correct the condition". Further, there was sufficient evidence that defendant's remedial efforts were insufficient and in conflict with the DOT Highway Maintenance Guidelines, which called for the crusher run only to be deposited when it was "moist and workable" and, further, that the conditions present on the subject roadway called for the use of hot mixed asphalt to stabilize the shoulder.

Pinter v. Town of Java, 134 A.D.3d 1446 (4th Dep't 2015). Driver's estate brought wrongful death action against town, alleging that town was negligent in allowing the road to exist in an icy or slippery condition, and in failing to install a guardrail to prevent vehicles from entering an adjacent pond. Decedent lost control of her vehicle, and the vehicle flipped onto its roof and eventually came to rest in a pond adjacent to the road. Defendants submitted proof that the road had been in existence since the 1800s, that the pond was created by the adjacent landowner approximately 50 years prior to the accident, and that there were no previous accidents at the accident site. They further established that the road had not undergone any major reconstruction since it was built and that no nationally accepted highway standards required guardrails at the location of the accident. In opposition to the motion, plaintiff's experts did not establish that guardrails were required under any existing standard, and their opinions were conclusory and without probative value. Plaintiff also failed to raise a triable issue of fact that there were prior accidents at the site that would have put defendants on notice of a defective condition. Case dismissed on SJ.

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

Kelley v. Incorporated Village of Hempstead, 138 A.D.3d 931, 30 N.Y.S.3d 277 (2nd Dep't 2016). The plaintiff allegedly sustained personal injuries when she tripped and fell over a stop sign post stump in a grass strip between a sidewalk and curb in the defendant Incorporated Village of Hempstead. The Village moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the basis that it had not received prior written notice of the defect that allegedly caused the plaintiff's accident, nor did it create such defect. In support of its motion for summary judgment, the Village submitted proof that in 2009 its employee removed the stop sign post and buried the remaining stump. However, the Village also submitted the deposition testimony of a nonparty "notice" witness which indicated that a portion of the stump existed above ground from the time when the stump was allegedly buried by the Village's employee up until the time of the plaintiff's accident in 2011. Consequently, there

was an issue of fact as to whether the Village affirmative action in removing the stop sign post immediately resulted in a dangerous condition.

Maggio v. Town of Hempstead, 134 A.D.3d 685, 20 N.Y.S.3d 576 (2nd Dep't 2015). The Town got summary judgment by demonstrating that it did not have prior written notice of the alleged defect and that it did not create the alleged defect. The affidavit of the nonparty abutting property owner, wherein he alleged that he saw some workers repair the area where the incident occurred years prior to the incident, was insufficient to raise a triable issue of fact as to whether the Town created the alleged defect. Similarly, the affidavit of the plaintiff's expert wherein he alleged that this prior repair work must have been done by the Town since no permits had been issued for the work is speculative and insufficient to raise a triable issue of fact as to whether the Town created the alleged defect.

Greener v. Town of Hurley, 140 A.D.3d 1285, 33 N.Y.S.3d 515 (3rd Dep't 2016). Plaintiff tripped and fell over a protruding culvert pipe located in the hamlet of West Hurley. Plaintiff contended that defendant created the dangerous condition (the protruding culvert pipe) through an affirmative act of negligence. Plaintiffs provided an affidavit of a neighbor who testified that during the winter she heard a "loud bang while one of the defendant's snowplows was clearing the roadway in front of [her] house." Then, after the snow melted, she "saw that the end of the culvert pipe was mangled, bent upwards and protruding above the surrounding surfaces". She observed that "the mangled portion of the culvert pipe coincides with where the snowplow was located at the time [that she] heard a loud bang." She called defendant "several times to report this condition" and spoke to its highway superintendent on several occasions before plaintiff's accident. The affidavit, along with photographs, was sufficient to defeat the motion for summary judgment.

Swietlikowski v. Village of Herkimer, 132 A.D.3d 1406, 18 N.Y.S.3d 250 (4th Dep't 2015). Bicyclist alleged he fell from his bike because of the Village's defective road condition. There was no prior written notice. But plaintiff's expert opined that the dangerous condition was caused by the intentional removal of paving material from the area adjacent to the water valve box cover at the time the roadway was resurfaced, and thus "plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident".

McManus v. Klein, 136 A.D.3d 700, 24 N.Y.S.3d 205 (2nd Dep't 2016). The plaintiff allegedly tripped over a portion of a sidewalk that was more than one inch higher than the rest of the sidewalk. She alleged in her bill of particulars that the Village installed the sidewalk and created the defect. The Village moved for summary judgment dismissing the complaint insofar as asserted against it on the ground that it did not receive any prior written notice of the defect pursuant to Village Code. In its papers in support of its motion, the Village did not comment on the plaintiff's allegation that it created the defect. The Village established, prima facie, that it did not have prior written notice of the defect, but it failed to establish, prima facie, that it did not affirmatively create the alleged defect. Therefore, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact.

Kilfoyle v. Town of North Hempstead, 138 A.D.3d 1069, 30 N.Y.S.3d 292 (2nd Dep't 2016). Plaintiff tripped and fell on a raised public sidewalk flag in front of a building owned by a commercial defendant. Plaintiff contended that defendant had created the defective sidewalk condition with its snow plowing activities. Defendant established its entitlement to summary judgment by demonstrating that the Town's Code did not contain language imposing tort liability on abutting landowners. It also established it did not perform any repairs to the sidewalk or otherwise create the defective condition of the raised sidewalk flag and that it did not benefit from a special use. Plaintiff's contention that snowplowing had caused the defect

was speculative and unsupported by any evidence. The evidence tended to show the elevated condition of the sidewalk was created by an overgrowth of tree roots.

McManus v. Klein, 136 A.D.3d 700, 24 N.Y.S.3d 205 (2nd Dep't 2015). Even assuming the truth of the injured plaintiff's deposition testimony that the Village created the icy condition by leaving piles of snow in the parking lot, the Village's failure to remove all snow and ice from the parking lot was passive in nature, and did not constitute an affirmative act of negligence which would bring this case within an exception to the prior written notice requirement. Thus, summary judgment to defendant granted to defendant.

Epperson v. City of New York, 133 A.D.3d 522, 21 N.Y.S.3d 23 (1st Dep't 2015). Plaintiff failed to present evidence sufficient to raise a triable issue of fact concerning whether the City caused or created the defective condition adjacent to the sewer grate by negligently re-paving the street. The opinion of plaintiff's expert that the street had been re-paved by the City was speculative, and, in any event, plaintiff presented nothing to show that the alleged re-paving created an immediately dangerous condition.

Creutzberger v. County of Suffolok, 140 A.D.3d 915, 33 N.Y.S.3d 438 (2nd Dep't 2016). Bicyclist brought action against county and company that held music and arts festival to recover damages for personal injuries he sustained when bicycle he was riding on a grass path struck the edge of a dock and he was thrown to the ground. The festival operator won SJ by showing it did not own, occupy, control, or have a special use of the dock area where the plaintiff's accident occurred, and that it had no contractual obligation to keep the area free from dangerous conditions. Further, it did not have the authority to block off access to the dock area since the County required that the entire Museum grounds remain open to the public for the event. With respect to the County, although it showed there was no prior written notice of the defect, it failed to establish that it did not affirmatively create the allegedly defective condition. It also failed to eliminate all triable issues of fact as to whether it breached its duty to adequately illuminate the area.

Hanley v. City of New York, 139 A.D.3d 800, 32 N.Y.S.3d 261 (2nd Dep't 2016). Plaintiff's vehicle left a paved roadway when its wheels veered into a rut running along the edge of roadway. Plaintiff's immediate reaction was to turn the wheel to the left to force the vehicle out of the rut, but she overcompensated the adjustment and drove across the roadway head-on into a vehicle that was traveling in the opposite direction. There was no prior written notice of the alleged defective condition as required by New York City Administrative Code § 7–201(c)(2). Evidence of roadway defects other than that which caused the plaintiff's accident, in areas where the accident did not take place, were insufficient to constitute prior written notice. Further, City did not cause or create the alleged defect through an affirmative act of negligence, because the alleged defect was caused over time by erosion and other environmental factors. Although plaintiff, through expert testimony, argued that the City had created a dangerous and defective condition by intentionally constructing a drainage rut alongside the roadway, these affidavits were speculative and conclusory. The accident reconstruction expert provided no evidence that the City had undertaken any drainage-related activity at the accident scene during the nine years since the road had last been repaved. They presented no evidence of how the roadway edge had been beveled in relation to the adjoining ground at the time it had last been paved or at any time thereafter as to place the City on immediate notice that the beveling was dangerous or improper. Moreover, the experts did not identified any specific binding industry standard, code, rule, or regulation allegedly violated by the City in the construction or maintenance of the roadway's drainage, beveling, or width. SJ to defendant.

