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

Matter Of World Trade Center Bombing Litigation., 17 N.Y.3d 428, 957 N.E.2d 733, 933 N.Y.S.2d 164 (2012). Personal injury action was brought against Port Authority arising from the 1993 terrorist bombing of the World Trade Center (WTC). Following jury trial, the trial court entered judgment in favor of plaintiff, and Port Authority appealed. The gravamen of the claims was a negligent failure by the Port Authority to provide adequate security—i.e., the failure to adopt the recommendations in the security reports; to restrict public access to the subgrade parking levels; to have an adequate security plan; to establish a manned checkpoint at the garage; to inspect vehicles; to have adequate security personnel; to employ recording devices concerning vehicles, operators, occupants, and pedestrians; and to investigate the possible consequences of a bombing within the WTC. Following a bifurcated trial solely on liability, a jury found that the Port Authority was liable for negligently failing to maintain the WTC parking garage in a reasonably safe condition. The jury apportioned 68% of the fault to the Port Authority and 32% to the terrorists. The Appellate Division affirmed. Issue for the Court of Appeals: Was the Port Authority's provision of security at the WTC a **governmental** function (public security) or a **proprietary** function (commercial landowner responsibility)? The Port Authority claimed that by assessing security risks, allocating police resources, and implementing safeguards at the WTC in the face of numerous possible threats, it engaged in conduct akin to a governmental, rather than a proprietary, function. Plaintiffs maintained that the provision of security within the parking garage—a commercial area that served the commercial tenants of the WTC (as well as the public) and generated income—fell within the Port Authority's proprietary capacity. The Court here sided with defendant. The Court reasoned that "while the instant terrorist bombing occurred within the parking garage and may focus some attention on proprietary responsibility, the Port Authority's police resources were devoted to countering criminal incidents for the benefit of all who visited the WTC. Any failure to secure the parking garage against terrorist attack predominantly derives from a failed allocation of police resource"". After finding that the government was acting within its governmental function, then next issue ecomes whether the security decisions were "**discretionary**" (automatic governmental immunity applies) or "**ministerial**"(gov immunity applies unless plaintiff can show a "special duty" to plaintiffs). The Court found them to be discretionary, and thus defendant was immune. Judge Ciparik dissented. He opined that the Port Authority's failure to implement discrete and basic security measures in the public parking area of the commercial building complex arose from the exercise of its proprietary—rather than governmental—obligations.

Weiner v. City of New York, 19 N.Y.3d 852, 970 N.E.2d 427 (2012). In this case, the Court of Appeals resolved a "split in the Departments" regarding whether the receipt of workers' compensation benefits bars a suit against the employer by a firefighter under GML 205-a. It held that WC does bar such suits. The facts were that an emergency medical technician employed by city fire department was hurt while responding to a report of an injured person on a poorly illuminated boardwalk in Brighton Beach. He sued his employer, the City, alleging both common law negligence and a cause of action under GML 205-a. Plaintiff contended that he could bring this action against the City pursuant to GML § 205–a because that statute gives a right of action to "any officer, member, agent or employee of any fire department" who is injured on duty, *"[i]n addition to any other right of action or recovery under any other provision of law"*. Plaintiff argued that his GML 205-a claim was "in addition to workers' compensation". Plaintiff's principal argument relied on a difference in wording between GML 205-a (firefighters) and GML 205-e (police officers). Section 205–e contains the same statement found in § 205–a that the cause of action created by the statute exists "[i]n addition to any other right of action or recovery under any other provision of law" but § 205–e (police officers) explicitly provides that "nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee or his or her representative by virtue of any provisions of the workers' compensation law". Plaintiff contended that the omission of this language concerning workers' compensation law in § 205–a with respect to firefighters was deliberate. The City moved to dismiss the complaint pursuant to CPLR 3211, arguing that plaintiff's receipt of workers' compensation benefits barred his lawsuit (also on the grounds that as an emergency medical technician he was not within the class of persons who may bring an action under § 205–a. Supreme Court denied the motion) citing *Lo Tempio v. City of Buffalo* (6 A.D.3d 1197, 775 N.Y.S.2d 717 [4th Dept 2004]) for the proposition that receipt of workers' compensation benefits do not bar GML 205-a suits against the employer. The Appellate Division, Second Department, reversed, agreeing with the City that plaintiff's action was barred by his receipt of workers' compensation benefits, thus splitting from the Fourth Upon review of the legislative history, the Court of Appeals affirmed, holding that *Lo Tempio* was wrongly decided in so far as that court held that a GML 205-a plaintiff's acceptance of workers' compensation benefits does not preclude a tort action against his or her employer. (The court declined to decide the issue of whether emergency medical technicians who are employed by fire departments can sue under GML § 205–a, or whether the right of action is limited to firefighters.)

Valdez v. City of New York, 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587 (2011). Plaintiff brought negligence action against city, alleging that she was shot outside her apartment by her former boyfriend after she reported to police that he had threatened to kill her, and after officer told her that former boyfriend would be arrested immediately (he was not) and that she should return to her apartment (she did). Jury found for plaintiff, somewhat (50% liability against City and 50% against plaintiff). City moved to set aside verdict, lost, and appealed, and the case bumped its way up to the Court of Appeals. The underlying issue (which the Court did not answer!) was whether the governmental acts here were "ministerial" or "discretionary". Under

McLean, if they were ministerial, there could be liability, but only if plaintiff showed a "special relationship". But if they were discretionary, and discretion were exercised, there could never be liability. The Court then jumped right past this thousand-pound-gorilla of an issue, and looked instead at whether plaintiff had established a "special relationship" with the municipal actors. If she had not, then she would lose the case even if the police actions were ministerial. The Court then found she had *not* established a special relationship. The Court found that, as a matter of law, plaintiff had failed to show the "justifiable reliance" element of a "special relationship". "It was not reasonable for [plaintiff] to conclude, based on nothing more than the officer's statement that the police were going to arrest [her ex-boyfriend] "immediately", that she could relax her vigilance indefinitely, a belief that apparently impelled her to exit her apartment some 28 hours later without further contact with the police". Thus, summary judgment granted to defendant. NOTE: In addressing the dissent's concerns that, if the government is always immune for discretionary acts, even when a special relationship is shown, then "plaintiffs will never be able to recover in negligence [in police cases]. . . because police work invariably involves the exercise of discretion". The Majority responded that it "does not share this view because we do not accept the premise underlying it. We know of no decision of this Court holding that police action (or inaction, as it might be more accurately characterized in this case) is always deemed to be discretionary under the discretionary/ministerial duty analysis".

II LATE SERVICE OF NOTICE OF CLAIM

A. When No Notice of Claim Needed

Johnson v. City of Peekskill, 91 A.D.3d 825, 936 N.Y.S.2d 701 (2nd Dep't 2012). The plaintiff's claim was held not subject to the notice of claim statute because the claim was primarily equitable in nature. The plaintiff's complaint sought injunctive relief; specifically, it demanded that a building permit be issued. Although the complaint also demanded compensatory and punitive damages, compliance with the notice of claim requirements of 50-e is not necessary where, as here, the action is brought in equity to restrain a continuing act and where a demand for money damages is merely incidental to the requested injunctive relief.

B. Late-Service of N/C without Leave of Court Is Nullity

Browne v. New York City Transit Authority, 90 A.D.3d 965, 934 N.Y.S.2d 821 (2nd Dep't 2011). Plaintiff's late service of a notice of claim upon the defendant was a nullity, as it was made without leave of the court. Furthermore, since the plaintiff cross-moved to deem the notice of claim timely served nunc pro tunc after the one-year and 90–day statute of limitations had expired, the Court did not have the authority to grant such relief.

C. Factors Considered in Deciding Whether to Grant Permission to Late-Serve a N/C

1. "Actual Knowledge" w/i 90 days or a reasonable time thereafter

a. "Actual Knowledge" By Whom?

Franco v. Town of Cairo, 87 A.D.3d 799, 928 N.Y.S.2d 396 (3rd Dep't 2011). Knowledge of a potential claim may be imputed to a municipality where its employees discern more than merely generalized awareness of an accident and injuries from their presence at an accident site. Within 90 days of this slip-and-fall accident, the Town had knowledge and an opportunity to investigate the alleged defect. Employees of the Town were summoned to the scene to assist plaintiff, who was immobile and still positioned at the place where she had fallen when they arrived. Police and emergency medical personnel were present and a written report was generated that specifically referenced the ice that allegedly caused petitioner to fall. The report stated that plaintiff was lying along the sidewalk and that she indicated she had fallen because of built up ice. The potential serious nature of her injury was evident not only from her immobility, but also, as related in the report, from the fact that she was crying and believed that she had broken her ankle (she had!). Moreover, less than two months after the accident, a law firm sent a letter to the Town's Public Library, adjacent to the accident site, regarding plaintiff's accident, requesting that the letter be forwarded to the liability insurance carrier. All this constitutes evidence of actual knowledge of the facts of the claim by the Town. A dissenting judge found the Town did not have actual knowledge of the facts of the claim because the police report was vague and ambiguous in describing the location of the accident, indicating that petitioner fell "on the ground due to ice that was built up along the sidewalk at the entrance of the driveway" to a private real estate office. It did not say that she fell on the sidewalk or that the ice was built up on the sidewalk. In short, the police report, according to the dissent, did not put the Town on notice of plaintiff's claim that negligent maintenance of the Town's sidewalk caused her to fall. The letter sent by plaintiff's attorney to the Town's library was also insufficient to provide notice as it only mentioned the accident date but gave no indication of the location, manner or cause of the accident.

b. "Actual Knowledge" Gained from prior Late Notice of Claim

Silberman v. City of Long Beach, 87 A.D.3d 1071, 929 N.Y.S.2d 758 (2nd Dep't 2011). Plaintiff served a notice of claim 1 day after the statutory 90–day period expired, and served an amended notice of claim more precisely identifying the location of her accident 12 days later. From those documents, defendant acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90–day period. Thus, motion to late-serve filed within the one-year 90-day period was granted.

c. "Actual Knowledge" Through Big Apple Map

Khalid v. City of New York, 91 A.D.3d 779, 937 N.Y.S.2d 124 (2nd Dep't 2012). Plaintiff did not demonstrate a reasonable excuse for failing to serve a timely notice of claim. While the plaintiff may have been physically incapacitated during the first three months after the accident, he failed

to demonstrate a reasonable excuse for the additional five-month delay after counsel was retained before properly filing the present petition for leave to serve a late notice of claim. Furthermore, 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 curb defect indicated on a map filed with the New York City Department of Transportation by the Big Apple Pothole and Sidewalk Protection Corporation six years before the accident did not suffice to give the City actual knowledge of the essential facts constituting the petitioner's claim. The City did not have actual timely knowledge of the petitioner's accident, his injuries, or the facts underlying his theory of liability.

d. "Actual Knowledge" through Police Reports

Joy v. County of Suffolk, 89 A.D.3d 1025, 933 N.Y.S.2d 369 (2nd Dep't 2011). Plaintiff demonstrated that the County and Town acquired timely knowledge of the essential facts underlying her claim by way of the timely notices of claim and copies of the police accident report served upon them by a passenger in the same vehicle in which the petitioner was a passenger at the time of accident, who also allegedly sustained injuries in the accident. While the plaintiff's excuse for her failure to serve a timely notice of claim was not reasonable, where there is actual notice and absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim.

Mitchell v. Town of Greenburgh, 96 A.D.3d 852, 946 N.Y.S.2d 220 (2nd Dep't 2012). Plaintiff contended that the Town acquired timely, actual knowledge of the facts constituting the claim by reason of an incident report that she filed with the Town of Greenburgh Police Department 21 days after the incident. The fact that the Town of Greenburgh Police Department had knowledge of this incident, without more, did not constitute actual knowledge of the claim. Furthermore, the police incident report failed to provide the Town with actual knowledge of the facts constituting the petitioner's claim that the hole in which she fell was located on property owned or maintained by the Town. In addition, the plaintiff failed to demonstrate a reasonable excuse for her 3 1/2-month delay in retaining an attorney.

Taylor v. County of Suffolk, 90 A.D.3d 769, 934 N.Y.S.2d 348 (2nd Dep't 2011). Plaintiff argued that defendant acquired actual knowledge of the facts constituting the claim within 90 days after the accident or a reasonable time thereafter by virtue of a police accident report made by the responding police officer. However, for a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation. Here, the police accident report did not provide the respondents with actual notice of the petitioners' claim of negligence in the happening of this accident or of the injured petitioner's claim that he was injured as a result of the respondents' negligence. Motion to late-serve denied.

e. "Actual Knowledge" through Hospital Records

Ramos–Elizares v. Westchester County Healthcare Corp., 94 A.D.3d 1130, 942 N.Y.S.2d 794 (2nd Dep't 2012). The evidence did not establish that the appellant had actual knowledge of the essential facts constituting the claim within the requisite 90–day period or a reasonable time thereafter. Merely having or creating hospital records, without more, does not establish actual knowledge of a potential claim where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on the petitioner attributable to malpractice. Plaintiff failed to establish that the alleged malpractice was apparent from an independent review of the medical records. The petitioners also failed to establish that the six-month delay after the expiration of the 90–day period would not substantially prejudice the appellant's ability to investigate the claim and maintain a defense on the merits.

Gentile v. Westchester Medical Center, 87 A.D.3d 1065, 929 N.Y.S.2d 330 (2nd Dep't 2011). Leave to late-serve notice of claim for malpractice on public hospital denied where there was no indication in hospital's records that it failed to properly manage patient's electrolytes or that patient's stroke was caused by that alleged failure, nor was there any indication in hospital's records to indicate that hospital had knowledge of patient's claims within 90 days of claims' alleged accrual or reasonable time thereafter.

Bowser ex rel. Almeyda v. New York Health and Hospitals Corp., 93 A.D.3d 608, 942 N.Y.S.2d 44 (1st Dep't 2012). Although ignorance of the law by infant plaintiff's mother is not a reasonable excuse for the failure to have served a timely notice of claim, infant plaintiff should not be deprived of a remedy where the record showed that defendant's possession of the medical records sufficiently constituted actual notice of the pertinent facts of the alleged malpractice claim. Plaintiffs submitted an affirmation from a physician stating that the medical records, on their face, evinced that defendant failed to properly diagnose the infant plaintiff's meningitis and brain injury.

Hernandez v. County of Suffolk, 90 A.D.3d 1049, 934 N.Y.S.2d 863 (2nd Dep't 2011). Where, as here, there was little in the medical records to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying a claim. Also, plaintiff failed to present a satisfactory excuse for the delay in seeking leave to serve a late notice of claim.

Castaneda v. Nassau Health Care Corp., 89 A.D.3d 782, 933 N.Y.S.2d 64 (2nd Dep't 2011). The infant plaintiff was born on May 14, 2007, at the defendant Nassau University Medical Center. He was delivered preterm with a gestational age of 32 weeks by C-section. He was transferred to the neonatal intensive care unit because he suffered from respiratory distress. After 25 days, on June 8, 2007, the infant plaintiff was discharged. At the time of his discharge, the infant plaintiff suffered from several medical problems. The infant plaintiff's mother was advised by medical

personnel that he may experience developmental delays. A notice of claim was served on the defendants on January 30, 2009, which was beyond the 90–day period. After the plaintiff commenced this action for medical malpractice, the plaintiff moved for leave to serve a late notice of claim upon the defendants and the defendants cross-moved to dismiss the complaint for failure to serve a timely notice of claim. Court here grants plaintiff leave to late-serve because plaintiff demonstrated that the defendants had actual knowledge of the essential facts constituting the claim, as the medical records provided knowledge of the facts and suggested an injury attributable to malpractice. Moreover, there was no evidence that the defendants would be substantially prejudiced if leave was granted to serve a late notice of claim. While two of the treating physicians no longer work for the defendants, there was no indication that they were unavailable.

Cartagena ex rel. Gilliam v. New York City Health and Hospitals Corp., 93 A.D.3d 187, 938 N.Y.S.2d 77 (1st Dep't 2012). A municipal hospital corporation has "actual knowledge" of a claim when it creates a contemporaneous medical record containing the essential facts constituting the alleged malpractice. In such a case, a delay in investigation is not prejudicial because the hospital has been in possession of the medical record since the claim arose. Conversely, merely creating and possessing a medical record where there is nothing in that record to suggest that "the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process," does not constitute actual knowledge of facts underlying a claim. Thus, to establish that HHC here had actual notice of the facts underlying the claim, the plaintiff was obliged to show that its hospital records indicated or noted an injury to the infant plaintiff. But here the hospital records directly contradicted the plaintiff's assertion that the infant suffered any injury. Thus, permission to serve late notice of claim denied.