Shufeldt v. City of Kingston, 140 A.D.3d 1464, 34 N.Y.S.3d 511 (3rd Dep't 2016). Bicyclist brought action against City alleging that City's negligence in not covering a recessed water valve created a hazardous depression in the roadway that caused him to fall. It was undisputed that defendant had enacted a prior

written notice provision, and that no written notice had been received by defendant regarding the alleged defect. Plaintiff argued that defendant affirmatively created the dangerous condition when it assumed supervisory authority over the repaving of the subject roadway, which had occurred a few months before his accident. In support of its motion, defendant submitted the deposition testimony and affidavit of its Superintendent of Public Works, who stated that he had inspected the subject roadway "before, during, and after" the paving project, that the paving conformed to state and city standards for roadway paving, and that the area of the roadway where the recessed water valve was located was "in better condition" following the paving project. As to the water valve, the Superintendent asserted that it was required to be recessed into the roadway, to prevent it from being dislodged by snow plows. In opposition to the motion, plaintiff submitted photographs and an affidavit describing his own measurements of the recessed water valve, with a depth of two to three inches "depending upon where you measured." Plaintiff also submitted the affidavit of an expert in roadway engineering and design. With no reference to any standards or authority, who opined, in conclusory fashion, that "with new paving the nut of the water valve should be basically flush with pavement." He then concluded that the water valve was defective based upon his review of photographs and plaintiff's testimony that "the hole surrounding the nut of the water valve was two (2) to three (3) inches below the pavement". Court held that this evidence lacked "any semblance of a foundation to support his opinion or the existence of common knowledge and practice within the [roadway construction] industry" and, thus, lacked probative value. In addition, plaintiff failed to provide any evidence that the paving project had, in fact, increased the depth of the recessed water valve or otherwise exacerbated any hazard. Plaintiff's proof thus failed to raise any triable issue of fact.

Sears v. S3 Tunnel Const. AJV, 140 A.D.3d 474, 31 N.Y.S.3d 879 (1st Dep't 2016). Plaintiff was injured when a re-paved trench in the street collapsed under her. At the time, construction of the Second Avenue subway was taking place in the area. MTA failed to establish prima facie that it owed no duty to plaintiff. MTA failed to show that neither it nor its contractors launched a force or instrument of harm in performing their contractual duties.

C. Abutting Landowner Liability for Sidewalk Defects

Williams v. Town of Smithtown, 135 A.D.3d 854, 24 N.Y.S.3d 150 (2nd Dep't 2016). Town established its entitlement to SJ by demonstrating that it did not have prior written notice of the defect and that it did not create the alleged defect through an affirmative act of negligence. With respect to the abutting Church, generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner. An abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk only where the landowner breached a specific ordinance or statute which obligates the owner to maintain the sidewalk. The Church established, prima facie, that no statute or ordinance imposed upon it a duty to maintain the subject sidewalk and that it did not create the alleged hazardous condition. Both defendants granted summary judgment.

Obee v. Ricotta, 140 A.D.3d 1134 (2nd Dep't 2016). Pedestrian tripped and fell over defective concrete sidewalk slab. Approximately three years prior to the alleged incident, the abutting owner replaced three slabs of the sidewalk abutting the property. The fourth slab abutting the property, upon which the plaintiff allegedly tripped, had not been replaced. Although the code of the village required an abutting landowner to keep a sidewalk in good and safe repair, it did not specifically impose tort liability for a breach of that duty. Thus, without proof that abutting owner either created the alleged defective condition or caused it to occur because of a special use, which was absent in the record, the plaintiff failed to establish her right to SJ on the issue of liability.

D. Big Apple Map Notice

Parra v. The City of New York, 137 A.D.3d 532, 27 N.Y.S.3d 36 (1st Dep't 2016). Plaintiff tripped over a sidewalk defect, defendants demonstrated that they lacked actual and constructive notice of the defective condition. The Big Apple map, which was filed more than six years prior to the accident, was insufficient to raise a triable issue as to constructive notice since there was no evidence that the condition shown on that map was the same defect that caused plaintiff's fall.

Ramirez v. City of New York, 139 A.D.3d 695, 32 N.Y.S.3d 201 (2nd Dep't 2016). City did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. The alleged defects indicated on a map filed with the New York City Department of Transportation by the Big Apple Pothole and Sidewalk Protection Corporation did not suffice to give the City actual knowledge of the essential facts underlying the plaintiff's present claim or his theory of liability against the City. Moreover, the plaintiff failed to demonstrate that the City obtained actual knowledge of the essential facts constituting his claim by virtue of alleged prior lawsuits filed against the City involving the same defective sidewalk condition that caused his injuries. There was no showing that the City had actual timely knowledge of the occurrence of the subject accident, the identity of the plaintiff as a claimant, the nature of the claim, the cause of this accident, or of any connection between the plaintiff's alleged injuries and any alleged negligence of the City. Motion to late-serve denied.

VII. NEW YORK CITY SIDEWALK LAW

A. "Sidewalk" v. "Curb".

Hunter-Lawson v. City of New York, 137 A.D.3d 864, 26 N.Y.S.3d 600 (2nd Dep't 2016). The City established that it had no duty to maintain the sidewalk and driveway that abutted the commercial property, and there was no evidence that the City created the alleged defective condition or that the plaintiff's alleged injuries were the result of the City's special use of the sidewalk and driveway. In opposition, the plaintiff asserted, for the first time, that she fell on a defective condition existing on the "curb," which the City had a duty to maintain. However, the City demonstrated that the notice of claim and complaint contained no allegation that the plaintiff was caused to fall due to a dangerous or defective condition on the curb. Furthermore, the plaintiff never sought leave to amend her notice of claim pursuant to General Municipal Law § 50–e(6). SJ granted to defendant.

Metzker v. City of New York, 139 A.D.3d 828, 31 N.Y.S.3d 175 (2nd Dep't 2016). Pedestrian who tripped and fell on a cable on a sidewalk abutting a mixed-use building brought action against building owner and others. Although the owner had no duty to maintain the curb, he had a duty to maintain the sidewalk abutting his mixed use property. The cable that caused the plaintiff to fall was not exclusively on the curb, but also on the sidewalk. There was thus an issue of fact. Summary judgment denied to defendant.

B. Abutting "Owner" Liability

Sangaray v. West River Associates, LLC, 26 N.Y.3d 793, 48 N.E.3d 933, 28 N.Y.S.3d 652 (2016). Section 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure. The Court of Appeals here notes that both the First and Second Departments had seemingly engrafted onto section 7-210 a "location requirement," such that if the defect upon which a person trips abuts a particular property, then the owner of that property is deemed liable, without conducting any inquiry as to whether a neighboring owner's failure to comply with its statutory

duties may have also been a proximate cause of the accident. Here, plaintiff tripped and fell when his right toe came into contact with a raised portion of the public sidewalk. The sidewalk flag that plaintiff was traversing ran from the front of a property owned by Defendant A to a neighboring premises owned by the Defendant B. A photograph contained in the record depicted the sidewalk flag sloping and descending (on the Defendant A side) lower than a level flagstone that was in front of Defendant B's property. The expansion joint that plaintiff's toe contacted abutted solely Defendant B's property. Defendant A asserted that because the area of the sidewalk upon which plaintiff tripped was located entirely in front of the Defendant B property, the "defect" did not abut the Defendant A premises and thus it could not be held liable for failing to maintain its sidewalk. But the Court held that the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's *duty* to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained. As part of its prima facie showing of entitlement to summary judgment, an abutting owner is required to do more than simply demonstrate that the alleged defect was on another landowner's property. Here, most of the sunken sidewalk flag that plaintiff traversed abutted Defendant A's property, and plaintiff claimed that Defendant A's sidewalk flag had sunk lower than the expansion joint upon which plaintiff allegedly tripped (located on the part abutting Defendant B's property). Thus, Defendant A failed to meet its burden of demonstrating entitlement to judgment as a matter of law, leaving factual questions as to whether it breached its duty to maintain the sidewalk flag abutting its property and, if so, whether that breach was a proximate cause of plaintiff's injuries.