Plaza ex rel. Rodriguez v. New York Health and Hospitals Corp., --- N.Y.S.2d ----, 97 A.D.3d 466, 2012 WL 2891165 (1st Dep't 2012). Defendant moved to dismiss complaint because plaintiff failed to comply with the 90–day notice of claim time period specified in GML 50-e. Plaintiff had served the notice of claim late, by several years, without court permission. In opposition to the motion, plaintiff cross-moved for an order deeming the notice of claim timely served nunc pro tunc or, in the alternative, granting leave to serve a late notice of claim. Court first noted that service of a late notice of claim without leave of court is a nullity, and then went on to decided that plaintiff had failed to meet the basic criteria. Plaintiff failed to provide a reasonable excuse for the delay and to establish that HHC had actual notice of the claim. The record showed that plaintiff's mother, while on notice of the infant's condition, lacked an understanding of the legal basis for the claim, and that she retained her current counsel almost two years after the infant's birth. However, ignorance of the law is not a reasonable excuse. To add insult to injury, the attorney then waited almost a year after being retained to file a notice of claim, without leave of the court. Actual knowledge of the essential facts is a very important factor in determining whether to grant an extension and should be accorded great weight, and here plaintiff failed to show actual notice from the medical record, as "the record alone did not

put defendant on notice of alleged malpractice that might years later give rise to another condition". Although the medical records showed there were difficulties encountered during the delivery, and that the Apgar scores of the infant were low, subsequent medical examinations did not reveal any abnormalities until years after the incidents giving rise to the claimed malpractice. Despite plaintiff's experts' testimony to the contrary, the medical records, on their face, did not give the defendants actual notice of the essential facts constituting malpractice. The dissent, in a lengthy, well-written analysis, disagreed.

f. "Actual Knowledge" through School Records

Keyes v. City of New York, 89 A.D.3d 1086, 933 N.Y.S.2d 607 (2nd Dep't 2011). Plaintiff failed to demonstrate that the defendant obtained actual knowledge of the essential facts constituting the claim that defendants failed to protect the infant petitioner from being attacked by another student in the school's cafeteria. There was no evidence in the record to support the hearsay allegations of the infant plaintiff's father that the infant reported the incident to a teacher or that the infant's grandmother had several meetings with the school's principal. Motion for permission to late-serve thus denied.

Conger v. Ogdensburg City School Dist., 87 A.D.3d 1253, 930 N.Y.S.2d 92 (3rd Dep't 2011). Motion by infant-student to late serve denied where school district was generally aware that child had fallen and broken his elbow, but there was no indication that school district was aware of the essential facts of the underlying claim or that child contended that his injuries were due to school district's negligence. The student had fallen on the ice while playing broomball during a physical education class. He went to the school nurse, nurse observed some bruising and swelling, but it did not seem like anything more. The child went to a local hospital later that day and was diagnosed with a broken left elbow. In the interim, his mother notified the school nurse about it. But there was no indication that the nurse or School District were aware of the essential facts of the underlying claim or that plaintiff contended that his injuries were due to the School District's negligence until plaintiff applied to file a late notice of claim several years later.

2. "Reasonable Excuse" for Late service

a. Medical Condition as Reasonable Excuse

Levin v. County of Westchester, 91 A.D.3d 646, 936 N.Y.S.2d 269 (2nd Dep't 2012). Plaintiff was injured while stepping off a ride at the Rye Playland amusement park, which was owned and operated by the County of Westchester. Because the platform next to the ride was too narrow, her foot missed the platform and she fell two feet to the concrete below. She sustained fracture to her right leg which required three surgeries between the time of the accident, and after the second surgery, she sustained a morphine overdose and remained in the hospital for several weeks. Hospital records showed that she left the hospital in a wheelchair accompanied by a private nurse. She then remained homebound as a result of excruciating pain for several months.

About three weeks after her third surgery, she retained a lawyer, who moved to late-serve a notice of claim. Leave was granted because the plaintiff's medical condition constituted a reasonable excuse and also because the County was not substantially prejudiced by the seven month delay in serving the notice of claim. Even though incident report prepared by county employee on date of accident was insufficient to afford county prompt notice of essential facts constituting patron's claim, and thus the instrumentality allegedly causing patron's injury had not undergone any post-accident design changes that would impede county's ability investigate patron's claim.

b. Incarceration as Reasonable Excuse

Csaszar v. County of Dutchess, 95 A.D.3d 1009, 943 N.Y.S.2d 610 (2nd Dep't 2012). Leave to serve late notice of claim on county was held not warranted where plaintiff's incarceration and difficulty in obtaining counsel were insufficient excuses for one-year delay in seeking leave to serve late notice of claim, and plaintiff failed to demonstrate that delay in serving notice of claim would not substantially prejudice county. The plaintiff's incarceration and his difficulty in obtaining counsel were insufficient excuses for the delay and the evidence submitted failed to establish that the County had actual knowledge of the essential facts constituting the claim within 90 days following accrual or a reasonable time.

Csaszar v. County of Dutchess, 95 A.D.3d 1009, 943 N.Y.S.2d 610 (2nd Dep't 2012). Plaintiff failed to demonstrate a reasonable excuse for his one-year delay in applying to late-serve. His incarceration and his difficulty in obtaining counsel were insufficient excuses for the delay. Also, he failed to establish actual notice by defendant within 90 days or a reasonable time thereafter.

c. Infancy as Reasonable Excuse

Doe v. North Tonawanda Cent. School Dist., 88 A.D.3d 1289, 930 N.Y.S.2d 371 (4th Dep't 2011). Former student sexually abused by teacher moved for leave to file late notice of claim against School District, raising her infancy as an excuse for failing to serve the notice of claim on time, and for not moving to late-serve for a full decade. She initiated the petition to late-serve shortly after she turned 18 (the abuse happened when she was 8) and, as an excuse for the lateness, proved that her legal guardians knew of the abuse, had eventually reported it to the police, but refused to initiate a civil claim on her behalf. The Court granted her permission to late serve, finding that her infancy combined with the refusal of her guardians to take legal action on her behalf constituted a reasonable excuse for the delay. Regarding the very important factor of whether the School District had actual knowledge of the facts constituting the claim within the 90-day period or shortly thereafter, the Majority here fudged it a bit. It pointed out that the School District had conducted an investigation of the teacher's conduct based upon accusations of sexual abuse made by other students and, in so doing, had acquired knowledge of abuse (of others) during or shortly after the time period in which this claimant was abused. One

(dissenting) judge wasn't buying it. He admitted that the child had a reasonable excuse for not serving a timely notice of claim, but this was, in his view, the only factor weighing in her favor. All the remaining factors weighed heavily against her application. Most importantly, the School District did not have timely actual notice of the claim, a factor on which courts place great emphasis. Although the School District was aware that its teacher-employee abused several other students during that time period, there was no evidence to suggest that it knew that this child-claimant was one of the victims until almost a decade after the alleged abuse occurred. The decade-long delay in seeking leave to serve a late notice of claim substantially prejudiced defendant's ability to investigate the alleged abuse and prepare a defense with respect to claimant.

d. Ignorance of Law as Reasonable Excuse

Meyer v. County of Suffolk, 90 A.D.3d 720, 934 N.Y.S.2d 235 (2nd Dep't 2011). Plaintiff failed to set forth a reasonable excuse for his delay in serving his notice of claim, and the record does not reveal the existence of a reasonable excuse. Lack of awareness of the possibility of a lawsuit is not a reasonable excuse for delay in filing a notice of claim. Additionally, ignorance of the requirement to serve the notice of claim within 90 days does not constitute a reasonable excuse. The record also did not reflect that the defendant had "actual knowledge of the essential facts constituting the claim." Furthermore, the plaintiff failed to establish that the delay in serving the late notice of claim would not substantially prejudice the defendant. Thus, motion to late serve denied, but the 42 USC § 1983 claim survived because it was not subject to a State statutory notice of claim requirement.

3. Notice of Claim Served on Wrong Municipal Entity

Gershanow v. Town of Clarkstown, 88 A.D.3d 879, 931 N.Y.S.2d 131 (2nd Dep't 2011). Grant of leave to serve late notice of claim upon town was warranted in action seeking damages for personal injuries wheelchair-bound bus passenger allegedly received as she was crossing road after alighting from bus; passenger's error in serving wrong town with respect to her claim was excusable and remedied promptly after discovery of mistake, town received petitioner's notice of claim 120 days after claim had arisen and had actual knowledge of essential facts constituting claim within reasonable time, and town was not substantially prejudiced by short delay in receiving notice of claim.

Barnaman v. New York City Health and Hospitals Corp., 90 A.D.3d 588, 934 N.Y.S.2d 443 (2nd Dep't 2011). The plaintiff served a notice of claim upon the Comptroller of the City of New York and upon Queens Hospital Center, a medical facility operated by HHC, within 90 days after her claim accrued. The City of New York and HHC are separate entities for purposes of a notice of claim. Accordingly, service upon the Comptroller of the City of New York was insufficient to constitute service upon HHC, the proper party to be served. Furthermore, serving a notice of

claim upon Queens Hospital Center did not satisfy the statutory requirements mandating notification to the proper public body or official, in this case a director or officer of HHC or the Corporation Counsel. The plaintiff contended that the savings provision of GML § 50–e(3)(c) (If manner of service of notice of claim is not in specific compliance with the Statute,, the service shall be valid if defendant demands a 50-h hearing or fails to return the notice of claim specifying the defect in the manner of service within thirty days after the notice is received) was applicable here because Queens Hospital Center forwarded the notice of claim to HHC. However, even assuming that service was made upon a proper party, GML § 50–e(3)(c) provides, in pertinent part, that service shall be valid if "the notice is actually received by a proper person" within 90 days after the claim accrued. Here the notice of claim was actually received by HHC's Office of Legal Affairs over three months after the 90–day statutory period expired. In the absence of evidence that the notice of claim was actually received by a proper person within 90 days after the claim accrued, service upon HHC could not be deemed valid under GML 50-e(3)(c). Further, contrary to the plaintiff's contention, the defendants were under no obligation to plead, as an affirmative defense, the plaintiff's failure to comply with the statutory notice of claim requirement, and their participation in pretrial discovery did not preclude them from raising the untimeliness of the notice of claim. Complaint dismissed for failure to serve a timely notice of claim.

Khela v. City of New York, 91 A.D.3d 912, 937 N.Y.S.2d 311 (2nd Dep't 2012). Motorcyclist lost control of his motorcycle while operating it on the eastbound entrance ramp of the Jackie Robinson Parkway at its intersection with Highland Boulevard in Brooklyn. A timely notice of claim was sent to the legal department of the defendant New York City Department of Transportation. Later, the plaintiff commenced this action against the New York State Department of Transportation and the New York City Department of Transportation. Later, he amended the summons and complaint to add the City of New York as a defendant. The amended complaint alleged the plaintiff's compliance with notice of claim requirements. Defendants moved to dismiss the complaint insofar as asserted against them on the ground that the plaintiff failed to serve a timely notice of claim upon the proper entity. Court noted that the New York City Department of Transportation is a department of the City of New York, and is not a separate legal entity and that, in order for service of a notice of claim upon the City of New York to be proper, it must be made upon either the Corporation Counsel, his or her designee, or the Comptroller of the City of New York. Here, the plaintiff failed to serve either the Corporation Counsel, his designee, or the City Comptroller within the statutory period. Further, the plaintiff's improper service upon the New York City Department of Transportation is not saved by GML § 50–e(3)(c), as that provision is "limited in scope to defects in the manner of serving a notice of claim on the correct public entity". Further, the defendants were not equitably estopped from asserting the plaintiff's failure to serve a timely notice of claim upon the correct public entity. The doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances, i.e., where the municipal defendant's conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct

was justifiably relied upon by that party. The fact that the defendants conducted a 50-h hearing did not amount to equitable estoppel. And defendants were under no duty to raise the failure to serve a timely notice of claim upon the proper entity as an affirmative defense in their answer. Case dismissed.

4. Patently Meritless Claims

Day v. Greenburgh Eleven Union Free School Dist., 88 A.D.3d 877, 931 N.Y.S.2d 513 (2nd Dep't 2011). While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit, but defendant failed to demonstrate that the claim was patently without merit, and thus leave to late serve granted.

5. Two Rare Case Of Equitable Estoppel as Reason to Grant Leave to Late-serve N/C

Padilla v. Department of Educ. of City of New York, 90 A.D.3d 458, 934 N.Y.S.2d 139 (1st Dep't 2011)**.** As NYC plaintiffs' lawyers will recall, in November 2002, after the Education Law had been amended to increase mayoral control over education and decrease the Board of Education's power, the Office of the Corporation Counsel posted a notice in the New York Law Journal indicating that it was the "sole representative for the New York City Department or Board of Education" for service of notices of claim and process. There followed a period of confusion about notice of claim procedures. The situation was clarified in 2007, in the *Perez* case, when the First Department held that the City was not a proper party to actions arising out of torts allegedly committed by the Board and its employees. In this case, by the time *Perez* was decided, it was too late for this plaintiff to move for leave to serve a late notice of claim. But the Court allowed the amended notice of claim anyway. The City and its department of education were equitably estopped from arguing that teacher's initial, timely notice of claim naming only City as a defendant was defective because their conduct, while it might not have risen to the level of fraud, was wrongful. The City improperly induced reliance by the teacher in the belief that she had served the proper party by filing an answer and discouraging her from serving a timely amended notice of claim against Department as the proper party.

Alvarez v. New York City Housing Authority, 97 A.D.3d 668, 948 N.Y.S.2d 648 (2nd Dep't 2012). The Court found that the case was an unusual case that warranted application of the doctrine of equitable estoppel against the City. The Comptroller's action in acknowledging receipt of the Notice of Claim, informing Plaintiff that it was conducting an investigation and his denying the claim based on DOE's version of the facts, lulled Plaintiff into sleeping on its rights to his detriment. Although the Comptroller's initial letter acknowledged that it received a claim against the City of New York, the Comptroller's later letter denying the claim never put Plaintiff on notice that the Comptroller was dealing solely on behalf of the City of New York or that the Notice of Claim was improper as to any other party. All of these acts made it reasonable for the

Plaintiff to believe that the Comptroller's decision to deny the claim was made for and on behalf of DOE. While there was no intent to deliberately mislead the Plaintiff, the Comptroller's response to the claim, wrongfully or negligently, induced reliance by the plaintiff, to his detriment to believe that its Notice of Claim was proper and that the proper party had been served. Accordingly, DOE was estopped from asserting the Late Notice of Claim defense.

6. No Authority to Grant Application for Leave to Late-Serve Made after SOL Expires

Decoteau v. City of New York, 97 A.D.3d 527, 947 N.Y.S.2d 343 (2nd Dep't 2012). The plaintiff's request, made in opposition to the defendant's motion to dismiss the complaint, to deem the late notice of claim timely served nunc pro tunc was made after the one-year and 90–day statute of limitations had expired, and thus the Supreme Court was without authority to grant such relief. Case dismissed.

III AMENDING THE NOTICE OF CLAIM

Donaldson v. New York City Housing Authority, 91 A.D.3d 550, 937 N.Y.S.2d 195 (1st Dep't 2012). Plaintiff was not entitled to leave to amend notice of claim pursuant to GML 50-e(6) (governing correction of a notice of claim for mistake, omission, irregularity, or defect) to change the theory of liability in his personal injury action against building owner from a slip and fall on the sidewalk outside the building due to an accumulation of snow/ice, to a slip and fall due to a wet metal weather strip located on the threshold of the building's front door. Leave to amend the notice of claim only "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" and plaintiff's proposed amendment impermissibly sought to change the theory of liability from a slip and fall on the sidewalk outside defendant's building due to an accumulation of snow/ice, to a slip and fall due to a wet metal weather strip located on the threshold of the building's front door.

Van Buren v. New York City Transit Authority, 95 A.D.3d 604, 944 N.Y.S.2d 108 (1st Dep't 2012). The motion court erred in granting leave to amend the notice of claim pursuant to GML 50-e(6) "since the statute only authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability." Plaintiff's proposed amendment impermissibly sought to change the theory of liability from a slip and fall on water that had accumulated inside defendants' bus through an open vent, to add the additional causative factor of the bus driver suddenly moving the bus forward before plaintiff had exited the rear door. Nevertheless, the court properly denied summary judgment to defendants, who failed to meet their burden of demonstrating entitlement to summary judgment on plaintiff's theory of the accumulated water.