Zorin v. City of New York, 137 A.D.3d 1116, 28 N.Y.S.3d 116 (2nd Dep't 2016). Plaintiff tripped and fell on a sidewalk abutting a private property in Queens. One of the defendants was entitled to summary judgment because it was a tenant, rather than the owner, of the premises, and thus owed no duty to the plaintiff to maintain the sidewalk. The City was also entitled to summary judgment because it did not own the premises, which was leased and occupied by another defendant for the purpose of operating a self-storage facility. The City also established it did not create the hole in the sidewalk. SJ to City.

C. Abutting "Tenant Liability"

Paperman v. 2281 86th Street Corp., 2016 WL 4199172 (2nd Dep't 2016). Plaintiff slipped and fell on a sidewalk in front of property owned by one defendant and leased to another defendant. The action was settled against the tenant. Following a jury trial, the jury found, *inter alia*, that the owner was not negligent, and that the tenant was negligent and its negligence was a substantial factor in causing the accident. Court held that Supreme Court properly submitted the issue of the tenant's negligence to the jury. "The provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party . . . except where it is "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk". Here, the owner demonstrated that a rider to the subject lease requiring the tenant to, at its own cost and expense, keep and maintain the sidewalk "in thorough repair and good order," was so comprehensive and exclusive as to entirely displace the owner's duty to maintain the sidewalk.

VIII. EMERGENCY VEHICLES (V&T Law 1104) AND HIGHWAY MAINTENANCE VEHICLES

A. Trouble with *Kabir* (*Kabir v. County of Monroe*, 16 N.Y.3d 217 2011)

Barcacel v City of Yonkers, 52 Misc.3d 544 (Westchester Co. Sup. Ct. 2016). Plaintiff was sitting on the sidewalk, five to seven feet from a driveway, when he was struck by the police vehicle. The police officer

was traveling at approximately 25 to 30 m.p.h. and stopped at a red light near the location for about 10 seconds, before continuing. As was distracted by another man waving his arms, standing on the sidewalk. Traveling at a speed of 5 to 7 m.p.h., he made a left turn into the driveway near the man waving his arms. At no point in time did he observe the plaintiff on the sidewalk, and he did not feel a bump as he drove over the plaintiff; he only heard screaming from under the truck. The main issue was whether defendant would get the benefit of 5 Vehicle and Traffic Law § 1104(a), which exempts the drivers of authorized emergency vehicles from the requirements of certain traffic laws when they are involved in an "emergency operation". The statute designates the following traffic operations a driver of an authorized emergency vehicle involved in an emergency operation in certain situations may take, subject to a standard of recklessness:

"1. Stop, stand or park irrespective of the provisions of this title;
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;
4. Disregard regulations governing directions of movement or turning in specified directions...."

As was made clear in *Kabir v. County of Monroe*, 16 N.Y.3d 217, 220, 920 N.Y.S.2d 268, 945 N.E.2d 461 (2011), "the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence." (Kabir, supra). Here, the Court notes that the Kabil decision causes some strange results. For example, where a plaintiff is hit by a police car or an ambulance while in a crosswalk, the ordinary standard of negligence rather than the reckless standard applied because the injury-producing conduct was not specifically exempted from the rules of the road by Vehicle and Traffic Law § 1104(b), the principles of ordinary negligence apply. The same result was reached in another case where a police officer failed to observe the plaintiff lying on a beach chair and ran him over. Here the defendant tried to get the reckless disregard standard to apply by alleging he was speeding by driving over 5 m.p.h. and that he turned into the driveway without signaling. The Court noted, however, that failing to use a turn signal or driving into a driveway is not conduct delineated in Vehicle and Traffic Law § 1104(b), and speeding was the only category of privileged conduct which might apply under the circumstances. But the testimony did not support an inference that the office was speeding. The only conduct that could have been the proximate cause of the accident was the defendant driver's failure to observe the plaintiff sitting or lying on the sidewalk. Whether the officer was driving 4 m.p.h., or 6 m.p.h., he would have struck the plaintiff, as he simply did not see him prior to the accident. Thus, the negligence standard applied.\

B. What Constitutes "Reckless Disregard"?

Foster v. Suffolk County Police Dept., 137 A.D.3d 855, 26 N.Y.S.3d 781 (2nd Dep't 2016). A fleeing suspect drove through a red light while fleeing from a police officer and struck and killed plaintiff's decedent. The pursuing officer had received a radio dispatch concerning the attempted sale of allegedly stolen landscaping equipment. He considered this a "nonpriority call" and traveled to the location without his lights or sirens on. When he arrived at the scene, he spoke to the man who had reported the incident and to the suspect. As he investigated the matter, an argument ensued, and the suspect, against the officer's orders, got into his car and fled. The officer pursued him with lights and sirens on. The pursuit was conducted at high speeds through a residential neighborhood. The suspect sped through a red light at the intersection and collided with plaintiff. Defendants failed to eliminate triable issues of fact as to whether the officer acted in reckless disregard for the safety of others in commencing, conducting, or failing to terminate the high-speed pursuit. Among other things, there were questions regarding whether the suspect had disobeyed several traffic control devices, and collisions with other cars at earlier intersections were narrowly avoided, and the officer saw this and should have stopped the pursuit. However, defendant was

granted summary judgment on the issue that it was entitled to *qualified* immunity under V&T Law 1104, i.e., the reckless disregard standard would apply.

Regdos v. City of Buffalo, 132 A.D.3d 1343, 17 N.Y.S.3d 528 (4th Dep't 2015). The jury rendered a verdict apportioning liability 45% to plaintiff and 55% to the police for the collision. Contrary to defendants' contention, the jury could have rationally determined that the combination of, inter alia, the officer's excessive speed, her failure to activate the emergency lights and siren and slow down or brake as she approached plaintiff's vehicle from behind, plaintiff's timely and appropriate engagement of her left turn signal, and the officer's attempt to pass plaintiff's vehicle on the left on the wrong side of the street at a city intersection, constituted "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104[e]). Defendants further contended that, because the jury assigned some fault to plaintiff, the jury necessarily concluded that the officer had activated the emergency lights and siren on her vehicle prior to the accident and that plaintiff was negligent because she failed to comply with Vehicle and Traffic Law § 1144(a) by yielding the right-of-way to the emergency police vehicle (see PJI 2:26). The Court rejected this contention because, in addition to charging the jury that the failure to comply with Vehicle and Traffic Law § 1144(a) constituted negligence, the court charged the jury concerning the general duty of drivers toward other motorists (see PJI 2:77, 2:77.1). Thus, the jury was not limited to a violation of Vehicle and Traffic Law § 1144(a) as a basis for finding plaintiff negligent. The jury could have rationally concluded that, although the officer had not activated her emergency lights or siren, plaintiff nonetheless "did not observe that which was there to be seen" and was "negligent in failing to look or in not looking carefully" (PJI 2:77.1).

Asante v. Asante, 135 A.D.3d 562, 22 N.Y.S.3d 848 (1st Dep't 2016). The City defendants won summary judgment with the officer's uncontroverted deposition testimony that she was responding to a "10–85" radio call of an officer in need of assistance when the police vehicle she was driving collided with plaintiff's motor vehicle and the deposition testimony that the light was red against her when she attempted to get through the intersection, which meant that her conduct was privileged under Vehicle & Traffic Law § 1104(b), entitling her to the "reckless disregard" standard, and her testimony that upon reaching the intersection, she observed plaintiff's vehicle, stopped the police vehicle and waited for plaintiff's vehicle to also stop prior to attempting to go around the front of that vehicle, and that both vehicles moved forward at the same time resulting in the accident. Defendant did not have "reckless disregard" as a matter of law.

Quintana v. Wallace, 131 A.D.3d 1221, 17 N.Y.S.3d 461 (2nd Dep't 2015). High-speed chase by police vehicle. Plaintiff lost at trial. The jury charge and verdict sheet interrogatory properly directed the jury to determine whether the police pursuit was conducted with reckless disregard for the safety of others, and jury determined it was not. No grounds for reversal.

C. Sirens and Lights

Shalom, et al. v. East Midwood Volunteer Ambulance Corp., 138 A.D.3d 724, 29 N.Y.S.3d 457 (2nd Dep't 2016). Ambulance driver and his partner testified at their depositions that the ambulance's lights and siren were activated when the collision at the intersection occurred. Plaintiff and his passenger testified they did not hear any sirens or see any flashing emergency lights prior to the accident. Vehicle and Traffic Law § 1104(c) states that "the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible." Thus, there was a question of fact as to whether the "reckless disregard" standard applied.