McIntosh v. Village of Freeport, 95 A.D.3d 965, 943 N.Y.S.2d 751 (2nd Dep't 2012). Leave to amend notice of claim to assert a derivative cause of action for guardian to recover damages for loss of services on her own behalf was allowed under GML 50-e(6). The derivative claim was predicated upon the same facts which had already been included in the notice of claim and complaint and therefore the defendant had been duly and timely notified.

Palmer v. Society for Seamen's Children, 88 A.D.3d 970, 931 N.Y.S.2d 389 (2nd Dep't 2011). The infant plaintiff allegedly sustained lead poisoning while residing in a foster home in Staten Island. The defendant moved to dismiss a second complaint filed on the grounds that the notice of claim was inadequate to apprise it of the new claims. The new theories of liability could not be raised in a proposed amended notice of claim because amendments of a substantive nature were not within the purview of GML 50-e(6). Since the notice of claim failed to adequately apprise the defendant of the infant plaintiff's claims relating to his placement, supervision, and removal while in foster care, summary judgment was granted dismissing so much of the complaint in the second action alleging those new theories.

Santana v. New York City Transit Authority, 88 A.D.3d 539, 930 N.Y.S.2d 587 (1st Dep't 2011). Plaintiffs' motion for leave to amend the notice of claim denied where they did not merely seek to supplement the original claim, but rather, impermissibly sought to change the theory of liability from a fall on the stairs due to snow, ice or slush to a fall due to a loose metal tread.

Roberson v. New York City Housing Authority, 89 A.D.3d 714, 931 N.Y.S.2d 900 (2nd Dep't 2011). While there was nothing in the record to indicate that the original notice of claim was prepared and served in bad faith, the inconsistent and varying descriptions of the nature of the claim and manner of the accident contained in the original notice of claim, the plaintiff's testimony at the municipal hearing, the complaint, the proposed amended notice of claim, and the plaintiff's affidavit in support of her motion, prejudiced the defendant's ability to conduct a meaningful and timely investigation. Thus, leave to amend the notice of claim denied.

Fleming v. City of New York, 89 A.D.3d 405, 931 N.Y.S.2d 866 (1st Dep't 2011). Court dismissed some of plaintiff's negligence claims because those theories of liability were not asserted in the original notice of claim, in which plaintiff asserted that he was injured as a result of an intentional assault by the corrections officer. Leave to amend the notice of claim pursuant to GML 50-e(6) because this cannot be done where the amendment creates a new theory of liability. A court may grant an application for leave to amend a notice of claim where the mistake, omission, irregularity, or defect in the original notice was made in good faith, *and it appears that the public corporation was not prejudiced thereby,* which was not the case here.

Gurnett v. Town of Wheatfield, 90 A.D.3d 1656, 935 N.Y.S.2d 820 (4th Dep't 2011). Town employee initially served a notice of claim alleging that she had been subjected to, inter alia, harassment, retaliation and a hostile work environment beginning "on *December 4,* 2009 and

continuing thereafter." Following the 50-h hearing, plaintiff sought leave to amend the notice of claim to reflect that the conduct complained of began on *May 29, 2009*, and she also sought leave to serve the amended notice of claim as a late notice of claim. Permission granted because plaintiff established that defendants received actual notice of the first incidents upon which the claim is based in a timely manner in June 2009.

Copeland v. City of New York, 90 A.D.3d 691, 934 N.Y.S.2d 315 (2nd Dep't 2011). Pursuant to GML 50-e(6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby. Here, there was no indication that the typographical error regarding the date of the accident in the original notice of claim was made in bad faith, the defendant did not demonstrate any actual prejudice to it as a result of the error,. Plaintiff's cross-motion to amend the notice of claim thus granted.

IV THE 50-H EXAMINATION

Boone v. City of New York, 92 A.D.3d 709, 938 N.Y.S.2d 474 (2nd Dep't 2012). Compliance with a demand for an oral examination pursuant to GML 50-h is a condition precedent to the commencement of an action against a municipal defendant. After the plaintiff repeatedly rescheduled and failed to appear for the scheduled examination, her attorney agreed to reschedule a new examination. Plaintiff thereafter failed to take sufficient steps to reschedule the new examination. Accordingly, the plaintiff's subsequent commencement of the action against the NYCHA without rescheduling the examination warranted dismissal of the complaint insofar as asserted against that defendant.

Cook v. Village of Greene, 95 A.D.3d 1639, 945 N.Y.S.2d 483 (3rd Dep't 2012). Defendant served a timely demand for 50-h examination. Plaintiff's counsel contacted defendant's counsel the day before the scheduled examination and stated that he no longer represented plaintiff, would not attend the hearing and did not know if plaintiff had retained new counsel. Defendant then served a demand for examination by certified mail to the address verified by plaintiff in his notice of claim as his address. Plaintiff failed to appear for the examination, but subsequently commenced this action in August 2010 against defendant, who then moved to dismiss the action asserting, among other things, plaintiff's failure to attend the 50-h hearing. The motion court denied the motion based on plaintiff's statement that the notice "was never delivered to my home, nor did I ever see these items." Reversed because "a properly executed affidavit of service raises a presumption that a proper mailing occurred" and generally "a mere denial of receipt is not enough to rebut this presumption".

V GOVERNMENTAL IMMUNITY

A. Judicial Immunity

Gotlin v. City of New York, 90 A.D.3d 605, 936 N.Y.S.2d 208 (2nd Dep't 2011). A 21–month–old child (decedent) died three days after suffering a severe beating at the hands of her mother's boyfriend, who allegedly had a prior conviction for assaulting a child. Prior to the decedent's death, the New York City Administration for Children's Services (hereinafter ACS), had a history of interaction with the decedent's family. Plaintiff sued the City of New York, ACS, and numerous ACS employees, alleging three causes of action: negligent supervision, wrongful death, and violations of 42 USC § 1983, respectively. Defendant moved to dismiss the complaint pursuant to CPLR 3211. Court rejected defendants' contention that plaintiff had inadequately alleged all of the elements necessary to support his position. Moreover, the defendants failed to establish that the acts attributed to them in the complaint constitute "an integral part of the judicial process," thereby warranting dismissal of the complaint on the ground of judicial immunity

Young v. Campbell, 87 A.D.3d 692, 929 N.Y.S.2d 249 (2nd Dep't 2011). Parent filed action against psychologists and social workers, who had been appointed to aid courts in divorce and neglect proceedings, to recover damages for negligence and malpractice for not reporting suspected child abuse and not causing children to be placed in protective custody. Court held that judicial immunity precluded the plaintiff from recovering damages for negligence or malpractice against them. An injured child may assert a cause of action for damages under Social Services Law § 420 for alleged violations of sections 413 and 417, which were enacted to protect children from physical abuse, however, these statutes do not provide a cause of action for the parent of the alleged abused child for the injuries to them.

B. Governmental v Proprietary Function

Matter Of World Trade Center Bombing Litigation., 17 N.Y.3d 428, 957 N.E.2d 733, 933 N.Y.S.2d 164 (2012). Personal injury action was brought against Port Authority arising from the 1993 terrorist bombing of the World Trade Center (WTC). Following jury trial, the trial court entered judgment in favor of plaintiff, and Port Authority appealed. The gravamen of the claims was a negligent failure by the Port Authority to provide adequate security—i.e., the failure to adopt the recommendations in the security reports; to restrict public access to the subgrade parking levels; to have an adequate security plan; to establish a manned checkpoint at the garage; to inspect vehicles; to have adequate security personnel; to employ recording devices concerning vehicles, operators, occupants, and pedestrians; and to investigate the possible consequences of a bombing within the WTC. Following a bifurcated trial solely on liability, a jury found that the Port Authority was liable for negligently failing to maintain the WTC parking garage in a reasonably safe condition. The jury apportioned 68% of the fault to the Port Authority and 32% to the terrorists. The Appellate Division affirmed. Issue for the Court of Appeals: Was the Port Authority's provision of security at the WTC a **governmental** function (public security) or a **proprietary** function (commercial landowner responsibility)? The Port Authority claimed that

by assessing security risks, allocating police resources, and implementing safeguards at the WTC in the face of numerous possible threats, it engaged in conduct akin to a governmental, rather than a proprietary, function. Plaintiffs maintained that the provision of security within the parking garage—a commercial area that served the commercial tenants of the WTC (as well as the public) and generated income—fell within the Port Authority's proprietary capacity. The Court here sided with defendant. The Court reasoned that "while the instant terrorist bombing occurred within the parking garage and may focus some attention on proprietary responsibility, the Port Authority's police resources were devoted to countering criminal incidents for the benefit of all who visited the WTC. Any failure to secure the parking garage against terrorist attack predominantly derives from a failed allocation of police resource"". After finding that the government was acting within its governmental function, then next issue ecomes whether the security decisions were "**discretionary**" (automatic governmental immunity applies) or "**ministerial**"(gov immunity applies unless plaintiff can show a "special duty" to plaintiffs). The Court found them to be discretionary, and thus defendant was immune. Judge Ciparik dissented. He opined that the Port Authority's failure to implement discrete and basic security measures in the public parking area of the commercial building complex arose from the exercise of its proprietary—rather than governmental—obligations.

Applewhite v. Accuhealth, Inc., 90 A.D.3d 501, 934 N.Y.S.2d 164 (1st Dep't 2011). The infant plaintiff went into anaphylactic shock during a home infusion of medication called Solu–Medrol. Her mother called 911 while the nurse who had been giving the home infusion commenced CPR. Two emergency medical technicians (EMTs) arrived, but only in a Basic Life Support (BLS) ambulance because an Advanced Life Support (ALS) ambulance was not available at the time the mother placed her call. While one of the EMTs assisted the nurse with CPR, the other left the apartment to request an ALS ambulance, because the ambulance that arrived first lacked a stretcher, a valve mask and a defibrillator. During that time, the mother made a second call to 911. Some time thereafter, paramedics arrived in an ALS ambulance. These paramedics administered epinephrine and oxygen to infant plaintiff and then transported her to the hospital. She survived, but suffered significant brain damage. Plaintiffs commenced this action against the City of New York because it administered the ambulance service through the fire department. Defendants moved for summary judgment. As a threshold issue, the Court had to determine the capacity in which the City was acting. If it was acting in its "proprietary" capacity, the normal rules of duty and negligence would apply, just as if defendant was a private party. If it was acting in its "governmental" capacity, and the actions were "ministerial" rather than "discretionary", then plaintiff could hold defendant liable if plaintiff showed a "special relationship" with the municipal actors. Court here held defendant was acting in its governmental, ministerial capacity. It explained that plaintiffs faulted defendant for failing to bring oxygen to the apartment, for advising the mother that she should wait for the ALS ambulance, and for waiting for the ALS ambulance that arrived 20 minutes later instead of taking the infant plaintiff to the hospital that was four minutes away. *Absent were allegations that defendant provided medical treatment in an improper manner. Here, the gravamen of plaintiffs'*

claim was that defendant should have transported the infant plaintiff to the hospital immediately rather than waiting an additional 20 minutes for the ALS ambulance to effectuate transport. This claim involves the quintessential purpose of the municipal ambulance system—transporting the patient to the hospital as quickly as possible. Defendant's poor advice and failure to transport is much closer to the performance of a government function than to the proprietary act of a medical provider caring for a patient. Accordingly, defendant's actions were ministerial and the special relationship doctrine applies. The Court distinguished this case from cases like *Kowal v. Deer Park Fire District,* 13 A.D.3d 489, 787 N.Y.S.2d 352 [2004] in which it was not necessary to establish a special relationship because the municipal paramedic was acting in a "proprietary" capacity, just like any private medical provider. ***Lesson: Be sure to allege medical negligence when suing municipal emergency responders!*** Nevertheless, there was a happy outcome. Plaintiff was able to show a "special relationship" (rare!). The first element of a special relationship is the assumption of an ***affirmative duty to act***. Here, the first ambulance to arrive at plaintiffs' home was a BLS ambulance, that did not have the necessary equipment to treat infant plaintiff. Despite her mother's request to take the child to the nearby hospital immediately, the EMTs allegedly assured the mother that it would be better for infant plaintiff to wait at the home until an ALS ambulance arrived with paramedics and proper equipment. Under these alleged circumstances, the assurances and advice of the emergency personnel constituted an assumption, "through promises or actions, ... to act on behalf of [infant plaintiff]" for the purposes of determining a special relationship. As for the second *Cuffy* factor, there was clearly ***knowledge*** on the part of the municipality's agents that ***inaction could lead to harm***. As for the third factor, some form of ***direct contact*** between the municipality's agents and the injured party. As for the fourth and final factor -- *justifiable reliance* -- the mother justifiably relied on the EMS technicians, who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance.

Salone v. Town of Hempstead, 91 A.D.3d 746, 937 N.Y.S.2d 103 (2nd Dep't 2012). Town was held immune from injury claim of child assaulted by three unidentified youths during pick–up basketball game in park maintained by town, where alleged deficiencies in town's security measures in relation to park implicated town's governmental function, and not its proprietary role as owner of park premises, and child had no direct contact with any town employee prior to alleged attack, such that town owed no special duty to child. The alleged deficiencies in the security measures taken by the defendant at the park, including the allotment of personnel to patrol the park, arose from the allocation of the defendant's security resources. Such deficiencies involving policymaking as to the nature of the risks presented at the park implicated the defendant's governmental function, not its proprietary role as owner of the premises.

C. Ministerial v Discretionary Actions

Valdez v. City of New York, 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587 (2011). Plaintiff brought negligence action against city, alleging that she was shot outside her apartment by her

former boyfriend after she reported to police that he had threatened to kill her, and after officer told her that former boyfriend would be arrested immediately (he was not) and that she should return to her apartment (she did). Jury found for plaintiff, somewhat (50% liability against City and 50% against plaintiff). City moved to set aside verdict, lost, and appealed, and the case bumped its way up to the Court of Appeals. The underlying issue (which the Court did not answer!) was whether the governmental acts here were "ministerial" or "discretionary". Under *McLean,* if they were ministerial, there could be liability, but only if plaintiff showed a "special relationship". But if they were discretionary, and discretion were exercised, there could never be liability. The Court then jumped right past this thousand-pound-gorilla of an issue, and looked instead at whether plaintiff had established a "special relationship" with the municipal actors. If she had not, then she would lose the case even if the police actions were ministerial. The Court then found she had *not* established a special relationship. The Court found that, as a matter of law, plaintiff had failed to show the "justifiable reliance" element of a "special relationship". "It was not reasonable for [plaintiff] to conclude, based on nothing more than the officer's statement that the police were going to arrest [her ex-boyfriend] "immediately", that she could relax her vigilance indefinitely, a belief that apparently impelled her to exit her apartment some 28 hours later without further contact with the police". Thus, summary judgment granted to defendant. NOTE: In addressing the dissent's concerns that, if the government is always immune for discretionary acts, even when a special relationship is shown, then "plaintiffs will never be able to recover in negligence [in police cases]. . . because police work invariably involves the exercise of discretion". The Majority responded that it "does not share this view because we do not accept the premise underlying it. We know of no decision of this Court holding that police action (or inaction, as it might be more accurately characterized in this case) is always deemed to be discretionary under the discretionary/ministerial duty analysis".

Bawa v. City of New York, 94 A.D.3d 926, 942 N.Y.S.2d 191 (2nd Dep't 2012). This action arises from a triple murder and suicide which took place at the home of plaintiff's decedent. On numerous occasions the police had arrived at the decedent's house in response to her telephone calls to the 911 police emergency number concerning domestic incidents involving her older son who lived with the decedent. However, the decedent never sought an order of protection against her son. The son then shot and killed the decedent, her companion, and the companion's health aide before killing himself. Plaintiff sued the City, police department, and police officers, for negligently failing to arrest the son and failing to follow up with decedent about her domestic situation. Under *McClean v City of New York,* a municipal defendant cannot be held liable, even if there was a "special duty" to the plaintiff, if the municipal actors' actions were "discretionary" rather than "ministerial". Here defendants were held immune for two reasons: First, defendants' conduct involved "exercise of discretion and reasoned professional judgment of officers and it was not inconsistent with accepted police practice", and thus, even if plaintiff showed a "special duty", under *McClean*, she would lose the case. Second, assuming the actions were ministerial, which they were not, defendants established that there was no special duty owed to the decedent by the police. The plaintiffs claimed that the "special duty" flowed from a statutory duty owed

to her because the City failed to adhere to requirements of the Family Protection and Domestic Violence Intervention Act of 1994. This argument was rejected since recognition of a private right of action under that Act would not be consistent with the legislative scheme. Nor did the record support the conclusion that a special relationship existed based upon an affirmative duty undertaken by the police department upon which the decedent justifiably relied.

Gabriel v. City of New York, 89 A.D.3d 982, 933 N.Y.S.2d 360 (2nd Dep't 2011). The City defendants demonstrated that the plaintiff did not include certain theories of liability (including that they negligently placed and/or supervised the child and that they negligently supervised the child's missing person investigation) in her notice of claim, and thus those causes of action were dismissed. Further, defendants demonstrated that the NYPD's challenged acts with respect to the investigation were discretionary rather than ministerial, and, thus, that they could not form the basis of tort liability, even if there were a "special duty". In any event, the plaintiff did not justifiably rely on any affirmative undertaking of the NYPD and its members, and, therefore, that there was no special relationship upon which liability could be predicated.

Matican v. City of New York, 94 A.D.3d 826, 941 N.Y.S.2d 698 (2nd Dep't 2012). The plaintiff, a drug informant, sued City of New York and the police officers who were involved in the plan to arrest the dealer, alleging defendants carelessly and recklessly planned and conducted the dealer's arrest in a manner that revealed the plaintiff's identity and exposed him to an unreasonable risk of harm, and that they breached their duty to protect him from harm arising out of his role in the arrest of the dealer. Defendants here failed to establish on summary judgment that they did not assume an affirmative duty to protect the plaintiff by concealing his identity, and by later protecting him from retaliation, when they arrested the dealer, or that the plaintiff did not justifiably rely upon the alleged promise by the defendants to conceal his identity and/or to protect him from revenge. (**NOTE**: This analysis apparently means that the defendants' actions were ministerial, not discretionary, because there can never be liability for discretionary governmental actions).

Miserendino v. City of Mount Vernon, 96 A.D.3d 810, 946 N.Y.S.2d 605 (2nd Dep't 2012). The plaintiff tripped and fell on a fire hose used by the defendant Fire Department to combat a fire in her apartment building. Defendants established that, at the time of the injured plaintiff's fall, they were performing discretionary rather than ministerial acts. In any event, laintiffs failed to establish a question of fact regarding whether a special relationship was formed.

Murchinson v. State, --- N.Y.S.2d ----, 97 A.D.3d 1014, 2012 WL 2924019 (3rd Dep't 2012). Plaintiff who backed his car out of driveway as a DEC forest ranger guided him and was hit by an oncoming car on the highway, sued DEC officer for negligence in guiding him out of the driveway. After a trial, in which the Court of Claims found the DEC forest ranger was negligent, the Court nonetheless dismissed the claim, concluding that—at the time of the accident—the ranger was performing a governmental function within the exercise of his discretion and, as such,

defendant was immune from liability. The Third Department affirmed, holding that traffic control is an inherently discretionary act, i .e., one that by its very nature necessarily involves the exercise of reasoned judgment, and thus government immunity applies regardless of whether there is a "special relationship", as long as defendant in fact exercised discretion (even negligently) which he did here.

D. No "Special Relationship" Found

Robiou v. City of New York, 89 A.D.3d 587, 933 N.Y.S.2d 27 (1st Dep't 2011). Superintendent of multiple dwelling was struck by glass that had fallen while in backyard as firefighters were breaking windows on upper floors to extinguish blaze in her building against municipality. Court held that firefighters did not assume duty to protect her through promise or actions, or give her any assurance that was definite enough to justify any reliance on her part, by their request that she escort them to the backyard where fire escapes were located. Case dismissed on summary judgment.

Noller v. Peralta, 94 A.D.3d 830, 941 N.Y.S.2d 700 (2nd Dep't 2012). Town was held not subject to liability for injuries sustained in motor vehicle accident as result of its failure to enforce town code provision prohibiting hedges more than 30 inches tall at intersections, where there was no special relationship between town and injured plaintiff (the drivers in a collision at the intersection there had claimed their view of each other was partially obstructed by the hedges).

VI PRIOR WRITTEN NOTICE REQUIREMENT

A. WHO must have prior written notice?

Betz v. Town of Huntington, 35 Misc.3d 1219, 2012 WL 1542995 (Suffolk Co. Sup. Ct. 2012). Defendant Town failed to get summary judgment on no-prior written notice grounds as defendant failed to submit proof of such lack of notice from the proper municipal official. Defendant failed to submit an affidavit from an employee of defendant's Town Clerk or Town Superintendent of Highways attesting to the fact that defendant had no prior written notice. The affidavits and deposition testimony that was submitted came from Town employees who were not statutory designees to receive prior written notice under Town Law § 65–a and the Town's local Code. Thus, the burden never shifted to plaintiff to prove notice.

Kenney v. County of Nassau, 93 A.D.3d 694, 940 N.Y.S.2d 130 (2nd Dep't 2012). Contrary to the plaintiff's contention, the County presented unequivocal evidence that the Office of the County Attorney, as statutory designee, did not receive prior written notice of the alleged defect in the roadway and that the County did not have constructive notice of the alleged defect (*see* Highway Law § 139[2]). Although plaintiff argued that the Nassau County Department of Public Works received prior written notice, such notice would not satisfy the statutory requirement that prior

written notice be given to the Office of the County Attorney. Summary judgment to municipal defendant granted.

Brown v. County of Suffolk, 89 A.D.3d 661, 931 N.Y.S.2d 685 (2nd Dep't 2011). The defendants won summary judgment by demonstrating that the County Clerk did not receive prior written notice of the alleged hazardous highway condition as required by Suffolk County Charter § C8–2A. Although both the Department of Public Works and the County Executive received prior written notice, such notice was insufficient because neither one of those departments was a statutory designee under Suffolk County Charter § C8–2A. Although written notice would not be required if the defendants created the condition by an affirmative act of negligence, the evidence submitted by the plaintiffs in opposition to the defendants' cross motion for summary judgment failed to raise a triable issue of fact as to whether the defendants' repair work immediately resulted in a pothole or other hazardous condition at the site of the injured plaintiff's accident.

B. How Must Prior Written Notice Records Be Maintained?

Wiley v. Incorporated Village of Garden City, 91 A.D.3d 764, 936 N.Y.S.2d 327 (2nd Dep't 2012). The plaintiff stumbled and fell in a parking lot owned by the defendant as a result of stepping into a pothole. The Village made a prima facie showing of entitlement to judgment as a matter of law by providing evidence that it lacked prior written notice of the allegedly dangerous condition, as required by Garden City Village Code. Plaintiff's contention that the Village failed to maintain indexed records of notices received, in violation of Village Law 4-402(g), was unavailing. Presented with such a failure, the burden shifts to the municipality to show that it made a diligent and good-faith search of its internal records, and here the municipality made a diligent effort and good-faith search of its records and found no prior written notice.

C. Does Local Prior Written Notice Law Trump State Prior Written Notice Law?

Wright v. Rezendez, 90 A.D.3d 1388, 934 N.Y.S.2d 874 (3rd Dep't 2011). Slip and fall on ice on sidewalk. Under Town Law, an action cannot be maintained against a town for injuries sustained as the result of a fall caused by snow or ice on sidewalks owned by the town, "unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways" (Town Law § 65–a [2]). Plaintiff conceded no written notice, but argued that Town Law § 65–a (2) was superseded by a local law of the Town, which only required written notice of dangerous conditions caused by ice and snow on "any highway, bridge or culvert". Plaintiff argued that since this local law did not include sidewalks, no written notice was required. The Court disagreed and ruled for defendant because "when a municipality adopts a local law that is intended to supersede a state statute, such intent must be clearly and unequivocally expressed in the body of the local law". Here, the local law in question made no reference to Town Law § 65–a, nor was there any indication that the Town, when it enacted it, did so with the intent of removing the limitations on its liability as set forth in the Town Law.

D. Prior Written Notice of WHAT? (the magic six: sidewalks, streets, highways, crosswalk, culverts, bridges)

Lagrasta v. Town of Oyster Bay, 88 A.D.3d 658, 930 N.Y.S.2d 254 (2nd Dep't 2011). Boat owner tripped and fell on floating wooden dock at marina owned, operated, and maintained by town. Town's prior written notice ordinance, which applied to alleged defects on any "street, highway, bridge, culvert, sidewalk or crosswalk," did not apply to alleged defect on floating wooden dock at marina owned, operated, and maintained by town. And as for ordinary negligence, there was a question of fact as to whether town had actual or constructive notice of alleged defective condition of floating wooden dock.

Austin v. Town of Southampton, 34 Misc.3d 1212, 943 N.Y.S.2d 790, 2012 WL 149344 (Suffolk Co. Sup. Ct. 2012). Plaintiff was leaving a construction work site when a low hanging branch entered the driver's side of the plaintiff's truck cab and struck the plaintiff on the head. He sued the Town alleging negligence on behalf of the town in its maintenance of the tree. Court notes that prior written notice laws may not properly extend to defective conditions of trees. As for negligence, a municipality is on notice to make a close inspection of a tree only when it is determined that a tree is hanging, or leaning, precariously over the roadway. There was no evidence of such notice here, and no proof the Town created the low hanging tree branch condition by negligent tree trimming activities. Plaintiff lost on summary judgment.

Oliveri v. Village of Greenport, 93 A.D.3d 773, 940 N.Y.S.2d 675 (2nd Dep't 2012). Pedestrian tripped on raised tree grate located in a strip of cobblestone between a sidewalk and a roadway in the village. The Village won summary judgment by submitting evidence that it lacked prior written notice of the allegedly defective condition. Contrary to the plaintiff's contention, the prior written notice provision of Village Law § 6–628 was applicable to the location of her accident.

Krausch v. Incorporated Village of Shoreham, 87 A.D.3d 715, 928 N.Y.S.2d 769 (2nd Dep't 2011). Pedestrian fell on a broken curb in a parking lot owned and operated by the village. Village moved for summary judgment because there was no prior written notice. Plaintiff claimed no prior written notice required because this parking lot did not fall into the definition of a public "highway". Plaintiff claimed this particular municipal parking lot was not a public area because access to the lot was controlled by an electronic gate. Court found that the mere fact that access to the parking lot area was controlled by an electronic gate did not raise a triable issue of fact as to whether the lot was open to the public. Defendant wins summary judgment because this parking lot is a "public highway" within the meaning of the Statute.

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

Jannicelli v. City of Schenectady, 90 A.D.3d 1206, 933 N.Y.S.2d 917 (3rd Dep't 2011). Plaintiff fell after stepping in a hole in the ground covered with grass clippings on a median on the City's street. Court found a triable issue of fact as to whether defendant affirmatively created the hazard by cutting the grass and leaving the grass clippings obscuring the hole.

Braver v. Village of Cedarhurst, 94 A.D.3d 933, 942 N.Y.S.2d 178 (2nd Dep't 2012). Plaintiff injured tripped and fell on a sidewalk in a parking lot because of a height differential between the sidewalk and the curb. In their bill of particulars, the plaintiffs alleged that the Village had created the dangerous sidewalk condition through a number of specified design and construction defects. Although the Village established that it did not receive prior written notice of the allegedly dangerous condition, the plaintiffs alleged in their bill of particulars that the Village affirmatively created the dangerous condition which caused the accident through various specified acts of negligence in the design and construction of the sidewalk and parking lot. Defendant did not defeat these affirmative negligence claims in its motion papers. Thus, summary judgment denied.

O'Buckley v. County of Chemung, 88 A.D.3d 1140, 931 N.Y.S.2d 717 (3rd Dep't 2011). The County's reliance on the lack of any written notice of the claimed defects was held to be misplaced as prior written notice requirements do not apply to plaintiff's claims that the County affirmatively created the defective condition, failed to install a guardrail or otherwise remedy the danger presented by the tree and failed to install adequate signage.

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

Urban v. City of Albany, 90 A.D.3d 1132, 933 N.Y.S.2d 457 (3rd Dep't 2011). In icy sidewalk case, plaintiff alleged defendant negligently created a dangerous condition by piling snow along the sidewalk which then melted and refroze, causing black ice to form. Plaintiff conceded that no prior written notice of the sidewalk's allegedly icy condition was provided. Supreme Court

found that this exception did not apply as it was limited to conduct "that immediately results in the existence of a dangerous condition". However, shortly after this decision was rendered, the Court of Appeals reversed the Second Department case upon which Supreme Court had, in part, relied and held that "the immediacy requirement for 'pothole cases' should not be extended to cases involving hazards related to negligent snow removal" (*San Marco v. Village/Town of Mount Kisco,* 16 N.Y.3d 111, 116, 919 N.Y.S.2d 459, 944 N.E.2d 1098 [2010]). Thus, dismissal of case reversed, since plaintiff presented triable issues of fact as to whether defendant's snow removal methods created the ice on which plaintiff fell and whether defendant exercised its duty of care to maintain the [sidewalk] in a reasonably safe condition".

Rosenblum v. City of New York, 89 A.D.3d 439, 931 N.Y.S.2d 326 (1st Dep't 2011). City's work in repairing potholes in crosswalks did not amount to affirmative act of negligence immediately resulting in existence of dangerous condition, as required to constitute exception to requirement that city receive prior written notice of allegedly dangerous condition of pothole over which pedestrian tripped and fell in crosswalk, since repair work had occurred two years prior to pedestrian's alleged trip and fall. Plaintiff offered no evidentiary support for her claim that the work performed in 2002 immediately resulted in the defective condition complained of in 2004. Mere eventual emergence of dangerous conditions as a result of wear and tear and environmental factors does not constitute an act of affirmative negligence for purposes of excusing requirement that city be provided prior written notice of dangerous condition under New York's Sidewalk Law.

Wiley v. Incorporated Village of Garden City, 91 A.D.3d 764, 936 N.Y.S.2d 327 (2nd Dep't 2012). Pedestrian failed to provide any evidence tending to show that repairs to parking lot performed by village immediately resulted in a pothole or any other surface defect in area in question, as required for application of affirmative negligence exception to statutory rule requiring prior written notice of defect. Plaintiff's contention that the Village failed to maintain indexed records of notices received, in violation of Village Law § 4–402(g), was unavailing. When presented with such a failure, the burden shifts to the municipality to show that it made a diligent and good-faith search of its internal records. Here, the municipality made a diligent effort and good-faith search of its records and found no prior written notice.

Vega v. City of New York, 88 A.D.3d 497, 930 N.Y.S.2d 558 (1st Dep't 2011) 2011. Plaintiff was injured when, while riding his bicycle, he struck a pothole, causing him to fall to the ground. It was uncontroverted that defendant did not receive prior written notice of the defect pursuant to the "Pothole Law" (Administrative Code of City of New York § 7–201[c][2]). A temporary repair approximately five months before plaintiff's accident did not create a defective condition within the meaning of the exception. Even assuming that the pothole that defendant repaired was the same defect that caused plaintiff's accident, there was nothing in the record indicating that defendant performed that repair negligently or that it resulted in an immediately dangerous condition.

Hubbard v. County of Madison, 93 A.D.3d 939, 939 N.Y.S.2d 619 (3rd Dep't 2012). Plaintiff lost control of her vehicle, crossed into the oncoming lane of traffic, and collided with a vehicle driven by one of the defendants. Plaintiff also sued the County for negligently maintaining, designing and constructing the roadway and failing to provide adequate signage. The County moved for summary judgment contending that it had no prior written notice of any allegedly dangerous or defective condition. A County local law provided that no civil action for damages or injuries to person or property arising out of alleged highway defects may be maintained against the County in the absence of prior written notice. Here, it was undisputed that no such notice was given to the County. (NOTE: What about Highway Law 139? Did plaintiff allege it?). With respect to plaintiffs' claim that the accident was caused by a "lip" of more than two inches from the paved portion of the highway to the shoulder, they contended that no prior written notice was required because the County created the defect through an affirmative act of negligence. However, the affirmative negligence exception to prior written notice statutes applies only where the action of the municipality "immediately results in the existence of a dangerous condition" (*Yarborough v. City of New York*). While evidence was presented that the County resurfaced the roadway and widened it from 20 to 24 feet, plaintiffs presented no proof establishing that any alleged differential between the roadway and the shoulder was the immediate result of this activity, as opposed to a condition that evolved over time. As for their claims alleging negligent design of the roadway and failure to erect adequate and proper warning signs, the Court agreed with plaintiffs that the prior written notice requirements did not apply to these alleged defects.