Pollak v Maimonides Med. Ctr., 136 A.D.3d 1008, 25 N.Y.S.3d 646 (2nd Dep't 2016). Plaintiff, whose car was struck by an ambulance as it entered an intersection where plaintiff had the right of way, raised questions of fact as to whether the ambulance driver had activated the ambulance sirens and lights (which is required for the ambulance driver to take advantage of the "reckless disregard" standard), and whether, in any event, the ambulance driver operated his vehicle in reckless disregard for the safety of others.

Bryan v. City of Long Beach, 138 A.D.3d 774, 29 N.Y.S.3d 525 (2nd Dep't 2016). In support of their motion, the defendants submitted the deposition testimony of the ambulance driver and his partner that the siren and lights were on, but plaintiff said they were not on. Thus, triable issue of fact as to whether reckless disregard standard applied.

D. Vicarious Liability for "Owner" of Police Vehicle

Guevara v. Ortega, 136 A.D.3d 508, 26 N.Y.S.3d 12 (1st Dep't 2016). Vehicle & Traffic Law 388 creates vicarious liability for "motor vehicle" owners for the negligence of their drivers, but also says that police vehicles are not "motor vehicles" for the purpose of this Statute. Specifically, Vehicle and Traffic Law § 388(2) exempts "police vehicles," which are defined by Vehicle and Traffic Law § 132–a, in relevant part, as "[e]very vehicle owned by the state, a public authority, a county, town, city or village, ***and operated by the police department or law enforcement agency of such governmental unit*** ...". Thus, there is no vicarious liability against the "owner" of a police vehicle, which is usually the police department. Liability against the police department is instead predicated on *respondeat superior*, i.e., vicarious liability of the employer for the negligence of is employee, the police officer/driver. In this case, plaintiff was injured when, while stopped in her car at a red light, defendant car wash attendant drove a New York City Police Department traffic van into plaintiff's vehicle. The City (owner of the police vehicle) was held not vicariously liable as the owner of the pursuant to Vehicle and Traffic Law § 388(1). Plaintiff's argument that this police vehicle did not qualify as a "police vehicle," because it ***was not being "operated by the police department"*** at the time of the accident, but, rather, was being "operated" by the car wash attendant, assumed that the term "operated" meant "to cause to function" or was a substitute for the word "driven." Court says this ignores the common use of the term "operated" as an intransitive verb meaning "to exert power or influence". Under plaintiff's interpretation, a police vehicle would not qualify as such under Vehicle and Traffic Law § 132–a unless it was being driven by "the police department," which strains common sense, since a police department cannot be the driver of a vehicle. More importantly, plaintiff's interpretation would strip the exemption provided to police vehicles in Vehicle and Traffic Law § 388(2) of its force and effect. Vehicle and Traffic Law § 388 specifically contemplates that someone, other than the vehicle's owner, is driving the vehicle when an injury occurs. If "police vehicles" are only exempted when an owner or owner equivalent is driving, there would be no need for the exemption in Vehicle and Traffic Law § 388(2). Moreover, recently, the Court of Appeals extensively reviewed the legislative history of Insurance Law § 3420 and Vehicle and Traffic Law § 388 to determine whether police vehicles are "motor vehicles" subject to the requirement of carrying supplementary uninsured/underinsured motorist coverage. In doing so, the Court of Appeals reaffirmed the holding in *Matter of State Farm Mut. Auto. Ins. Co. v. Amato*, 72 N.Y.2d 288, 295, 532 N.Y.S.2d 239, 528 N.E.2d 162 (1988) that police vehicles are not required to have uninsured motorist coverage because "New York ha[s] traditionally exempted police vehicles from statutes dealing with civil liability under the Vehicle and Traffic Law".

E. Highway Maintenance Vehicles – Reckless Disregard

Roberts v. Anderson, 133 A.D.3d 1384, 19 N.Y.S.3d 843 (4th Dep't 2015). Plaintiff was struck by the wing

blade of a snowplow while he was clearing snow from his driveway. The snowplow was a vehicle "actually engaged in work on a highway" that was exempt from the rules of the road except to the extent that those operating the snowplow acted with "reckless disregard for the safety of others". The snowplow operators demonstrated they took several safety precautions before reversing the snowplow, including checking both side mirrors and sounding the horn as a warning, as well as ensuring that the snowplow's backup lights and "beeping" alert were activated while the vehicle was traveling in reverse at a slow speed. One of the operators, whose view was partially obstructed by the snowplow's raised wing blade, nevertheless informed the driver that he was clear to reverse the snowplow, and he failed to warn the driver of plaintiff's presence in the street just beyond the apron of the driveway. But none of this rose "to the level of recklessness required for the imposition of liability".

SCHOOL LIABILITY

A. Bullying

Motta ex rel. v. Eldred Central School District, 2016 WL 3619331 (3rd Dep't 2016). Plaintiff junior-high student was subjected to harassment and bullying by several classmates, who called him disparaging epithets, urinated on him, damaged or otherwise snatched his belongings and engaged in physical altercations with him. On several occasions, the school principal, a guidance counselor and a school security guard were notified of the bullying and although some remedial action was taken the bullying allegedly continued. The harassment and bullying allegedly had a negative effect on, among other things, on the student's academic performance, requiring him to repeat ninth grade, as well as his behavior in that he engaged in physical altercations with his classmates that resulted in his suspensions from school. Plaintiffs sued the school district alleging that the infant sustained physical, mental and emotional injuries as a result of defendant's negligent supervision of its students and its violation of the Dignity for All Students Act (Education Law § 10 et seq. [hereinafter DASA]). On SJ motion by defendant, Court ruled that DASA does not provide for a private right of action. There is no explicit private right of action in the statutory scheme nor can one be implied from the statutory language and the legislative history. As for the negligent supervision cause of action, there was no dispute that defendant had actual knowledge of the numerous conflicts between the student and his classmates. In support of its summary judgment motion, defendant submitted the affidavits of the school principal and a guidance counselor, as well as their deposition testimony, indicating that they investigated, reported and addressed all incidents of which they were made aware and resolved those conflicts through discipline of the identified student, mediation, directives to plaintiff's teachers and a change in class schedules to keep plaintiff and the identified classmates separated when possible. This evidence, and the deposition testimony of the school security officer, further indicated that not all incidents were reported by plaintiff to school officials despite being advised to do so, and that many of the investigations into plaintiff's complaints concluded that plaintiff also engaged in harassing and violent conduct with the other students. In response, plaintiffs submitted affidavits from plaintiff and his mother as well as other evidence setting forth specific incidents of harassment and bullying reported to school administrators that continued even after remedial measures were taken by defendant. These affidavits noted specific occasions where defendant's response to plaintiff's complaints of bullying appeared inadequate and, at times, met with inappropriate responses and the blame was placed on plaintiff. Court found that the conflicting evidence established triable issues of fact with regard to whether defendant adequately supervised the students.

B. Sports Injuries

Scavelli v Town of Carmel, 131 A.D.3d 688, 15 N.Y.S.3d 214 (2nd Dep't 2015). Eighth-grade student injured in gym class "speedball" game when a fellow student tripped him while they were both going for the

same ball. Gym teacher had instructed the students that this was a "no contact" sport where players on two teams pass the ball to their teammates and seek to score goals from behind a cone line. Plaintiff testified that another student deliberately tripped him as he went for the ball, in contradiction to the rules, and that this same player had engaged in some aggressive activity a few days earlier, of which the gym teacher was aware. Plaintiff also testified that the gym teach was not paying attention to what was going on, but rather was some distance away, on the other side of the gym, chatting with some other students. The majority gives defendant summary judgment because it found the plaintiff's testimony that the other child deliberately tripped him was conclusory and speculative in light of the infant plaintiff's testimony that he was concentrating on the ball at the time of the accident and on the fact that both boys seemed to be going for the ball at the same time. Further, the incident "occurred so quickly that it could not have been prevented by even the most intense supervision". Dissent disagrees and would have found a triable issue of fact as to whether the gym teacher should have provided more careful supervision given the prior incident, and whether such supervision would have prevented the allegedly intentional act.

Altagracia v. Harrison Cent. Sch. Dist., 136 A.D.3d 848, 24 N.Y.S.3d 764 (2nd Dep't 2016). Back of student's head struck pole supporting basketball backboard and hoop while he was playing basketball during recess. The subject pole was open and apparent, the risk of colliding with it was inherent in the activity of playing basketball in the courtyard, and the defendant did nothing to conceal or unreasonably increase the risk, and thus the assumption of risk doctrine applied. Plaintiff's contentions that padding of the subject pole was required and that the absence of padding created a risk beyond that which was inherent in the subject activity and voluntarily assumed by the plaintiff were rejected.

Safon v. Bellmore-Merrick Cent. High Sch. Dist., 134 A.D.3d 1008, 22 N.Y.S.3d 233 (2nd Dep't 2015). Plaintiff varsity lacrosse player who was playing a practice game after school was running toward the goal when his left foot came into contact with the base of the goal, causing him to twist his ankle and fall face down on the ground. According to the plaintiff, a net should have been attached to the goal, but, at the time he fell, the net was not covering the entire base of the goal. Court held plaintiff assumed the risk by voluntarily participating in lacrosse practice where the condition of the goal was not concealed and clearly visible.

Duffy v. Long Beach City Sch. Dist., 134 A.D.3d 761, 22 N.Y.S.3d 88 (2nd Dep't 2015). Fifteen-year old junior varsity football player was practicing football with other team members while waiting for the official football practice to begin. The players were unsupervised while they waited; there were no football coaches present on the practice field. While they waited for practice to begin, the plaintiff and other members of the team began taking turns using a piece of practice equipment called a blocking sled to catapult each other into the air. Two other members of the team were propelled into the air before the plaintiff took his turn. The plaintiff was propelled about 10 or 15 feet into the air, and when he landed he fractured both of his wrists. The plaintiff stated that about 20 minutes passed between the time the players first went over to the blocking sled and the time that he was injured. The plaintiff's head coach later testified that if he or any other coaches had been out on the practice field, they would not have allowed the players to use the blocking sled to catapult each other into the air. Regarding the negligent supervision claim, defendants failed to demonstrate that they had relinquished custody and control of the plaintiff at the time of the accident. To the contrary, the record demonstrated that the defendants retained custody and control over the plaintiff at the time of the accident, and that the junior varsity head coach was responsible for his supervision. Under the circumstances, the mere fact that the accident occurred following the formal end of classes for the day was without legal significance. Summary judgment denied. There was also a question of fact regarding assumption or risk doctrine.

Simonides v. Eastchester Union Free School District, 140 A.D.3d 728, 31 N.Y.S.3d 210 (2nd Dep't 2016). Seven-year-old first grade student was injured during recess when she hurried onto a playground slide on her knees in order to avoid being tagged by a friend with whom she was playing, and then fell off the slide while trying to straighten out her legs as she descended. The infant plaintiff repeatedly had been instructed regarding the rules of conduct on the playground and with respect to the proper use of the slide, including the instruction that riders were only allowed to go down the slide on their bottoms. The accident occurred in such a manner that it could not reasonably have been prevented by more intense supervision, thereby negating any alleged lack of supervision as the proximate cause of her injuries. SJ to defendant.

Santos v. City of New York, 138 A.D.3d 968, 30 N.Y.S.3d 258 (2nd Dep't 2016). Seventh-grader tripped and fell while participating in an obstacle course activity during gym class. Defendant demonstrated that it provided adequate supervision and instruction during the infant plaintiff's gym class and that the alleged accident occurred in so short a span of time that even the most intense supervision could not have prevented it.

Kaminer v. Jericho Union Free School District, 139 A.D.3d 1013, 34 N.Y.S.3d 88 (2nd Dep't 2016). A high school student was struck in the head by an errant baseball, thrown by the coach, during his high school baseball team's practice. Defendant met its prima facie burden for summary judgment dismissing the complaint by establishing that plaintiff was aware of and appreciated the risks inherent in the sport of baseball, including the risk of being struck by an errant baseball, and that he voluntarily assumed that risk. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether the coach's use of a fleece winter glove to throw the baseball subjected plaintiff to a concealed or unreasonably increased risk. Notably, "[t]he primary assumption of risk doctrine also encompasses risks involving less than optimal conditions". Case dismissed.

Perez v. Comsewogue School District, 2016 WL 3703147 (2nd Dep't 2016). Student was struck in the eye by a ball that had been kicked by another student during recess. At the time of the incident, the infant plaintiff, who had been diagnosed with a medical condition and was not allowed on the field area where sports were played at recess, was standing on a blacktop area of the playground where children were not permitted to engage in sporting activities and was in close proximity to her classroom aide and a substitute teacher. Court held defendant provided adequate supervision to the infant plaintiff and, in any event, that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries.

C. Student on Student Assaults/negligence

Ponsiglione v. Board of Educ. of City of N.Y., 135 A.D.3d 844, 24 N.Y.S.3d 155 (2nd Dep't 2016). Negligent supervision case by student against school district dismissed after another student pushed him down the stairs. School did not have sufficiently specific knowledge or notice of the dangerous conduct that caused the injury, and that the act of pushing the infant plaintiff from behind as she was walking down a staircase was impulsive and could not have been anticipated.

Dixon v. William Floyd Union Free Sch. Dist., 136 A.D.3d 972, 25 N.Y.S.3d 363 (2nd Dep't 2016). Twelfth-grade student was assaulted in a school hallway by the family members of a fellow student. A few days before the assault, the plaintiff and fellow student had an argument; however, there had been no physical altercation or threats of a physical altercation. The District got summary judgment because it had no actual or constructive knowledge or notice of any dangerous conduct on the part of the fellow student's family, and that the attack on the plaintiff was thus not reasonably foreseeable.

Sacino v. Warwick Valley Cent. School Dist., 138 A.D.3d 717, 29 N.Y.S.3d 57 (2nd Dep't 2016). Seventh-grader was assaulted by a fellow seventh-grade student toward the end of an "advisory period," during which students sought extra help from teachers. The assault was held to be an unforeseeable act, and the school had no actual or constructive notice of prior conduct similar to the subject incident. In any event, the School District established, prima facie, that the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries.

Maldari v. Mount Pleasant Cent. Sch. Dist., 131 A.D.3d 1019, 17 N.Y.S.3d 48 (2nd Dep't 2015). Plaintiff alleged school negligently failed to prevent him from being bullied by fellow students at his high school. The conduct consisted of, inter alia, verbal taunts, and acts in which other students allegedly pushed or bumped against the infant plaintiff, and culminated in an incident that occurred in the cafeteria, in which another student allegedly "grabbed" him and simulated a lewd act. Plaintiff sought damages for emotional injuries he allegedly sustained based on a theory of negligent supervision. Defendant established that the assault by a student in the cafeteria was an unforeseeable act and that it had no actual or constructive notice of prior conduct similar to the incident in the cafeteria.

Lennon v. Cornwall Cent. Sch. Dist., 132 A.D.3d 820, 18 N.Y.S.3d 139 (2nd Dep't 2015). At a field trip to the Bronx zoo, students were separated into small groups supervised by parent chaperones. Eleven-year-old (apparently a trouble maker) was part of a group chaperoned by three parents. Five teachers from the middle school also accompanied the children on the field trip. Several groups of sixth graders were gathered inside the "Jungle World" exhibit when the trouble-maker kid suddenly ran toward the exit, colliding with two girls who were standing near the exit door, and causing them to fall and sustain injuries. The two girls claimed that the trouble-maker intentionally pushed them. However, the trouble-maker claimed he was running because another student was chasing him, and he accidentally came into contact with the girls. School's submissions failed to eliminate all triable issues of fact as to whether the School District had actual or constructive notice of the fellow student's potential for causing harm, and whether, under the circumstances, the School District provided adequate supervision during the field trip. Dissent says defendant cannot be held liable for the "impulsive act of an 11–year–old child who collided with two of his fellow students while running out of a zoo exhibit", and would have granted summary judgment to defendant. The incident occurred in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury. Further, the defendant demonstrated it had no specific knowledge or notice of any dangerous conduct on the part of the trouble-maker. Regardless of whether the trouble-maker intentionally or accidentally collided with the girls, his act of colliding with them as he ran to reach the exit door was an impulsive one that could not reasonably have been anticipated. Although the trouble-maker did have a disciplinary history, the two prior incidents in which he was involved were insufficient to place the School District on notice that he would, either intentionally or accidentally, collide with two students as he ran to reach the exit door of a zoo exhibit.