G. Abutting Landowner Liability for Sidewalk Defects

Davison v. City of Buffalo, 96 A.D.3d 1516, 947 N.Y.S.2d 702 (4th Dep't 2012). Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. However, the general rule is inapplicable where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks ***and imposes liability for injuries resulting from the breach of that duty.*** Here, the version of section 413–50(A) of the Code of defendant City of Buffalo (Code) applicable to this case provided that the owner of lands fronting or abutting on any street shall "make, maintain and repair the sidewalk adjoining his [or her] lands," and that such owner "shall be liable for any injury ... by reason of omission, failure or negligence to make, maintain or repair such sidewalk" (former Code § 413–50[A]). The Court concluded that the plain language of former section 413–50(A) of the Code imposed liability upon defendant for plaintiff's injuries. To the extent that this holding was inconsistent with the Fourth Department's prior holding in *Montes v. City of Buffalo* (295 A.D.2d 896, 897, 744 N.Y.S.2d 601, *lv denied* 99 N.Y.2d 504, 754 N.Y.S.2d 203, 784 N.E.2d 76), that case is no longer to be followed in light of the decision of the Court of Appeals in the *Smalley* case.

H. Constructive Notice May Be Enough for Town and County Highway Defects

Conti v. Town of Constantia, 96 A.D.3d 1461, 946 N.Y.S.2d 747 (4th Dep't 2012). Plaintiff fell on a road owned and maintained by defendant Town. Defendant thereafter moved for summary judgment dismissing the complaint on the grounds that it had no prior written notice of the alleged defect as required by Town Law § 65–a, and that it was not negligent with respect to plaintiff's contention that there was inadequate lighting. "Pursuant to Town Law § 65–a (1), a town may be liable for a dangerous highway condition if it had either prior written notice ***or constructive notice*** of the dangerous condition". (NOTE: County Law § 139 has a similar provision regarding County highways). In support of its motion, defendant established as a matter of law that it had no prior written notice of the alleged dangerous condition of the road, but it failed even to address whether it lacked ***constructive notice*** thereof. Thus, defendant failed to establish its entitlement to judgment as a matter of law pursuant to Town Law § 65–a (1) because it failed to meet its initial burden with respect to the constructive notice prong of the statute

I. Sidewalks -- De Minimus Height Differential

Schwartz v. Bleu Evolution Bar & Restaurant Corp., 90 A.D.3d 488, 935 N.Y.S.2d 10 (1st Dep't 2011). Plaintiff tripped and fell when her foot got caught in a gap between two sidewalk flags. The gap was approximately one-half-inch-wide and the height differential between the flags was also approximately one-half-inch. Defendants were held entitled to summary judgment based on plaintiff's theory of how the accident occurred. The gap between the flags and the height differential was trivial and plaintiff has not come forward with evidence to show that the defect presented a significant hazard despite being de minimis.

J. Big Apple Map Notice

Adamson v. City of New York, 87 A.D.3d 1088, 930 N.Y.S.2d 232 (2nd Dep't 2011). The most recent Big Apple defect map on file with city did not show any sidewalk defect at subject location, but an earlier map on file with the city did. That earlier map appeared to show the defect that caused plaintiff's trip and fall, a raised or uneven portion of the sidewalk at the location. Both maps have identical stamps on them which read: "This map does not supersede any previously filed notice of a defective, unsafe, dangerous or obstructed condition." The City, relying on the more recent map that showed no defect, moved for summary judgment on the issue of no prior written notice. In opposition the plaintiff submitted the previous Big Apple map, which showed a raised or uneven portion of sidewalk at the subject location. In ruling for defendant, Court stated that "contrary to the plaintiff's contentions, even where a Big Apple map is stamped with a notation that it does not supersede any prior maps, it is nevertheless the map

filed closest in time to the accident at issue that controls for the purpose of establishing prior written notice.

VII New York City Sidewalk Law

A. Prior Written Notice by City

Sacco v. City of New York, 92 A.D.3d 529, 938 N.Y.S.2d 314 (1st Dep't 2012). In this trip and fall action, Court held that motion court erred in determining, as a matter of law, that the City had not been provided with prior written notice, pursuant to Administrative Code § 7–201(c)(2), of the defective condition upon which plaintiff fell. Plaintiff made an evidentiary showing that the City received an inspection report, dated November 2004, from its Parks Department, the agency responsible for repairing the subject walkway, showing that "it had knowledge of the condition and the danger it presented". The report serves as an "acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition" (§ 7–201 [c][2]). Since the City had notice of a defect and failed to cure it, despite having an opportunity to do so, plaintiff's motion for partial summary judgment on the issue of liability should have been granted, and here was.
Levy v. City of New York, 94 A.D.3d 1060, 943 N.Y.S.2d 187 (2nd Dep't 2012). Pedestrian sued City when he tripped and fell as a result of a defect in the roadway adjacent to a hydrant gate box. The City won summary judgment by providing evidence that they did not have prior written notice of the alleged defective condition as required by the Administrative Code of the City of New York (*see* Administrative Code of City of N.Y. § 7–201[c][2]).

Batts v. City of New York, 93 A.D.3d 425, 939 N.Y.S.2d 425 (1st Dep't 2012). Pedestrians brought action against city, property owner, developer, and contractor to recover for personal injuries sustained when scaffold-supported sidewalk shed collapsed and fell on them as they walked underneath it. Court held the action as against the City should have been dismissed. Administrative Code of City of N.Y. § 7–201(c)(2) requires plaintiffs to show that the City received prior written notice of the alleged defect as a prerequisite to maintaining an action and, although there was evidence that the City was notified of the unstable nature of the sidewalk shed, the City neither created the sidewalk shed through an affirmative act of negligence nor did it make a special use of it. Thus the lack of prior written notice was fatal to plaintiffs' claim against the City.

Daniels v. City of New York, 91 A.D.3d 699, 936 N.Y.S.2d 897 (2nd Dep't 2012). Plaintiff fell on a "sunken and uneven portion of the crosswalk/roadway" while crossing the southbound traffic lanes of Court Street in the northern crosswalk at the intersection of Court Street and Montague Street in Brooklyn. The map filed with the Department of Transportation by Big Apple Corporation included two notations near that area, containing the map's symbol for "extended section of broken, misaligned, or uneven curb." It also included a notation indicating a "pothole or other hazard" in the portion of the northern crosswalk that traversed the northbound traffic

lanes. There was no notation indicating any crosswalk or roadway hazard on the portion of the northern crosswalk that traversed the southbound traffic lanes. Court granted City summary judgment under NY Sidewalk Law because none of the defects shown on the Big Apple map was the one on which the plaintiff's claim was based, and, therefore the map did not give the City written notice of the defect.

Arcabascio v. City of New York, 91 A.D.3d 684, 937 N.Y.S.2d 121 (2nd Dep't 2012). City lacked prior written notice of alleged defective condition of boardwalk that caused pedestrian to trip and fall, approximately 16 feet away from light pole numbered 93, despite city's intake records concerning uneven boards on boardwalk and work orders noting that there were loose or broken boards in need of repair between light poles numbered 80 through 105, where boardwalk was 1.8 miles long and light poles were located approximately 115 feet apart from one another, work order noted that all defective areas on boardwalk in need of repair had been painted yellow by city, and pedestrian's husband confirmed that area where pedestrian fell was not so marked.

Burwell v. City of New York, 97 A.D.3d 617, 948 N.Y.S.2d 401 (2nd Dep't 2012). Plaintiff's vehicle struck the protruding base of a fire hydrant as she drove over a sidewalk while attempting to enter the parking lot of commercial premises owned by commercial defendants. She sued the owners and the City of New York alleging that the several defendants negligently maintained the curb, sidewalk, and hydrant in violation of Administrative Code of the City of New York §§ 7–210 and 19–152. Specifically, the plaintiff alleged that the defendants negligently permitted the curb of the sidewalk to deteriorate to such an extent that it provided no barrier between the sidewalk flagstone and the roadway, and that they permitted the broken hydrant to obstruct the normal flow of traffic into and out of the parking lot. Defendants got out on summary judgment by demonstrating that the alleged deterioration of the curb was not a proximate cause of the accident. But the City's motion was denied because a map prepared by the Big Apple Pothole and Sidewalk Protection Corporation, which was submitted by the City in support of its motion, reflected prior written notice to the City of an "obstruction protruding from the sidewalk" in the vicinity of the plaintiff's accident.

Batts v. City of New York, 93 A.D.3d 425, 939 N.Y.S.2d 425 (1st Dep't 2012). Lack of prior written notice was fatal to pedestrians' claim against city for injuries sustained when scaffold-supported sidewalk shed collapsed and fell on them as they walked underneath it, even though there was evidence that city was verbally notified of shed's unstable nature, where city neither created shed through affirmative act of negligence nor made special use of it.

B. "Affirmatively Created" Exception to Notice Requirement

Sehnert, v. The New York City Transit Authority, 95 A.D.3d 463, 942 N.Y.S.2d 871 (1st Dep't 2012). Plaintiff sustained injuries after exiting a bus and tripping and falling over a piece of metal protruding from the sidewalk. Plaintiffs contended that the piece of metal was a broken

signpost that the City installed and removed. However, they submitted no evidence that established that the piece of metal was a sign or signpost installed or removed by the City and thus failed to show that the City caused or created the alleged sidewalk defect. Nor did they show that the City had prior written notice of the alleged defect as required by Administrative Code of City of N.Y. § 7–201 [c][2]).

C. Abutting Owner Liability for Failure to Maintain Sidewalk in Safe Condition

Canaie v. G & G II Realty Properties, LLC, 35 Misc.3d 1203, 2012 WL 1020966 (Queens Co. Sup. Ct. 2012). Pedestrian slipped and fell on an uneven portion of a public sidewalk adjacent to the commercial premises owned by one defendant and leased by another. Plaintiff alleged failure to maintain the sidewalk in a proper and safe condition. On the motion for summary judgment, the defendants failed to provide any evidence showing that they properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries. Here, the plaintiff's deposition testimony, submitted by the defendant, indicated that the plaintiff tripped and fell on a raised portion of the sidewalk that she characterized as a deep hole. The photographs marked as exhibits at the EBT corroborated the testimony regarding the raised sidewalk flag. Therefore, defendants' evidence was insufficient to demonstrate, as a matter of law, that no defective condition existed on the sidewalk where the plaintiff allegedly tripped and fell. Moreover, although the owner of the building testified that he usually inspected the building on a weekly basis and walked on the sidewalk in the area of the alleged defect, triable issues of fact exist as whether the alleged defect was visible and apparent, and did not exist for a sufficient length of time to permit the defendant to discover and remedy it.

Camacho v. City of New York, 96 A.D.3d 795, 946 N.Y.S.2d 597 (2nd Dep't 2012). Pedestrian brought personal injury action against city, property owners, and others, when she tripped and fell over sidewalk flag that was raised on one side at the expansion joint. The abutting landowners won summary judgment by submitting a survey of their property line, which showed that the portion of the sidewalk which contained the alleged defect did not abut their property.

Araujo v. Mercer Square Owners Corp., 95 A.D.3d 624, 944 N.Y.S.2d 126 (1st Dep't 2012). Owner of commercial unit in condominium building did not owe duty to pedestrian who tripped and fell over broken portion of sidewalk in front of building; condominium declaration provided that board of managers of condominium was required to maintain and repair common elements of condominium, including public sidewalk "outside of and immediately appurtenant" to building, and owner of commercial unit, as owner of an individual unit in building, was not an "owner" for purposes of city administrative code. New York City Administrative Code, § 7–210. Although condominium's declaration contained provision purporting to give owner of commercial unit "exclusive easement" for sidewalks, provision was ineffective to transfer any

rights to owner of commercial unit, where neither condominium, nor its sponsor, held title to public sidewalk.

D. Abutting Owner's Tenant Liability

Reyderman v. Meyer Berfond Trust # 1, 90 A.D.3d 633, 935 N.Y.S.2d 28 (2nd Dep't 2011). Owner of building failed to establish that the sidewalk at issue was part of the premises it leased to the third-party defendant tenant, or that tenant assumed the duty to maintain the sidewalk abutting the building. Additionally, pursuant to the Administrative Code of the City of New York § 7–210, owner had a nondelegable statutory duty to maintain the sidewalk abutting its premises. Defendant's motion for summary judgment denied.

Bing v. 296 Third Ave. Group, L.P., 94 A.D.3d 413, 941 N.Y.S.2d 141 (1st Dep't 2012). Pedestrian brought suit against landlord and against tenant after she slipped and fell on snow or ice condition on ramp extending from sidewalk to interior of newsstand leased by landlord to tenant. Court held that, regardless of whether ramp extending from sidewalk to interior of newsstand was part of newsstand premises or part of sidewalk, tenant operating newsstand, rather than out-of-possession landlord, was responsible for clearing ramp of snow or ice on which pedestrian fell; if ramp were part of sidewalk, lease provided that tenant was responsible for maintaining premises and removing snow and ice from sidewalk, and if ramp were part of the premises, though landlord retained right of re-entry pursuant to lease, snow or ice was not significant structural or design defect for which out-of-possession landlord could be liable. Out-of-possession landlord is generally not liable for condition of demised premises unless landlord has contractual obligation to maintain premises, or right to re-enter in order to inspect or repair, and defective condition is significant structural or design defect that is contrary to specific statutory safety provision.

E. Where State is the Abutting Property Owner

Locario v. State, 90 A.D.3d 547, 935 N.Y.S.2d 20 (1st Dep't 2011). Pedestrian brought action against the State to recover damages for injuries sustained as a result of a trip and fall on a sidewalk in front of a state-owned building. State argued that MHRL § 11(1)(j)'s "general reference to 'abutting property owners,' without more, was insufficient to demonstrate the requisite consent on the part of the State to waive its immunity in this respect and assume the liability imposed by New York City Administrative Code § 7–210. MHRL § 11(1)(j) proscribes the adoption of a local law which transfers the subject liability to abutting property owners only where such local law supersedes a state statute. The Court noted that, on its face, MHRL § 11(1)(j) does not expressly prohibit local governments from transferring liability to the State. Using the rule of statutory construction set forth in McKinney's Statutes § 240, Court found that the transfer of liability to the State as an abutting property owner was permissible under MHRL § 11(1)(j).

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

Moreno v. Shanker, 93 A.D.3d 829, 941 N.Y.S.2d 216 (2nd Dep't 2012). Plaintiff slipped and fell on the sidewalk in front of a building owned by the defendants. At the time of the plaintiff's fall, the building was undergoing renovation. Almost 10 months after the accident, the New York City Department of Buildings issued a final certificate of occupancy for the building. This certificate stated that the "altered" building contained four dwelling units. The defendants moved for summary judgment, contending that, at the time of the accident, they were exempt from liability under the provisions of Administrative Code of the City of New York § 7–210, specifically because of the exception for "one, two, or three family residential real property that is ... owner occupied" (Administrative Code § 7–210[b][i]). The defendants established that when the accident took place, the premises were "owner occupied" as that term is used in Administrative Code § 7–210(b)(i), despite the fact that they temporarily relocated from the premises in order to accommodate the renovation work. Summary judgment to defendants granted.

Boorstein v. 1261 48th Street Condominium, 96 A.D.3d 703, 946 N.Y.S.2d 200 (2nd Dep't 2012). Plaintiff tripped and fell on sidewalk abutting property owned by condominium. Condominium established its prima facie entitlement to judgment as a matter of law by demonstrating that the property was three-family residence, that it was partially owner-occupied, and that it was used solely for residential purposes, thus exempting it from liability pursuant to city administrative code for alleged failure to maintain the sidewalk abutting its property.

Velez v. City of New York, --- N.Y.S.2d ----, 97 A.D.3d 813, 2012 WL 3023508 (2nd Dep't 2012). Plaintiff slipped or tripped and fell on the sidewalk between premises known as 429 7th Street and 431 7th Street in Brooklyn. The defendant got summary judgment dismissing the complaint as it was exempt from the liability imposed by Administrative Code of the City of New York § 7–210 because the abutting building was a three-family owner-occupied property used exclusively for residential purposes.

Howard v. City of New York, 95 A.D.3d 1276, 944 N.Y.S.2d 886 (2nd Dep't 2012). Here, the defendant property owner failed to make a prima facie showing that she was entitled to judgment on the theory that she was exempt from liability pursuant to Administrative Code § 7–210(b). Although Smith submitted proof that the subject property was a two-family residence, her own deposition testimony raises an issue of fact as to whether the premises were "owner occupied" within the meaning of Administrative Code § 7–210(b).

Sunhee Lee v. Ilyasov, 95 A.D.3d 1205, 945 N.Y.S.2d 150 (2nd Dep't 2012). Since the defendants' property, a one-family house, was owner-occupied and used exclusively for residential purposes, the defendants were exempt from liability imposed pursuant to

Administrative Code of the City of New York § 7–210(b) for negligent failure to remove snow and ice from the sidewalk. Thus, the defendants could be held liable for the hazardous condition on the sidewalk only if they undertook snow and ice removal efforts that made the naturally occurring condition more hazardous or caused the defect to occur because of a special use. But there were issues of fact as to whether they undertook snow and ice removal efforts that made naturally occurring conditions on the abutting public sidewalk more hazardous, or whether any such efforts on their part created or exacerbated allegedly icy condition of sidewalk.