Emmanuel B. v City of New York, 131 A.D.3d 831, 15 N.Y.S.3d 790 (1st Dep't 2015). Seven-year-old second-grade student suffered serious physical injuries as the result of an altercation in which a classmate caused him to strike his head against a bookcase. Earlier on the day of the incident, the infant-plaintiff had informed his teacher that the assailant was picking on him and calling him names. At the end of the school day, when students were lining up to go home, plaintiff and the assailant exchanged words, and the assailant pushed plaintiff into a desk. Plaintiff pushed back, and the assailant pushed him again, causing plaintiff to fall back into a bookcase. Plaintiff testified that the assailant and other boys had been teasing him during the school year, but he made no claim that the assailant had physically attacked him before the subject incident. Also before the subject incident, plaintiff's mother complained to the principal that several boys had been bullying her son, but she did not identify the offenders by name. The school principal testified that, before

the subject incident, she had never received any complaints that the assailant had acted violently or had been involved in physical altercations or engaged in improper touching or hitting of other students. On these facts, defendant granted summary judgment. No negligent supervision. Unforeseeable sudden act that no amount of supervision would have prevented. "There is no non-speculative basis for finding that any greater level of supervision than was provided would have prevented the sudden and spontaneous altercation between the two students". Dissent says there was conflicting testimony as to whether the assailant had a prior history of physically molesting other students and whether these incidents were reported to the school. As to proximate causation dissent finds an issue of fact as to whether the assault occurred so suddenly that no amount of supervision could have prevented it, given the evidence that the students had been verbally quarreling before the physical altercation and that the teacher had told them to stop arguing.

Elbadwi v. Saugerties Central School District, 2016 WL 3619347 (3rd Dep't 2016). Ten-year old plaintiff's class gathered in the school's cafeteria for recess before lunch. According to defendant's lunch monitor, plaintiff and her classmates were expressly instructed to remain on the blacktop area adjacent to the school's playground and not to venture onto the playground itself—as the rubberized surface of the playground was icy and the equipment was covered with snow. Less than one minute after exiting the school for the scheduled outdoor recess, plaintiff, in an effort to avoid a collision with a fellow classmate, jumped onto a double slide located on the playground, slipped, fell and fractured her upper left arm. Court found that the underlying accident occurred in so short a span of time that even the most intense supervision could not have prevented it, and thus lack of supervision was not the proximate cause of the injury. As to the premises liability claim, since plaintiff and her classmates were instructed not to use such equipment, defendant was not required to clear the equipment of snow and ice. SJ to defendant granted.

D. Student on Teacher Assaults – "Special Duty" needed

Brumer v. City of New York, 132 A.D.3d 795, 18 N.Y.S.3d 149 (2nd Dep't 2015). A student had been restrained by a school security guard after engaging in a fight with another boy during a fire drill. Although the security guard escorted the student away from the rest of the class, the student subsequently returned to the scene and began fighting again. During this second episode, the student hit her. Although a school district owes a special duty to its minor students, that duty does not extend to teachers, administrators, or other adults on or off school premises. The school did not have a special duty toward this teacher and thus case dismissed.

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

Diaz v. Brentwood Union Free School District, 2016 WL 3704678 (2nd Dep't 2016). Student was assaulted by members of a gang after being dismissed from summer (high) school. Plaintiff was leaving the school at dismissal time along with many other kids as the school security guards were directing the students to leave the property. The plaintiff intended to walk to a restaurant with his friends to get something to eat. Prior to leaving the school grounds, the plaintiff noticed a group of six young men, whom the plaintiff thought were gang members, walking down the street toward the school, yelling "[w]here's the Bloods around here?" At the General Municipal Law § 50–h hearing, the plaintiff testified that he "didn't feel threatened" when he saw the group because he was not a member of a gang, "so [he] didn't think they would mess with [him]." The plaintiff further testified that, while his friends stopped to converse with other students, he continued walking and was assaulted by the six young men after he left the school grounds. At his deposition, the plaintiff testified that, prior to the assault, he had attempted to return to the school campus, but the security guards prevented him from doing so. Case dismissed on summary judgment because the student "was not on school property and no longer in the defendant's custody or under its control and was, thus, outside of the

orbit of its authority" and "plaintiff was not released into a foreseeably hazardous setting that the defendant had a hand in creating". Dissent would have reversed because defendant failed to establish that it provided adequate supervision, and it was necessary for the defendant to submit affidavits from the school security guards in order to satisfy its initial burden. But majority says plaintiff's own testimony from the General Municipal Law § 50–h hearing, which the defendant submitted in support of its motion, reflected that the plaintiff did not feel threatened by the gang members and that he decided to leave school grounds. The defendant demonstrated that the plaintiff departed safely from school premises prior to the assault. Once the plaintiff left school premises, the defendant had no duty to supervise him off school premises after dismissal from school.

IX. FIREFIGHTER AND POLICE CAUSES OF ACTION

Kelly v. City of New York, 134 A.D.3d 676, 20 N.Y.S.3d 572 (2nd Dep't 2015). Plaintiff was injured in the course of her employment as a police officer in New York City when her foot became caught on a loose power cord which extended across the office floor from a paper shredder. She sued under common-law negligence and General Municipal Law § 205–e. Defendant's motion to dismiss the common-law negligence claims was denied. The defendants failed to establish, prima facie, that the firefighter rule barred the plaintiffs' cause of action alleging common-law negligence. The injured plaintiff's injury did not occur during an act in furtherance of a police function which exposed her to a heightened risk of sustaining that injury. The performance of her duties merely furnished the occasion for the injury. Furthermore, the defendants failed to establish, prima facie, that they did not have constructive notice of the condition complained of. The General Municipal Law § 205–e claim also survived summary judgment. Plaintiffs predicated their General Municipal Law § 205–e cause of action on Labor Law § 27–a(3)(a)(1), which may appropriately serve as a statutory predicate for a section 205–e cause of action. The defendants failed to satisfy their threshold burden on their motion for summary judgment by providing proof of their assertion that the subject injuries were not the result of a "recognized hazard" within the meaning of Labor Law § 27–a(3)(a)(1).

Gallagher v. 109-02 Dev., LLC, 137 A.D.3d 1073, 28 N.Y.S.3d 387 (2nd Dep't 2016). Firefighter brought action against auto shop owner after he slipped and fell in a mechanic's pit while responding to a fire at the auto shop. Plaintiff alleged violation of OSHA regulation 29 CFR § 1910.23(a)(1). However, a cause of action predicated on the alleged violation of OSHA regulations can only be maintained against a plaintiff's employer (see Ramos v. Baker, 91 A.D.3d 930, 933, 937 N.Y.S.2d 328). This Court has noted that OSHA governs employee/employer relationships, and thus OSHA regulations do not impose a specific statutory duty on parties other than a plaintiff's employer.

Klein v. Man Sui, 132 A.D.3d 1358, 17 N.Y.S.3d 818 (4th Dep't 2015). Police officer brought GML 205-e claim when he was injured while chasing and apprehending defendant, who had fled on foot from the scene of a traffic stop. There is no dispute that plaintiff identified the statute violated by defendant, who pleaded guilty to disorderly conduct, and that he sufficiently described the manner in which he was injured. The dispute is whether plaintiff established as a matter of law that defendant's actions caused his injury, either directly or indirectly and, if so, whether defendant raised a triable issue of fact. Court found that plaintiff met his initial burden of demonstrating "a practical or reasonable connection between the violation and [his] injury" by submitting a copy of his police report in which he stated that he was injured as a result of his apprehension of defendant, along with an affidavit swearing to the truth of the matters asserted in the report. The burden then shifted to defendant to raise an issue of fact, and the court properly determined that he failed to meet that burden. Defendant had relied exclusively on the affidavit of a chiropractor who merely summarized plaintiff's pre-incident medical records, which showed that plaintiff suffered from lower back

pain and discomfort prior to his encounter with defendant. The affidavit was insufficient to raise an issue of fact whether plaintiff's injuries are owing wholly to a preexisting medical condition, thereby absolving defendant of all liability.

Voss v. City of New York, 138 A.D.3d 427, 27 N.Y.S.3d 867 (1st Dep't 2016). Plaintiff police officer had not yet completed her tour of duty, when another officer grabbed her from behind and allegedly demonstrated a take-down maneuver, injuring plaintiff. Although a § 205–e claim may be predicated upon a violation of Labor Law § 27–a, here plaintiff's injury was not the type of workplace injury contemplated by the Statute. With respect to the alleged Penal Law violations, there was no evidence that any criminal charges were brought against the fellow officer, and plaintiff offered no evidence that the officer's conduct was intentional, criminally reckless, or criminally negligent, so as to rebut the presumption that the Penal Law was not violated.