G. "Tree Wells", "Ramps", and Other Features Not Part of the "Sidewalk"

Pevzner v. 1397 E. 2nd, LLC, 96 A.D.3d 921, 947 N.Y.S.2d 543 (2nd Dep't 2012). The injured plaintiff allegedly fell and sustained injuries while walking on East 2nd Street in Brooklyn when he stepped into an unpaved square of ground next to the curb measuring approximately three feet by three feet. Summary judgment granted to defendant because a tree well does not fall within the applicable Administrative Code definition of "sidewalk" and, thus, "section 7–210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells".

Gary v. 101 Owners Corp., 89 A.D.3d 627, 934 N.Y.S.2d 13 (1st Dep't 2011). A landowner is not liable for a defect in a pedestrian ramp leading from the street onto a sidewalk unless the landowner created the defect or the ramp was constructed for its special use. Here, defendant established that it was entitled to summary judgment because plaintiff did not trip on the sidewalk flag abutting defendant's property; instead, plaintiff stumbled on either a crack running through the adjacent pedestrian ramp, or against the edge of the sidewalk flag, which had been exposed when the bordering edge of the ramp sagged below the flag, possibly after the ramp cracked. The defective ramp and not a defect in the flag caused plaintiff's injury. Plaintiff did not claim that defendant's activity created the defect in the ramp or that it was constructed for defendant's special use.

Khaimova v. City of New York, 95 A.D.3d 1280, 945 N.Y.S.2d 710 (2nd Dep't 2012). Brick walkway where the plaintiff fell, which ran parallel to a concrete section of the sidewalk, was part of the "sidewalk" for purposes of liability under Administrative Code of the City of New York § 7–210. The brick walkway lay between the curb and the adjacent property lines, and was intended for the use of pedestrians, as evidenced by the placement of parking meters thereon. Moreover, the obligation on the abutting landowner "to install, construct, reconstruct, repave, repair or replace defective sidewalk flags" (Administrative Code of City of N.Y. § 7–210[b]) included an obligation to maintain the brick walkway in this case in a reasonably safe condition. Although defendants submitted evidence demonstrating that they had no actual or constructive notice of the defective condition of the brick walkway, plaintiff raised a triable issue of fact as to constructive notice.

H. City Liable for Poor Lighting, Flooding, Etc., Regardless of Sidewalk Law

Amador v. City of New York, 96 A.D.3d 475, 946 N.Y.S.2d 151 (1st Dep't 2012). Pedestrian brought action against city and city department of transportation for slip and fall on the sidewalk in front of a privately owned building because of a combination of a defect in the sidewalk, inadequate lighting, and chronic flooding. Plaintiffs also submitted evidence relevant to defendants' notice of the inadequate lighting and chronic flooding, i.e., that the street was always dark and that the flooding had been occurring for several months before the date of his accident. However, defendants' motion focused solely on the applicability of Administrative Code of City of N.Y. § 7–210(a), which imposes a duty upon the owner of property abutting a sidewalk to maintain the sidewalk in a reasonably safe condition. Defendants failed to address the allegedly inadequate lighting and tendency to flood that may have caused or contributed to plaintiff's accident by rendering the sidewalk defect obscure. Thus, defendants failed to establish, as required, that they neither created nor had notice of the allegedly dangerous conditions or that the conditions did not cause plaintiff's injury.

VIII EMERGENCY AND HIGHWAY MAINTENANCE VEHICLES

A. V&T Law 1103(b) (Reckless Disregard Standard for Highway Maintenance Vehicles)

Fong v. Town of Montgomery, 94 A.D.3d 946, 942 N.Y.S.2d 368 (2nd Dep't 2012). The defendants failed to meet their prima facie burden of establishing the applicability of the so-called "rules of the road" exemption contained in V&T 1103(b) for emergency vehicles responding to a bona fide emergency and, therefore, were not entitled to the application of the "reckless disregard" standard of care.

B. V&T Law 1104 (Reckless Disregard Standard for Emergency Vehicles)

1. Must be actually engaged in "emergency operation"

Mouzakes v. County of Suffolk, 94 A.D.3d 829, 941 N.Y.S.2d 850 (2nd Dep't 2012). Plaintiff was injured when a vehicle operated by an intoxicated driver, and pursued by a County police officer, collided with his vehicle. V&T 1104 protection applies for "emergency" vehicles actually responding to an emergency. An "emergency operation" of a police vehicle includes "pursuing an actual or suspected violator of the law" (V&T 1114-b). Here, the defendants made a prima facie showing that the police officer involved in the pursuit of the intoxicated driver was engaged in an emergency operation at the time of the accident, and that the police officer's conduct did not rise to the level of reckless disregard for the safety of others. Plaintiff failed to raise a triable issue of fact.

Banks v. City of New York, 92 A.D.3d 591, 939 N.Y.S.2d 39 (1st Dep't 2012). Court held that the trial court properly charged the jury with determining whether, at the time of the accident,

defendant police officer was "involved in an emergency operation" of an authorized emergency vehicle, pursuant to V&T 1104. The officer had been investigating a person who, from a truck, made a hand motion and may have waved to the police. Plaintiff, on the other hand, denied seeing the truck. Thus, whether it was an emergency operation was an issue of fact.

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

Gonzalez v. City of New York, 91 A.D.3d 582, 936 N.Y.S.2d 892 (1st Dep't 2012). Defendant fire truck driver was driving to the scene of an emergency when the truck collided with a van, injuring plaintiff.. The defendant driver had stopped on Third Avenue and was turning right onto 68th Street, with the traffic light in his favor, when he hit the van. The defendant driver was not engaged in any of the specific conduct that the driver of an authorized emergency vehicle in an emergency operation is permitted by V&T Law 1104(b), i.e., he was not stopping, standing or parking in violation of the rules of the road, proceeding past a red signal or stop sign, speeding, or proceeding in the wrong direction or making an unlawful turn. Thus, his conduct was held here to be governed not by the reckless disregard standard of care but by ordinary negligence principles pursuant to the Kabir v. County of Monroe Ct of Appeals case.

Fajardo v. City of New York 95 A.D.3d 820, 943 N.Y.S.2d 587 (2nd Dep't 2012). A New York City Fire Department fire rescue truck responding to an emergency rear-ended plaintiff. The fire rescue truck struck the vehicle approximately 30 seconds after the traffic signal controlling the lane in which both vehicles were traveling changed from red to green, and while the fire rescue truck was decelerating from approximately 15 miles per hour in moderate-to-heavy traffic conditions. V&T Law 1104 did not apply because none of the four specified conducts set forth in the Statute were involved (*Kabir v County of Monroe,* 16 NY3d 217). Rather, plaintiff alleged that the driver was following too closely. Thus the ordinary negligence standard applied rather than the "reckless disregard" standard.

Katanov v. County of Nassau, 91 A.D.3d 723, 936 N.Y.S.2d 285 (2nd Dep't 2012). Pedestrian was stuck by police car responding to emergency call. The injury-causing conduct of the police officer, i.e., making a turn into a parking space located within the parking lot while traveling at approximately two miles per hour, did not fall within any of the categories of privileged conduct set forth in V&T Law 1104(b) and thus plaintiff's claim was governed by principles of ordinary negligence.

Benn v. New York Presbyterian Hosp., 35 Misc.3d 1237, 2012 WL 2120307 (Kings Co. Sup. Ct. 2012). Infant plaintiff along with two friends, took a bus to Avenue K and Coney Island Avenue to attend school at PS 99. They had to cross Coney Island Avenue to get to the school. A school crossing guard assigned to the intersection was stationed on the corner of the school across from the bus stop. Plaintiff began crossing the street while the light was green, however, the light

changed before she reached the sidewalk. Plaintiff, while still in the crosswalk, was struck by Defendant New York Presbyterian Hospital's ambulance, which was traveling on Coney Island Avenue. Plaintiff sued the City, claiming that the crossing guard failed to properly control traffic at the intersection and assist her in safely crossing the street, and also sued the Hospital, claiming that the ambulance driver's negligence caused the accident. The Hospital defendants argued that since they were responding to an emergency situation, pursuant to V&T Law 1104 they could only be found liable for Plaintiff's injuries if their conduct was reckless and that, as a matter of law, they were not. More specifically, they argued that the fourth type of activity in said section, "disregard regulations governing directions of movement or turning in specified directions", was applicable because the accident happened when the ambulance was in the left hand turning lane at the time of the accident, with the intention of proceeding forward. They argued that the injury producing conduct was driving straight ahead from the left hand turning lane and that such conduct is entitled to the reckless disregard standard. However, they failed to submit any evidence indicating that driving in the left hand turning lane was the injury producing conduct. The accident didn't occur because Defendant crossed into the left hand turning lane and hit the Plaintiff. The injury producing conduct was *proceeding through the crosswalk*, while the light was green and while Plaintiff was present in the crosswalk. Therefore, since the injury causing conduct was not privileged under the Statute, the ordinary negligence standard governed this claim. As for the City's motion for summary judgment, it argued that (1) the City was immune from suit because it assume no special duty to the Plaintiff and (2) if there was a duty, it did not trigger because Plaintiff was unable to show reliance. Here the Court found that the City, by providing the school crossing officer at the intersection during school hours, assumed a special duty to provide due care to protect the students, including the plaintiff. However, the City also contended that even if the special duty exception existed, Plaintiff could not show justifiable reliance on the school crossing guard because the Infant/Plaintiff did not remember the accident. Here the Court found that once it has been established that a special duty existed, for summary judgment purposes, the burden was on the City to show that there was no issue of fact that the duty did not trigger. The City failed to establish that the Plaintiff did not rely on the crossing guard's presence. The Infant/Plaintiff, a seventh grader, suffered a blow to her head, resulting in her having no memory of the incident. However, her memory of the incident was not dispositive of the issue, since reliance could be determined in other ways.

3. What Constitutes "Reckless Disregard"?

Elnakib v. County of Suffolk, 90 A.D.3d 596, 934 N.Y.S.2d 223 (2nd Dep't 2011). Since jury could have found that police officer acted with reckless disregard for the safety of others by driving through a stop sign at a view-obstructed intersection at a high rate of speed and striking plaintiff's vehicle, city failed to meet burden for judgment as a matter of law.

Spencer v. Astralease Associated, Inc., 89 A.D.3d 530, 932 N.Y.S.2d 480 (1st Dep't 2011). Defendant ambulance driver activated his siren and emergency lights prior to the accident and hit

the ambulance's air horn several times and slowed his rate of speed as he approached the intersection. Thus, he had a qualified privilege to proceed through the red light. There was no evidence that he acted with reckless disregard for the safety of others during the emergency operation.

Gonzalez v. Zavala, 88 A.D.3d 946, 931 N.Y.S.2d 396 (2nd Dep't 2011). Pedestrian brought action against county police department when she was struck by a vehicle that was attempting to evade pursuing police officer. Court found that Police officer was engaged in an emergency operation at the time vehicle he was pursuing sideswiped another vehicle, hit a taxi, mounted a sidewalk, and struck pedestrian, and his conduct did not rise to the level of reckless disregard for the safety of others. He stopped at each red traffic light while chasing the speeding vehicle. Summary judgment to defendant.

Nikolov v. Town of Cheektowaga, 96 A.D.3d 1372, 946 N.Y.S.2d 734 (4th Dep't 2012). At the time of the collision, defendant officer was operating a police vehicle while responding to a dispatch call concerning a driver on the highway operating a vehicle in a reckless manner. There was no dispute that defendant officer's vehicle entered the intersection against a red light. Proceeding through a red light is expressly set forth V&T Law 1104 as one of the privileges extended to an authorized police vehicle engaged in an emergency operation. Thus, the reckless disregard standard applied. Defendants established as a matter of law that defendant officer's conduct did not rise to the level of reckless disregard for the safety of others and plaintiff failed to raise a triable issue of fact in opposition to that part of the motion. Even assuming, arguendo, that defendant officer experienced a short-term reduction in visibility of the intersection where the collision occurred, the Court concluded that such factor did not constitute reckless disregard for the safety of others under the circumstances of this case. With respect to the speed at which the police vehicle entered the intersection, defendant officer testified at his deposition that he was traveling at 15 miles per hour. Plaintiff testified at his deposition, however, that he did not observe the police vehicle at any time prior to the collision and thus was not able to provide a competent estimate of its speed, and the passenger in plaintiff's vehicle testified at her deposition that she was "not a driver" and "can't tell" speed. Thus there was no evidence that defendant officer acted recklessly.

IX QUALIFIED IMMUNITY FOR DEFECTIVELY DESIGNED ROADWAYS

A. Upgrades Necessary Only When Roadway Has History of Accidents or Undergoes Significant Repairs or Reconstruction

Hubbard v. County of Madison, 93 A.D.3d 939, 939 N.Y.S.2d 619 (3rd Dep't 2012) Summary judgment granted to County where its local law required prior written notice and there was none. With respect to plaintiff's claim that the car accident was caused by a "lip" of more than two inches from the paved portion of the highway to the shoulder, they contended that no prior

written notice was required because the County created the defect through an affirmative act of negligence. However, the affirmative negligence exception to prior written notice statutes applies only where the action of the municipality "immediately results in the existence of a dangerous condition", and here the evidence showed that the County resurfaced the roadway and widened it from 20 to 24 feet in 2002, and plaintiffs presented no proof establishing that any alleged differential between the roadway and the shoulder was the immediate result of this activity, as opposed to a condition that evolved over time. As for plaintiffs' claims of negligent design of the roadway and failure to erect adequate and proper warning signs, prior written notice requirements did not apply, but plaintiffs failed to satisfy their burden of coming forward with evidence raising a question of fact concerning any negligence on the part of the County in this regard. Specifically, they submitted no proof that the signage that was in place at the time of the accident was obscured, inadequate or otherwise failed to comply with acceptable standards. With respect to their claim that a double curve design was inherently dangerous, it is firmly established that, "i]n maintaining older highways, [a municipality] is not obliged to undertake expensive reconstruction simply because highway safety design standards have changed since the original construction". Rather, upgrades are necessary only when a roadway has a history of accidents or undergoes significant repairs or reconstruction. Here, the uncontradicted proof submitted by the County established that it did not design the road, but rather inherited it from Chenango County in 1803, and there was no evidence that the roadway—which was designed in the "horse-and-buggy days"—was not designed in compliance with standards in effect at the time. Furthermore, there was no documented history of accidents in the vicinity of the double curve which would place the County on notice of the need for reconstruction or remediation of the roadway, and merely widening a roadway and overlaying it with new pavement, "as opposed to ripping it out and rebuilding it or reconfiguring it, does not constitute significant repair or reconstruction for the purpose of requiring a municipality to upgrade a roadway to comply with current design standards". Summary judgment granted to defendant.

B. Defendant Liable Where It Affirmatively Creates Dangerous Highway Condition

Grevelding v. State, 91 A.D.3d 1309, 937 N.Y.S.2d 782 (4th Dep't 2012). Decedent's vehicle slid across the roadway while passing over a bridge on Interstate 81 in the City of Syracuse, struck a snow bank packed against the concrete barrier guard at the edge of the bridge, and vaulted off the bridge onto the road below. The evidence at trial established that defendant removed the snow bank from the bridge only after a second fatal vaulting accident occurred, approximately 36 hours after decedent's accident. According to claimant, defendant was negligent in, inter alia, creating the dangerous condition of the snow bank, which rendered the concrete barrier guard ineffective, failing to maintain the bridge in a safe condition, failing to warn of that dangerous condition, and failing to close the bridge in the event that it could not be made safe for travelers. Appellate Division reverses Court of Claims and decides that defendant was liable for creating the dangerous condition. It remitted the matter to the Court of Claims for a new trial on the issues of decedent's alleged contributory negligence and damages.

C. "Public Planning Body" Must Consider and Pass Upon A Risk in Order for Qualified Immunity to Apply

Leon v. New York City Transit Authority, 96 A.D.3d 554, 947 N.Y.S.2d 33 (1st Dep't 2012). Subway passenger fell into a gap between the platform and a subway car when he attempted to board the subway car. New York City Transit Authority failed to present any evidence that a public planning body had considered and passed upon the question of risk that a passenger would fall into the gap between the platform and the track at a subway station, as required to establish its entitlement to qualified immunity. Court pointed out that, to establish its entitlement to qualified immunity, a governmental body must show that "a public planning body considered and passed upon the same question of risk as would go to a jury in the case at issue". A mere informal review or internal policy will not suffice. The TA submitted several documents that refer to the 6–inch–gap standard for straight tracks, including a 1987 memorandum that states that the gap between the platform and straight track must not exceed 6 inches, and an affidavit by the TA engineer who calculated the 9.2–inch–gap standard for curved tracks. All these documents addressed the risk that trains will scrape against the platform as they travel along the track. None of the documents, however, addressed "the same question of risk" that was at issue in this case, i.e., the risk that a passenger would fall into the gap between platform and track. The TA conceded that the 1987 memorandum "was not a study, did not purport to be a study, and contained no reference to any study." The Memorandum thus was insufficient to demonstrate the TA's entitlement to qualified immunity.