Vaughn v. Veolia Transportation, Inc., 138 A.D.3d 979, 30 N.Y.S.3d 230 (2nd Dep't 2016). Police officer sued shuttle bus owner and airline after he slipped and fell while descending wet stairs of bus on tarmac at airport during rain storm. Court held that dismissal of the plaintiff's common-law negligence cause of action was not fatal, as a matter of law, to his General Municipal Law § 205–e cause of action. In order to recover under General Municipal Law § 205–e, the statute does not mandate that the plaintiff establish general negligence, but rather, negligence of any person in "failing to comply" with the requirements of, inter alia, a regulation (General Municipal Law § 205–e), or "negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties". Issues of fact existed.

Johnson v. Wythe Place, LLC, 134 A.D.3d 569 (1st Dep't 2015). Police officer, who was injured falling down an apartment building's steps while pursuing a suspect, brought GMO 205-e action against owner of apartment building, claiming that the condition of the steps was unsafe and that owner had constructive notice of the condition of the steps. Defendant established that it lacked actual or constructive notice of the alleged defective condition of the step on which plaintiff fell. The superintendent's deposition testimony and affidavit, and the affidavit of a member of the building management company established that there were no prior repairs, complaints, or reports of prior incidents involving the same step. Nor was there any evidence of any violations or citations issued regarding the staircase. As to constructive notice, defendant's superintendent of the building testified that he had cleaned the steps at 7:00 a.m. on the morning of plaintiff's accident, and did not observe any crack or caving in of the step. Plaintiff's own testimony, that he did not see the crack as he walked up the stairs just minutes before the accident, indicated that the alleged defective condition was not "visible and apparent" so as to give rise to constructive notice. Finally, the photographs did not raise an issue of fact, as they did not show how deep the crack was. From the photograph, it was difficult to discern anything more than a superficial marking or surface scratch. Case dismissed on SJ.

D'Andrea v. Bond, 2016 WL 4007331 (2nd Dep't 2016). Police officer responded to a radio call that placed him in the vicinity of the defendant's property. The backyard of the defendant's property was enclosed by both stockade and chain link fences. On the ground next to a fence gate was a small pile of discarded stockade fencing. The defendant testified at her deposition that this pile was the remains of a former fence gate which had been damaged by Hurricane Sandy, and which had been taken down and replaced by a handyman. The plaintiff testified at his deposition that, upon arriving at the scene, he heard noises coming from the defendant's backyard, whereupon he stepped onto the pile of stockade fencing with two feet and lifted his leg to the top of the chain link fence to move higher and get a better look when the pile of fencing collapsed. He fell and his shoulder hit the ground. The complaint alleged GML 205-e predicated on a failure to comply with, inter alia, Administrative Code of the City of New York § 28–301.1, which is entitled

"Owner's responsibilities," and which states in relevant part that "[a]ll buildings and all parts thereof and all other structures shall be maintained in a safe condition." Liability under General Municipal Law § 205–e pursuant to this administrative code section is limited to structural or design defects. Here, the defendant established on SJ that the pile of stockade fencing was not a structural or design defect of any kind. Thus, the plaintiff failed to identify any statute or ordinance with which the defendant failed to comply, or facts from which it might be inferred that the defendant's negligence directly or indirectly caused the harm alleged in this case.

X. COURT OF CLAIMS PROCEDURE

Lange v. State of New York, 133 A.D.3d 1250 (4th Dep't 2015). Motion for permission to file a late claim against the State denied after a review of the factors listed in Court of Claims Act § 10(6), as well as other discretionary factors. Although three of the factors favored claimant, i.e., notice, opportunity to investigate and lack of substantial prejudice to defendant, the appellate court declined to disturb the court's exercise of discretion, inasmuch as the record supported the court's determination that the excuse offered for the delay was inadequate and the proposed claim is of questionable merit.

Hargrove v. State of New York, 138 A.D.3d 777 (2nd Dep't 2016). The Court of Claims Act requires a claim to specify, among other things, "the time when" the claim arose and the "place where" it arose (Court of Claims Act § 11[b]). A notice of intention to file a claim must also include a statement as to when and where the claim arose. These requirements must be "strictly construed and a failure to comply therewith is a jurisdictional defect compelling the dismissal of the claim". Here, the State demonstrated that the claim was commenced more than 90 days after the date when the claim accrued and that the claimant failed to timely serve a notice of intention to file a claim that included "the time when" the claim arose and the "place where" it arose. The claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction. Case dismissed.

XI. MUNICIPALITIES FACING STORM IN PROGRESS

Rusin v. City of New York, 133 A.D.3d 648, 19 N.Y.S.3d 84 (2nd Dep't 2015). The plaintiffs sued the City of New York and the New York City Department of Sanitation after the plaintiff slipped and fell on snow and ice while walking in the crosswalk across a roadway in Brooklyn. The accident occurred about 57 hours after a snow storm that resulted in a total of approximately 20 inches of snow falling. Additionally, in the 57 hours after the end of the snow storm, the temperature rose above, and fell below, freezing. Defendant won summary judgment showing that they did not have a reasonable opportunity to remedy the allegedly dangerous condition that was created by the extraordinary snowstorm.

Scarlato v. Town of Islip, 135 A.D.3d 738, 22 N.Y.S.3d 593 (2nd Dep't 2016). Pedestrian brought action against town after she slipped and fell on a snow and ice condition on an airport sidewalk. The defendant demonstrated its entitlement to SJ by submitting the deposition testimony of the plaintiff and certified climatological records from Airport which demonstrated that the plaintiff's fall occurred during a storm in progress. The plaintiff testified at her deposition that the weather was "clear" at another location approximately two hours before her accident, but this testimony was insufficient to raise a triable issue of fact as to whether the storm was in progress at the airport when she fell. Similarly, the affidavit of the plaintiff's son, submitted in opposition to the motion, established that no efforts were made to clear the sidewalk until after the plaintiff fell and, at most, provided some evidence of a mere lull in the storm, which was insufficient to raise a triable issue of fact. Moreover, the plaintiff's own meteorological expert

confirmed that the climatological records demonstrated that the condition upon which the plaintiff fell was created during a single storm which was ongoing at the time of her accident.

Potter v. YMCA of Kingston & Ulster County, 136 A.D.3d 1265, 25 N.Y.S.3d 748 (3rd Dep't 2016). Defendant failed to establish as a matter of law that the precipitation from a storm in progress was the sole proximate cause of plaintiff's fall. Defendant submitted proof in the form of a sworn statement from a meteorologist that light snow and/or freezing rain began falling at 4:54 a.m. on the day of the accident and that such weather left less than one tenth of an inch of new precipitation on the ground. Plaintiffs submitted certified records from the National Climatic Data Center that established that, two days prior to the accident, .94 inches of rain and 8.1 inches of snow had fallen. Further, plaintiff averred that ice on defendant's parking lot had built up over a significant period of time during the winter and prior to his fall. In addition, defendant's chief executive officer and president explained that defendant's automatic snow and ice removal service was "purely a plowing contract." She further explained that, for sand or salt to be applied, defendant would have had to make a specific request, which would have resulted in an additional services bill for defendant's records. She explained that her records did not indicate that any sanding or salting services had been provided in February. Considering the significant precipitation two days prior to the alleged storm in progress, plaintiff's observations that ice had been accumulating in the parking lot prior to the morning of the accident and the concession that defendant's only snow and ice maintenance during February would have been plowing, material issues of fact preclude summary judgment

XII. MUNICIPAL BUS LIABILITY

Andreca v. Cash World Tours, Inc., 135 A.D.3d 675, 22 N.Y.S.3d 878 (2nd Dep't 2016). Defendant was granted summary judgment where plaintiff's deposition testimony demonstrated that the stop of the bus was not unusual or violent or of a different class than the jerks and jolts commonly experienced in city bus travel.

Bethune v. MTA Long Island Bus, 138 A.D.3d 1052, 31 N.Y.S.3d 144 (2nd Dep't 2016). Plaintiff was injured shortly after she boarded a bus owned and operated by the defendant MTA Long Island Bus (hereinafter the defendant), when the driver applied the brakes, causing the plaintiff to lose her balance and hurt her foot. Defendant demonstrated that the stop of the bus was not unusual or violent or of a different class than the jerks and jolts commonly experienced in city bus travel, and plaintiff was unable to meet her burden in opposition. SJ to defendant.