D. McClean/DiNardo/Valdez Trio Do NOT Apply to Highway Design Cases

Madden ex rel. Madden v. Town of Greene, --- N.Y.S.2d ----, 2012 WL 2477873 (Chenango Co. Sup. Ct. 2012). Defendant moved to renew its summary judgment motion relying on three cases decided by the Court of Appeals after filing of its original summary judgment motion in 2007—*Valdez v. City of New York*, 18 NY3d 69 (2011); *DiNardo v. City of New York*, 13 NY3d 872 (2009); and *McLean v. City of New York*, 12 NY3d 194 (2009)— which announced a significant change in the law regarding governmental immunity. Defendant here argued that those cases mean that a municipality may ***never*** be liable for any discretionary governmental functions, ***including highway design.*** The Court disagreed. It found that "the extensive body of Court of Appeals case law regarding governmental immunity for various types of governmental functions demonstrate that these cases simply have no bearing on governmental action that has historically been afforded only qualified immunity, like highway design". Acts involving the conscious exercise of discretion of a judicial or quasi-judicial nature—like police protection—have been afforded absolute immunity, even if the action was negligent or malicious. The rationale for affording such acts absolute immunity is to permit public officials to exercise their discretion without fear of retaliatory lawsuits. This is the type of governmental function that was directly at issue in *Valdez*. By contrast, discretionary actions not of a judicial or quasi-judicial nature, but which require the application of specialized expertise—like highway planning and design decisions—are afforded only qualified immunity, which, unlike absolute immunity—is negated by bad faith or the lack of any reasonable basis for the action. Qualified immunity is based on an entirely different rationale than absolute immunity, namely, judicial deference to the expertise of coordinate branches of government in their performance of planning and design decisions.

X SCHOOL LIABILITY

A. Sports Injuries

Kamara ex rel. Kamara v. City of New York, 93 A.D.3d 449, 940 N.Y.S.2d 53 (1st Dep't 2012) . Student, by his father and natural guardian, brought action against New York City Board of Education and New York City Department of Education, alleging negligent supervision after he was injured during a lunchtime basketball game when another student pushed him while he was in the air attempting to get the ball. Court held that the complaint should have been dismissed as against defendant City of New York because it is not a proper party to the action (*see,* 2002 amendments to the Education Law). Summary judgment should also have been granted to defendants New York City Board of Education and New York City Department of Education (collectively, DOE). The record demonstrated that the spontaneous act of the other student pushing plaintiff as they attempted to rebound a basketball was the type of incident that "occurred in such a short span of time that it could not have been prevented by the most intense supervision". Although plaintiff presented evidence that school personnel had notice that the other student had bullied him in the past, such evidence was not sufficiently specific to alert DOE that the student would push plaintiff during a basketball game.

Viola v. Carmel Cent. School Dist., 95 A.D.3d 1206, 945 N.Y.S.2d 155 (2nd Dep't 2012). Mother of a tenth grade student sued school district and others to recover for personal injuries sustained by the student when she slid into second base during a softball game held on a field behind a high school. Defendants failed to demonstrate that the base was properly positioned, that the student was aware of the improper positioning, or that it was an open and obvious condition. Moreover, the defendants failed to establish that the allegedly improperly positioned base did not unreasonably increase the risk of injury as, among other things, the defendants' employees testified that an improperly positioned base would be a hazard for sliding runners and that a game should be stopped to correct such a condition.

Charles v. Uniondale School Dist. Bd. of Educ., 91 A.D.3d 805, 937 N.Y.S.2d 275 (2nd Dep't 2012). Although being struck with a passed ball is a known risk inherent in the sport of lacrosse, the defendant failed to eliminate all triable issues of fact as to whether it unreasonably increased the risk of harm to the plaintiff by failing to provide him with head and face protection during preseason high school lacrosse practice.

Stoughtenger v. Hannibal Cent. School Dist., 90 A.D.3d 1696, 935 N.Y.S.2d 430 (4th Dep't 2011). Student's mother brought action against school district and board of education, seeking damages for injuries student sustained while participating in a wrestling unit in defendants' ***compulsory*** physical education class. The Court pointed out that there are important distinctions between ***voluntary*** participation in interscholastic sports and recreation activities and ***compulsory*** participation in physical education class. Inasmuch as plaintiff was participating in a ***compulsory*** physical education class and his participation in the wrestling unit was mandatory, the defense of primary assumption of risk was not applicable. Thus, the Court reject defendants' contention that summary judgment dismissing the complaint should have been granted on that affirmative defense. Further, the court properly determined that there were triable issues of fact with respect to the negligent supervision claim and the comparative fault of plaintiff in choosing an opponent that outweighed him by approximately 100 pounds.

Castro v. City of New York, 94 A.D.3d 1032, 944 N.Y.S.2d 155 (2nd Dep't 2012). Softball player tripped over raised sewer grate while playing softball on cement ballfield owned by city. Summary judgment granted to defendant, who established that the plaintiff assumed the risk of injury by voluntarily participating in the softball game despite his knowledge that doing so could bring him into contact with the open and obvious raised sewer grate

Navarro v. City of New York, 87 A.D.3d 877, 929 N.Y.S.2d 236 (1st Dep't 2011). In an elective High school girls' softball class, plaintiff, then 16 years old, hit ground balls to a fielder as a warmup exercise. A student then approached plaintiff and asked if she could hit a few balls. Plaintiff handed the bat to her and told her, consistent with the teacher's instructions for practice drills, that she should not take full swings. Upon being handed the bat, however, the girl immediately threw the ball in the air and took a full swing before plaintiff had time to get out of the way. As a result, the bat hit plaintiff on the cheek, causing injury. Plaintiff won at trial, but on appeal from post-trial motion, Court sides with defendant, dismissing case. According to the Court, the record established that plaintiff assumed the risk that resulted in her injury because "it is well established that the danger associated with people swinging bats ... while warming up for

the game is inherent in the game of baseball" and "the record is devoid of evidence that plaintiff's injury resulted from any unassumed, concealed or unreasonably increased risks". The Court also noted that the verdict could not be sustained on a theory of negligent supervision for an additional and independent reason; Plaintiff testified that only three to five seconds elapsed between her giving the bat to the other girl and the bat's striking her face" and in "so short a span of time, even the most intense supervision could not have prevented it".

Talyanna S. v. Mount Vernon City School Dist., 97 A.D.3d 561, 948 N.Y.S.2d 103 (2nd Dep't 2012) Fourth-grade student was in a physical education class participating in a "fitness stations" exercise. According to the physical education teacher's deposition testimony, the teacher had set up six to seven activities spread out throughout the school's gymnasium, whereby all the activities would be occurring simultaneously. Plaintiff was injured when she fell from the balance board and hurt her ankle. Defendant's motion for summary judgment denied because the defendant's physical education teacher testified at his deposition that the balance board activity was one that required more supervision than other activities, yet he failed to provide proof that he actually provided heightened supervision. Additionally, there was proof that the infant plaintiff struggled to maintain her balance on the balance board and fell twice before the event allegedly causing her injury. Further, the physical education teacher only became aware of the infant plaintiff's injury upon being notified by one of her fellow students, thus raising an inference that there was no heightened supervision of balance board activity.

Gibbons v. Pine Bush Cent. School Dist., 97 A.D.3d 724, 948 N.Y.S.2d 664 (2nd Dep't 2012). Student was struck in the right eye by a shuttlecock while playing badminton during his high school physical education class. Summary judgment affidavit of student's expert was insufficient to raise a triable issue of fact as to whether school district was negligent in failing to provide student with protective eye gear since there was no evidence to show that a recommendation to use such gear reflected a generally accepted standard or practice in high school.

B. Sexual Assaults

Doe v. Chenango Valley Central School Dist., 92 A.D.3d 1016, 938 N.Y.S.2d 360 (3rd Dep't 2012). Infant student's parent brought action against school district, alleging negligent retention and supervision of school bus driver and negligent supervision of infant, arising out of incident in which driver sexually abused infant while on school field trip. The bus driver had pleaded guilty to sexual abuse in the first degree for, among other things, touching the breasts and buttocks of female students, including plaintiffs', while they were swimming during a field trip. Defendant claimed that it had no reason to believe that the bus driver was unfit to serve as a school bus operator and, therefore, summary judgment dismissing the entire complaint against it was warranted. The Court disagreed because, even though defendant's search for a criminal record turned up no results before they hired him, approximately eight months prior to the incident giving rise to this action, one of the plaintiffs' parents had complained to defendant's acting transportation director that the driver had lowered his pants and exposed his adult diaper to a group of children on his bus. Although the record revealed that it is defendant's policy to

conduct a thorough investigation if an employee behaves inappropriately in a way that may affect his or her job fitness, there was no evidence that defendant conducted any investigation or took any action against the driver with respect to this incident.

C. School Nurse Liability

Martinez v. City of New York, 90 A.D.3d 718, 935 N.Y.S.2d 45 (2nd Dep't 2011). Plaintiff's decedent, an 11–year–old student and life-long asthmatic, reported to the nurse's office complaining of coughing and on-and-off wheezing. His inhaler of medication was empty, he explained to the nurse, and his mother had known this before sending him to school that morning. The child's father was contacted and, ultimately, his mother arrived at the school. Although the nurse did not consider it an emergency when the child left the school with his mother, the nurse told the mother that if she did not have any medication, she should take him straight to the emergency room. The mother replied that she was going to take the child home and treat his asthma with a nebulizer. The mother then drove the child home. They walked up four flights of stairs to their apartment, and the child's breathing changed, leading to cardiac arrest. Court held the school nurse was entitled to summary judgment because the infant was not "released without further supervision into a foreseeably hazardous setting", but rather "into the care and custody of his mother". The evidence established that the child was released into a "safe spot," with his mother, who understood his condition, and planned to treat his attack with medication at home.

D. Playground Liability

Dworzanski v. Niagara–Wheatfield Cent. School Dist., 89 A.D.3d 1378, 932 N.Y.S.2d 285 (4th Dep't 2011). A third-grade student at defendant's elementary school was injured while walking by playground equipment known as a "slide pole" during a school recess period. Another student had slid down the slide pole and landed on him. At the time of the injury, four third-grade classes, including the class of plaintiff's son, were using the school playground, and the classes were being supervised by the classroom teachers. Court held that defendant met its initial burden by establishing that its supervision of the playground was adequate and that plaintiff's son was engaged in "normal play" at the time of the accident. In opposition, however, plaintiff raised an issue of fact whether his son was injured as a result of a game of " tag," a game that was in violation of playground rules and that nevertheless was frequently played by the students during recess despite defendant's notice thereof. "Persistent rule breaking may serve as a basis for liability, particularly where school personnel fail to address the students' rule-breaking behavior and that failure foreseeably leads to injury". Thus, there were questions of fact for trial. Also, there were issues of fact as to whether the school provided students with sufficient instruction concerning the use of the playground equipment. One dissenting judge, Smith, would have granted summary judgment to defendant in all regards because the accident was a "sudden and unforeseen event that no amount of supervision could have prevented" He opined that "although a child's violation of a school rule that prohibits certain conduct may raise a triable issue of fact with respect to negligent supervision, in the case before us there is no evidence that the injury sustained by plaintiff's son was the result of a violation of the rule against playing tag".

Harris v. Debbie's Creative Child Care, Inc., 87 A.D.3d 615, 928 N.Y.S.2d 583 (2nd Dep't 2011). The nine-year-old plaintiff was on the grounds of Jamaica Avenue School in Plainview to watch his brother's T-ball game. These grounds contained a fenced-in playground which the School District leased to the defendant Debbie's Creative Child Care, Inc. That evening, the School District had locked the gates to the playground fence at closing time, 5:00 P.M. The infant plaintiff, finding the gates locked, allegedly attempted to enter the closed playground by climbing onto a picnic table, which was adjacent to the fence and secured to it by a chain and lock. When his foot became caught between the table and the fence, he fell, and was injured. There was no evidence that the picnic table or fence was in any way defective. Summary judgment to school district because the picnic table and fence were not defective and the School District had no duty to warn the infant plaintiff of the risks of his own behavior, which were readily perceivable.

E. Student on Student Assaults

Buchholz v. Patchogue–Medford School Dist., 88 A.D.3d 843, 931 N.Y.S.2d 113 (2nd Dep't 2011). The School District submitted evidence on summary judgment motion showing that the student-plaintiff and his two student assailants had never previously been involved in a violent altercation with each other, and that none of the disciplinary infractions previously committed by the assailants involved violent behavior. Such evidence established, prima facie, that the School District had no actual or constructive knowledge of dangerous conduct by the students and that it could not have reasonably foreseen the attack on the plaintiff. In opposition, the plaintiff failed to raise a triable issue of fact on the issue of actual or constructive notice. Summary judgment to defendant granted regarding this issue, but the School failed to get out on the negligent supervision claim. At deposition, the plaintiff testified that the assault happened over the course of "a few minutes," and during that entire time, a security guard watched from only a few feet away, but did not intervene until the assault had ended. At his deposition, the security guard agreed with the plaintiff that he was standing only a few feet away when the assault occurred, but in contrast, testified that the assault occurred over the course of mere seconds, while the hallway was crowded with high school students, and that he intervened "immediately." Court held that the deposition testimony of the plaintiff did not eliminate all triable issues of fact as to whether the security guard who witnessed the assault was presented with a potentially dangerous situation and failed to take "energetic steps to intervene" in time to prevent some of the injuries allegedly sustained by the plaintiff.

Keith S. v. East Islip Union Free School Dist., 96 A.D.3d 927, 946 N.Y.S.2d 638 (2nd Dep't 2012). The infant plaintiff was a sixth-grade student at a middle school. While walking between classes, he encountered another sixth-grade student with whom he was friendly, and patted him on the back or pushed him slightly. The friend turned and, grabbing the infant plaintiff, swung him so that he struck a nearby wall. He sued, but summary judgment was granted to the school district since the infant plaintiff and his fellow student were on friendly terms, had no record of misbehavior of a violent or a nonviolent nature, and no history of previous altercations, and thus there was no actual or constructive notice of prior conduct similar to the subject incident. In addition, there was no evidence that any negligent supervision on the part of the district was the proximate cause of the infant plaintiff's injuries. Further, the incident at issue occurred in so short a span of time that " 'even the most intense supervision could not have prevented it.

Rosborough v. Pine Plains Cent. School Dist., 97 A.D.3d 648, 948 N.Y.S.2d 373 (2nd Dep't 2012). Eighth-grade student was struck in eye by stick thrown by fellow student during fire drill. Defendant was granted summary judgment because the injury was deemed caused by spontaneous and unforeseen act that could not have been prevented by any reasonable degree of supervision, and thus any lack of supervision by school district was not proximate cause of injury student allegedly sustained as result of accident for purposes of imposing liability on school district in student's personal injury suit.

F. Student on Teacher Assaults

Rolanda Morgan–Word v. New York City Department of Education., 96 A.D.3d 1025, 946 N.Y.S.2d 888 (2nd Dep't 2012). Plaintiff was injured in while attempting to break up a fight between two students at a school where she was an assistant principal. She sued the school. Defendants failed to win summary judgment as they failed to eliminate triable issues of fact as to whether they assumed a special duty to the injured plaintiff. (Note: Teachers assaulted by students must show "special duty" toward them was assumed, but students assaulted by other students need not because the school's duty toward the students is in *loco parentis*).

XI MISCELLANEOUS MUNCIPAL LIABILITY

A. Falling Tree Liability

McKeever v. City of Rye, 35 Misc.3d 1208, 2012 WL 1174744 (N.Y.City Ct. 2012). This is a civil action for negligence in connection damages caused by a fallen tree that damaged a house. Plaintiff lost the case at trial, and defendant's victory was affirmed on appeal, because there was no evidence that defendant had actual notice of any decay or disease in the particular tree that fell nor of any other defect in the tree. Plaintiff merely offered proof that there was an absence of records of any tree work by the City for the years 2010 and 2011, despite several tree calls during the previous several years. Under established law, "a landowner from whose property a tree fell and injured plaintiff is under no duty to consistently check all trees for non-visible decay and would be under an obligation to take reasonable steps to prevent harm if manifestation of decay was readily observable". There was no indication of any visible defect or decay offered by plaintiff here.

B. Snow and Rainfall Removal Liability

Ali v. Village of Pleasantville, 95 A.D.3d 796, 943 N.Y.S.2d 582 (2nd Dep't 2012). Village could not be held liable for injuries sustained by pedestrian in slip and fall on sidewalk during ongoing snowstorm; village had no prior written notice of existence of allegedly dangerous condition, while storm was ongoing, village had no duty to remove snow that accumulated after it undertook snow-abatement efforts, and village's alleged failure to remove snow that had fallen during course of storm and its alleged failure to apply salt or sand to sidewalk, were not

affirmative acts of negligence. Plaintiff failed to raise a triable issue of fact as to whether the Village created or exacerbated the allegedly dangerous condition through an affirmative negligent act during the course of its efforts to abate the effects of the snowstorm. The Village's alleged failure to remove snow that had fallen during the course of the storm and its alleged failure to apply salt or sand to the sidewalk, did not constitute affirmative acts of negligence.

Rui–Jiao Liu v. City of White Plains, 95 A.D.3d 1192, 945 N.Y.S.2d 174 (2nd Dep't 2012). Plaintiff slipped and fell while descending from the fourth step from the bottom of a stairway) just above a landing between the first and second floors of the south stairwell in the Trans Center parking garage. The parking garage was owned by the defendant City of White Plains and operated by the defendant City of White Plains Parking Department. The parking garage was attached to the northbound Metro North train platform by two pedestrian bridges, which were covered by roofs but not shielded by side windows, so that the pedestrian bridges were open to the elements. At the end of one of the pedestrian bridges, there was access to the third floor of the parking garage through a door. Entry to the south stairwell, which led to the ground floor of the parking garage, was also located at or near that door. The plaintiff, who entered the south stairwell on the third floor, slipped while she was walking down the stairway leading from the second floor to the first floor of the parking garage. At the time of the accident, there was a heavy rain which had been falling since the previous night. Summary judgment granted to City because the plaintiff testified at deposition that the subject step was wet due to precipitation that was tracked in by other commuters, that there were no puddles on the steps and that the rainstorm was ongoing at the time of the accident. "A property owner ... is not required to constantly remove all moisture resulting from tracked-in precipitation". The City also submitted evidence that the subject stairwell was checked between 6:30 A.M. and 7:00 A.M. on the morning of the accident, and that the accident occurred at 9:00 A.M., during rush hour. Thus, the City showed that it did not create the alleged wet condition nor had actual or constructive notice of the condition for a sufficient length of time for its daytime ramp attendant to have discovered and remedied it. Further, the City demonstrated that it neither created, nor had actual or constructive notice of, any structural or physical defect on the stairway that might have caused or contributed to the plaintiff's accident. Note that it was raining heavily at the time she entered the stairwell, and that the water on the steps appeared to be there from having been tracked in by other commuters. Plaintiff failed to raise a triable issue of fact with respect to whether the City affirmatively created a structural or physical defect. The findings of the plaintiff's expert were not supported by empirical data or any relevant construction practices or industry standards concerning the alleged defect which actually caused the accident, or how he reached his conclusions. In addition, the plaintiff's expert failed to establish that the structural or physical condition of the staircase on the date of the accident was the same as the structural or physical condition of the staircase on the date of his inspection more than two years after the accident occurred.

C. Bus Liability

1. Safe Place To Alight/Board

Cividanes v. City of New York, 95 A.D.3d 1, 940 N.Y.S.2d 619 (1st Dep't 2012). Bus passenger who sprained her ankle when alighting from bus and stepping into hole in road, as result of bus driver's alleged negligence in failing to pull up properly to the curb and provide her with safe and adequate place to exit, brought suit against municipal transit authority, which moved for summary judgment on ground that passenger had not established the requisite "serious injury" to sue under insurance Law 5102. Issue was whether passenger's injuries arose from "use and operation" of bus, and thus made the No-Fault Law and serious injury threshold applicable. Court found that the vehicle in question, the bus, was not the instrumentality that caused plaintiff's fall. First, her accident did not arise out of the "inherent nature" of the bus; she stepped into a hole and fell. Second, the accident did not arise within the "natural territorial limits" of the bus; she fell on the street. And third, while the bus may have positioned plaintiff near the condition which ultimately produced the injury, by letting her off in front of the hole, the bus itself was not the instrumentality that produced the alleged injury. Thus, plaintiff was not injured from the "use and operation" of the bus, and was not required to show a "serious injury". Defendant's summary judgment motion denied.

2. "Unusual and Violent Movements"

Guadalupe v. New York City Transit Authority, 91 A.D.3d 716, 936 N.Y.S.2d 314 (2nd Dep't 2012). The plaintiff was standing on the bus, as there were no vacant seats. According to the plaintiff, the bus driver applied the brakes suddenly, and she was propelled forward into a pole. However, the plaintiff testified that, immediately prior to the incident, the bus was traveling at a "moderate" speed, that, as a result of the accident, she did not fall to the floor but rather remained standing, and that she did not see anyone else on the bus move as a result of the bus stopping. As a matter of law, the described was not "unusual and violent," and of a "different class than the jerks and jolts commonly experienced in city bus travel. Thus, summary judgment granted to defendant.

Burke v. MTA Bus Co., 95 A.D.3d 813, 942 N.Y.S.2d 817 (2nd Dep't 2012). Plaintiff's own deposition testimony was sufficient to establish that the stop was not "unusual or violent" and of a "different class than the jerks and jolts commonly experienced in city bus travel". Thus summary judgment granted to defendant.

Gioulis v. MTA Bus Co., 94 A.D.3d 811, 941 N.Y.S.2d 689 (2nd Dep't 2012). Bus driver applied brakes, allegedly to avoid a collision with another vehicle while in a parking lot. The plaintiff testified that, prior to the bus stopping; the bus appeared to her to be trying to "out beat" a car in the parking lot in which it was traveling. She further asserted that the bus was traveling "pretty fast," although she could not quantify a speed. She further recalled that the driver slammed on the brakes, which caused her entire body to come off her seat and into the metal partition and

pole directly in front of her seat, causing injuries to her right knee. A triable issue of fact existed as to whether the stop at issue was unusual and violent, as opposed to whether the stop involved only the normal jerks and jolts commonly associated with city bus travel.

Lowhar–Lewis v. Metropolitan Transp. Authority, 97 A.D.3d 728, 948 N.Y.S.2d 667 (2nd Dep't 2012). The bus driver testified at his deposition that he was in heavy traffic "at least a car length" behind a passenger car, when the car stopped suddenly in an intersection, although the light was green. The bus driver, who testified that the bus had been traveling at "probably less than 15" miles per hour, applied the brake and stopped the bus immediately. He was able to avoid colliding with the car, which then made a left turn without having signaled. Defendants moved for summary judgment based on this testimony, but Court found triable issue of fact existed as to whether the stop of the bus was unusual and violent, causing her to fall. Defendant's emergency doctrine defense failed; the doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead; a trailing driver's conduct in failing to leave reasonable distance creates the possibility that a sudden stop will be necessary.

D. Prison Liability

Davis v. State, 91 A.D.3d 1356, 937 N.Y.S.2d 521 (4th Dep't 2012). Prisoner brought action against state, alleging that the Department of Correctional Services (DOCS) breached its statutory duty to inform District Attorney of his unlawful sentence. Former statute (Correction Law 601-a) imposed upon warden a duty to contact District Attorney when a person was sentenced as a multiple felony offender and the warden believed that the person was erroneously sentenced. But Court here held this Statute did not provide prisoner with a private right of action against state; to infer such a private right of action would be inconsistent with the legislative scheme.

E. Inmate on Inmate Assaults

Brown v. City of New York, 95 A.D.3d 1051, 944 N.Y.S.2d 599 (2nd Dep't 2012). Inmate allegedly injured when another prisoner assaulted him and broke his jaw sued city to recover damages for personal injuries. Foreseeability of an inmate-on-inmate assault is not limited to situations in which the municipality had actual knowledge of a danger, but also includes situations in which the municipality had constructive notice of the danger. Determining whether the municipality had "reason to know" about a danger, its knowledge of the particular inmates is relevant, but so are its knowledge of risks to a class of inmates, its expertise or prior experience, and its own policies and practices designed to address the risks. Here, defendants failed to submit any evidence to show that they lacked knowledge of any danger presented by the assailant. Therefore, they failed to establish their prima facie entitlement to judgment as a matter of law.

Barnette v. City of New York, 96 A.D.3d 700, 945 N.Y.S.2d 749 (2nd Dep't 2012). While housed at Riker's Island in a new admissions dormitory where inmates had access to a methadone detoxification unit, the plaintiff was assaulted by another inmate as the inmates formed a line to receive medication. Defendants made a prima facie showing that the attack on the plaintiff was not reasonably foreseeable, demonstrating that neither the plaintiff nor the assailant were known gang members or were in custody for violent crimes. The plaintiff testified at his deposition that he did not know his assailant, who, unprovoked, verbally confronted him and "blindsided" him with a punch to the left side of his face. The plaintiff further testified that a correction officer was present and made verbal attempts to prevent the altercation before it began. As another correction officer testified at her deposition that she was also present but did not witness the assault, the presence of two officers to supervise the inmates in the dormitory complied with the facility's procedures and the standard of "active supervision" as defined in the State Commission of Correction Minimum Standards and Regulations for Management of County Jails and Penitentiaries (9 NYCRR 7003.2[c], 7003.3[a]), which the plaintiff alleged, and the City defendants conceded, was the proper level of supervision required under the circumstances. Summary judgment to defendant.

F. False Arrest and Malicious Prosecution

Brownell v. LeClaire, 96 A.D.3d 1336, 948 N.Y.S.2d 168 (3rd Dep't 2012). Plaintiff's claims of false arrest and unlawful imprisonment accrued on the date he was released from prison, and given that plaintiff did not file a notice of claim until after that time, and did not commence his action against the County defendants until after that time, long after the relevant statutory time limits had expired, his claims for false arrest and unlawful imprisonment were dismissed. However, plaintiff's claim for malicious prosecution did not accrue until the judgment of conviction was vacated, and, as a result, the notice of claim was timely filed and the underlying action was commenced within the statutory time limits. As for the merits of that claim, plaintiff was arrested because he was alleged to have provided police with oral and written statements admitting that he had entered the victims' residence without permission and, while inside, had damaged some of their personal property. These alleged admissions were corroborated by fingerprints that the police recovered at the crime scene which appear to be plaintiff's. This evidence established as a matter of law that probable cause existed for plaintiff's arrest and the decision to prosecute him for this burglary was rationally based. Case thus dismissed.

G. Excessive Force

Holland v. City of Poughkeepsie, 90 A.D.3d 841, 935 N.Y.S.2d 583 (2nd Dep't 2011). Plaintiff, an epileptic, refused transport to the hospital after having suffered four grand mal seizures, two of which were witnessed by a paramedic and an EMT. According to deposition testimony, after the paramedic administered valium and the plaintiff partially recovered from his seizures, the paramedic called his supervising physician, who instructed him to transport the plaintiff to the

hospital because a narcotic had been administered. When the plaintiff refused to go, the EMT called the police for assistance. Upon responding to the scene, an officer attempted to convince the plaintiff to go to the hospital. The plaintiff became agitated, pulled the monitor leads off his chest, pulled out his IV, and exited the back of the ambulance while screaming obscenities. A struggle ensued (allegedly after plaintiff lunged at the officer) during which the officer attempted to restrain the plaintiff and warned him that he would be arrested if he did not stop. When the plaintiff failed to respond to these warnings, the officer used his taser to incapacitate the plaintiff. Additional police officers arrived, the plaintiff was handcuffed, and he was transported to the hospital in custody for, inter alia, disorderly conduct. Defendants failed to get the excessive force case dismissed on summary judgment because a triable issue of fact as to whether the officer's use of a taser to restrain the plaintiff, either to arrest him or to restrain him for his own safety, was excessive. The false arrest claim was also allowed to proceed because a triable issue of fact remained as to whether a reasonable officer could interpret the plaintiff's behavior as being motivated by an "intent to cause public inconvenience, annoyance or alarm" (Penal Law § 240.20[1]), which is required for a disorderly conduct arrest. Many other causes of action survived as well.

XII FIREFIGHTER AND POLICE CAUSES OF ACTION

A. GML 205-a (Firefighters) and 205-e (Police Officers)

Diaz–Montez v. Dore–Almonor, 96 A.D.3d 991, 947 N.Y.S.2d 171(2nd Dep't 2012). Plaintiff police officer sued under GML 205-e for in-the-line-of-duty injuries alleging defendants failed to comply with various provisions of the Penal Law and that her injuries were caused because the defendants "intentionally prevented or attempted to prevent a police officer from effecting a lawful arrest." The defendants moved to dismiss the complaint contending that it failed to state a cause of action to recover damages under GML 205-e because it did not allege that they acted with negligence in causing her injury. They won the motion because, while the complaint set forth provisions of the Penal Law which could properly serve as a predicate for an action pursuant to GML 205-e, it contained no description of the manner in which the plaintiff police officer was injured and no facts from which it could be inferred that the defendants' negligence directly or indirectly caused the harm, as required under the Statute.

Schaefer v. New York City Transit Authority, 96 A.D.3d 485, 946 N.Y.S.2d 154 (1st Dep't 2012). Police officer sued city transit authority and others when he fell while extricating passengers from a stuck elevator on transit authority property. Court here held that trial court erred in setting aside plaintiff's jury verdict based on defendants' claim that particular engineering standards did not form a proper basis for liability under GML 205-e.

Weiner v. City of New York, 19 N.Y.3d 852, 970 N.E.2d 427 (2012). In this case, the Court of Appeals resolved a "split in the Departments" regarding whether the receipt of workers'

compensation benefits bars a suit against the employer by a firefighter under GML 205-a. It held that WC does bar such suits. The facts were that an emergency medical technician employed by city fire department was hurt while responding to a report of an injured person on a poorly illuminated boardwalk in Brighton Beach. He sued his employer, the City, alleging both common law negligence and a cause of action under GML 205-a. Plaintiff contended that he could bring this action against the City pursuant to GML § 205–a because that statute gives a right of action to "any officer, member, agent or employee of any fire department" who is injured on duty, *"[i]n addition to any other right of action or recovery under any other provision of law"*. Plaintiff argued that his GML 205-a claim was "in addition to workers' compensation". Plaintiff's principal argument relied on a difference in wording between GML 205-a (firefighters) and GML 205-e (police officers). Section 205–e contains the same statement found in § 205–a that the cause of action created by the statute exists "[i]n addition to any other right of action or recovery under any other provision of law" but § 205–e (police officers) explicitly provides that "nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee or his or her representative by virtue of any provisions of the workers' compensation law". Plaintiff contended that the omission of this language concerning workers' compensation law in § 205–a with respect to firefighters was deliberate. The City moved to dismiss the complaint pursuant to CPLR 3211, arguing that plaintiff's receipt of workers' compensation benefits barred his lawsuit (also on the grounds that as an emergency medical technician he was not within the class of persons who may bring an action under § 205–a. Supreme Court denied the motion) citing *Lo Tempio v. City of Buffalo* (6 A.D.3d 1197, 775 N.Y.S.2d 717 [4th Dept 2004]) for the proposition that receipt of workers' compensation benefits do not bar GML 205-a suits against the employer. The Appellate Division, Second Department, reversed, agreeing with the City that plaintiff's action was barred by his receipt of workers' compensation benefits, thus splitting from the Fourth Upon review of the legislative history, the Court of Appeals affirmed, holding that *Lo Tempio* was wrongly decided in so far as that court held that a GML 205-a plaintiff's acceptance of workers' compensation benefits does not preclude a tort action against his or her employer. (The court declined to decide the issue of whether emergency medical technicians who are employed by fire departments can sue under GML § 205–a, or whether the right of action is limited to firefighters.)

B. Firefighters' Rule

Carro v. City of New York, 89 A.D.3d 1049, 933 N.Y.S.2d 605 (2nd Dep't 2011). Police officer was injured while on duty when she fell from a police truck while loading wooden police barriers onto it. She sued under common-law negligence and pursuant to GML 205-e. Court determined that the plaintiffs' cause of action alleging common-law negligence was barred by the so-called "firefighter's rule," as the City established that the plaintiff's acts were taken in furtherance of a specific police function which exposed her to the risk of the injury she ultimately sustained. The GML 205-e claim also failed but for other reasons.