XIII. FALSE ARREST, MALICIOUS PROSECUTION AND EXCESSIVE FORCE

Torres v. Jones, 26 N.Y.3d 742 (2016). In a false arrest action under federal and state law, evidence that the defendant police officers arrested the plaintiff without probable cause, after inventing a patently false confession, may establish the officers' liability for detaining the plaintiff without any lawful privilege. Evidence that the officers forwarded the false confession to prosecutors can satisfy the commencement element of a malicious prosecution cause of action, and the proof of the absence of probable cause for the prosecution and the police's transmission of the fabricated evidence can overcome the presumption of probable cause arising from a grand jury's indictment of the plaintiff. The same proof can support an inference that the police acted with actual malice in commencing the prosecution. Applying these principles to consolidated appeals, the Court held that the courts below improperly granted summary judgment to the individual defendants on plaintiff's false arrest and malicious prosecution claims under New York common law and 42 USC § 1983 and that plaintiff had triable state law claims against defendants the City of New York and the New York City Police Department. Court noted that it had "never elaborated on how a

plaintiff in a malicious prosecution case demonstrates that the defendant commenced or continued the underlying criminal proceeding . . . but by suggesting that a defendant other than a public prosecutor may be liable for supplying false information to the prosecutor in substantial furtherance of a criminal action against the plaintiff, we have implicitly recognized that such conduct may, depending on the circumstances, constitute the commencement or continuation of the prosecution". Court rinds that, "just as in the false arrest context, the plaintiff in a malicious prosecution action must also establish at trial the absence of probable cause to believe that he or she committed the charged crimes, but this element operates differently in the malicious prosecution context because once a suspect has been indicted ... the law holds that the Grand Jury action creates a presumption of probable cause". Generally, the plaintiff cannot rebut the presumption of probable cause with evidence merely indicating that the authorities acquired information that, depending on the inferences one might choose to draw, might have fallen somewhat shy of establishing probable cause. And even if the plaintiff shows a sufficiently serious lack of cause for the prosecution and rebuts the presumption at trial, he or she still must prove to the satisfaction of the jury that the defendant acted with malice, i.e., that the defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served. 42 USC § 1983 authorizes the plaintiff to sue government agents for unlawful arrest and malicious prosecution in violation of the laws and Constitution of the United States and the elements of those causes of action are substantially the same as the elements of the comparable state common-law claims, and are thus evaluated in much the same way. But the government itself cannot be liable for false arrest or malicious prosecution under 42 USC § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights. The lower court here improperly granted summary judgment to defendants on plaintiff's common-law false arrest and malicious prosecution claims, and it foreclosed judgment as a matter of law in favor of the individual defendants on plaintiff's claims under 42 USC § 1983. Plaintiff's deposition testimony raised triable questions of fact regarding whether the detectives unlawfully arrested her for the murder at issue without probable cause, improperly commenced the prosecution against her and participated in the prosecution out of malice.

Davila v. City of New York, 139 A.D.3d 890 (2d Dep't 2016). Two police officers responded to several 911 emergency calls reporting a disturbance at an apartment building in Brooklyn where the plaintiff resided with his parents. While the officers were attempting to restrain the plaintiff, who had a long history of mental illness and was behaving erratically, both he and the officers fell down a flight of stairs. The jury found in favor of the plaintiff on his causes of action to recover damages for negligence and use of excessive force. The defendants moved, inter alia, pursuant to CPLR 4401 for judgment as a matter of law dismissing those causes of action, and the Supreme Court denied those branches of their motion. The Court here reverses and dismissed the cause of action alleging the use of excessive force by the police officers. It was undisputed that, by the time they arrived at the scene, the defendant officers were aware that they were dealing with an emotionally disturbed person, that the person had started or attempted to start a fire, and that he had been throwing items out of the window of the apartment where he lived with his parents. Upon entering the building's stairwell, the officers were confronted by the plaintiff, naked except for a pair of underpants around his knees or ankles. The circumstances almost immediately became more tense when the officers attempted to approach the plaintiff and he punched one of them in the face and fled up the stairs, screaming. While the officers could have waited for the Emergency Services Unit (hereinafter ESU) to arrive and take over, it could not be said that, by approaching the plaintiff and speaking to him, they employed excessive force. Moreover, under the circumstances of this case, the officers' actions would be entitled to qualified immunity as a matter of law. "If found to be objectively reasonable, an officer's actions are privileged under the doctrine of qualified immunity". Here, considering the specific context of the case, it was clear that officers of reasonable competence could disagree on whether the defendant officers should have waited for the ESU to arrive, instead of approaching the plaintiff initially and then, after he struck one

officer, rushing the plaintiff and attempting to handcuff him. Thus, the actions were objectively reasonable. As for the negligence claims, the jury got it wrong there, too, and here the Court reverses the supreme court's upholding of the verdict. Under the doctrine of governmental function immunity, "government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general." The evidence established as a matter of law that the allegedly negligent acts of the police officers were discretionary, and not ministerial and, therefore, that the doctrine of governmental function immunity precluded liability for the allegedly negligent conduct of the officers.

Wright v. City of Buffalo, 137 A.D.3d 1739, 29 N.Y.S.3d 723 (4th Dep't 2016). In this false imprisonment/wrongful arrest case, defendant contended the police actions were privileged because they were authorized to take decedent into custody (after a "grand seizure" event) pursuant to Mental Hygiene Law § 9.41, which provides in relevant part that "any ... police officer ... may take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others." The defendant submitted evidence that the police's action was undertaken in the exercise of reasoned professional judgment of the officers, but plaintiff submitted his own testimony and that of a neighbor raising issues of fact as to whether he had a mental illness and whether he was conducting himself in a manner likely to result in serious harm to himself or others. Specifically, plaintiff testified that a paramedic suggested to the police that, rather than take custody of plaintiff, they afford him some time in which to recover from the effects of the seizure. Also a neighbor testified that, after the police lifted decedent from the chair, decedent said, "ok, I'll go, I'll go." Plaintiff testified that he said that he would go to the hospital but that he needed "some time to really just get [his] bearings and just figure out what's going on." All this raises a question of fact as to whether the arrest was reasonable.

De Lourdes Torres v. Jones, 26 N.Y.3d 742, 47 N.E.3d 747, 27 N.Y.S.3d 468 (2016). Arrestee brought two actions against city and police detectives, alleging false arrest, false imprisonment, and malicious prosecution under § 1983 and common law, and asserting a claim of municipal liability under § 1981. Defendants moved for summary judgment in both cases. In a false arrest action under federal and state law, evidence that the defendant police officers arrested the plaintiff without probable cause, after inventing a patently false confession, may establish the officers' liability for detaining the plaintiff without any lawful privilege. Evidence that the officers forwarded the false confession to prosecutors can satisfy the commencement element of a malicious prosecution cause of action, and the proof of the absence of probable cause for the prosecution and the police's transmission of the fabricated evidence can overcome the presumption of probable cause arising from a grand jury's indictment of the plaintiff. The same proof can support an inference that the police acted with actual malice in commencing the prosecution. Applying these principles to the consolidated appeals before it, the Court held that the courts below improperly granted summary judgment to the individual defendants on plaintiff's false arrest and malicious prosecution claims under New York common law and 42 USC § 1983. The Court further conclude that, although plaintiff maintained triable state law claims against defendants the City of New York and the New York City Police Department, the lower courts properly granted summary judgment to those governmental entities on plaintiff's claims under 42 USC § 1983.

Dann v. Auburn Police Department, 138 A.D.3d 1468, 31 N.Y.S.3d 335 (4th Dep't 2016). Plaintiff sued two sets of defendants (City of Auburn and its police department, and the County of Cayuga and it's DA office) on various theories. The County defendants demonstrated their entitlement to SJ based on their prosecutorial immunity, and plaintiff failed to raise a triable question of fact. The law provides absolute immunity "for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process", i.e., conduct involving "initiating a prosecution and ... presenting the State's case". Although

prosecutors are afforded only qualified immunity when acting in an *investigative capacity*, the Court here rejected plaintiff's contention that the prosecutor's actions went beyond "the professional evaluation of the evidence assembled by the police," a function that would not deprive the prosecutor of absolute immunity. As for the City defendants, the malicious prosecution claims against them were dismissed because the City showed the police had probable cause to charge plaintiff with assault in the second degree and plaintiff failed to raise a triable issue of fact. That quantum of suspicion was furnished to the police by the sworn statements of the victim and the victim's brother-in-law, was buttressed by the sworn statement of plaintiff himself, and was further supported by the findings made by the police during their prudent and careful investigation into the incident. "In the context of a malicious prosecution cause of action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty". "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely requires information sufficient to support a reasonable belief that an offense has been or is being committed by the suspected individual". Moreover, where, as here, "a warrant of arrest has been issued by a court of competent jurisdiction, there is 'a presumption that the arrest was made on probable cause'".