MUNICIPAL LIABILITY
2016-2017 UPDATE

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I THE NOTICE OF CLAIM

A. Is a Notice of Claim Even Required?

1. Required Where Statutory Duty to Indemnify

Marrone v Miloscio, 145 A.D.3d 996, 44 N.Y.S.3d 502 (2nd Dep't 2016). Plaintiff was rear-ended by a motorist who was (unbeknownst to plaintiff) employed by National Grid LLC but who was driving a vehicle regaistered to the Island Power Authority (LIPA). At the time he filed suit, plaintiff did not know National Grid was the employer, and assumed LIPA was, and thus he sued only the driver and LIPA. (National Grid and LIPA had a contractual arrangement under with National Grid was providing maintenance and operation services for LIPA's electrical infrastructure, which explains why a National Grid employee was driving LIPA's vehicle). For some reason, no notice of claim was served on LIPA prior to suit. More than three years after the accident, LIPA brought a motion to for summary judgment (on the grounds that no notice of claim had been served against it). Plaintiff cross-moved to amend his complaint to substitute National Grid for LIPA as a defendant and, in opposition to the defendants' motion for summary judgment, contended that National Grid, in its agreements with LIPA, had waived its right to indemnification and that, accordingly, LIPA was not entitled to a notice of claim since it could not be held liable. In support of this contention, the plaintiff proffered the Management Service Agreement which appeared to show that LIPA would not have to indemnify National Grid. Supreme Court concluded that, because the defendant driver was operating a vehicle owned by LIPA at the time of the accident, LIPA had a statutory duty, pursuant to General Municipal Law § 50–e(1)(b), to indemnify National Grid and that it was therefore entitled to a notice of claim. It further found that, even if National Grid LLC had waived indemnification via the agreement, a notice of claim was still required as a result of LIPA's statutory duty to indemnify. Accordingly, the court granted the defendants' motion for summary judgment dismissing the complaint and denied the plaintiff's cross motion for leave to amend his complaint. The Appellate Division reversed, indicating that the summary judgment motion was premature, that plaintiff needing more discovery on the exact relationship between the driver, LIPA and National Grid. The Appellate Division also allowed the claim against National Grid to proceed, even though it had not been named in the lawsuit within three years of the accident, based on the relation back doctrine.

2. Not Required for Sheriff (unless there is a statutory duty to indemnify)

Berardi v Niagara County, 147 A.D.3d 1400, 47 N.Y.S.3d 544 (4th Dep't 2017). Inmate at county jail sued Sheriff after being sexually assaulted and subjected to verbal sexual harassment by an employee of sherrif when he was providing medical services to inmates at the jail. Court held that plaintiff was not required to file a notice of claim or comply with General Municipal Law §§ 50–h and 50–i prior to the commencement of the action against the Sheriff. Nevertheless, the amended complaint failed to state a cause of action against the Sheriff. It is well settled that a principal or employer may be vicariously liable for the tortious acts of its employees only if those acts were "committed in furtherance of the employer's business and within the scope of employment" and the sexual assault perpetrated was not an act committed in furtherance of the Sheriff's business and was "a clear departure from the scope of employment".

Villar v Howard, 28 N.Y.3d 74, 64 N.E.3d 280 (2016). Pretrial detainee brought action against county sheriff, seeking damages for injuries he sustained as result of having been sexually assaulted twice by another inmate in county jail. He claimed the sheriff was negligent in the way he ran and supervised the jail, which caused the incident. The main issue on the appeals was whether plaintiff was required to serve a

dissalows an action against ***individuals*** who have not been named in a notice of claim. In contrast, the Appellate Division, Third and Fourth Departments have held that naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants. Here, the Second Department agrees with the Third and Fourth. General Municipal Law § 50–e(2) requires that "[t]he notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable." Listing the names of the individuals who allegedly committed the wrongdoing is not required. Accordingly, the Supreme Court should not have granted dismissal of plaintiff's second and third causes of action, alleging common-law false arrest and malicious prosecution, respectively, insofar as asserted against the individual officers.

Young v New York City Health & Hosps. Corp., 147 A.D.3d 509, 48 N.Y.S.3d 316 (1st Dep't 2017). Upon summary judgment motion, the court correctly dismissed the complaint against the defendant-individual doctors because (under the First Department's rule) they were subject to notice of claim requirements and were not named in the notice of claim. The Hospital also got out: Plaintiff's service of a notice of claim on the City of New York, through the City Comptroller's Office, did not constitute service upon the hospital, a separate public entity. Because the time within which to commence an action against the hospital had expired, the motion court "lacked the power to authorize late filing of the notice". Two of the doctors, however, were not entitled to dismissal of the complaint on summary judgment. There was a question of fact as to whether these doctors were employees of the hospital and thus whether a notice of claim was required as against them.

5. N/C Required Not Just for Torts When Suing County

Sager v County of Sullivan, 145 A.D.3d 1175, 41 N.Y.S.3d 443 (3rd Dep't 2016). Plaintiff commenced an action against defendant County, his former employer, asserting a claim for improper termination from his position as Deputy Commissioner of Social Services in violation of Civil Service Law § 75–b, the Public Sector Whistleblower Law. He did not first serve a notice of claim, and the issue was whether he should have. Although this was not a "tort" action, General Municipal Law § 50–e, as applicable to counties pursuant to County Law § 52, provides that "[a]ny claim ... against a county for damage [or] injury ... and any other claim for damages arising at law or in equity, alleged to have been caused ... by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with [General Municipal Law § 50–e]". Thus a notice of claim was a condition precedent to the suit. Plaintiff's reliance on appellate decisions involving complaints asserting a Civil Service Law § 75–b or similar claims against cities, in which the courts have ruled that the filing of a notice of claim is not required were misplaced because the more narrow notice of claim provisions of General Municipal Law §§ 50–e and 50–i apply, limiting the requirement for notices of claim to "tort" claims (General Municipal Law § 50–e[1][a]) or claims for "personal injury, wrongful death or damage to real or personal property" (General Municipal Law § 50–i[1]). By comparison, County Law § 52 applies to the claim against defendant, a county, and mandates notices of claim in a much broader scope of matters than the General Municipal Law, requiring that a notice of claim be filed for "[a]ny claim ... against a county for damage" or "any other claim for damages arising at law or in equity". Case dismissed.

B. 90-Day Time Period Tolled For Continuous Treatment

Hill v New York City Health & Hosps. Corp., 147 A.D.3d 430, 47 N.Y.S.3d 267 (1st Dep't 2017). This case is a reminder that the continuous treatment doctrine tolls the time to serve a notice of claim. Note, however, that the 90-day period is not tolled for infancy, disability, etc., though those may somethimes (but not always) form the basis for a "reasonable excuse" for the delay in serving the notice of claim.

Jianfeng Jiang v. Xue Chao Wei, 54 N.Y.S.3d 278, 54 N.Y.S.3d 278 (1st Dep't 2017). In this medical malpractice action, Court rejected plaintiff's contention that certain visits were part of a continuous course of treatment such that the statutory period for filing a notice of claim was tolled. Although it was clear that the municipal hospital anticipated further treatment at the time of discharge, it was likewise clear that plaintiff did not anticipate any, given his failure to show up for follow-up appointments and his exclusive reliance on codefendant acupuncturist who plaintiff believed to be a licensed physician for treatment during the interim period. Plaintiff's actions indicated an intention to discontinue his relationship with the defendant hospital; his return visit must therefore be deemed a "renewal, rather than a continuation, of the physician-patient relationship".

C. Defects, Insufficiencies and Problems in The Notice of Claim

1. Theory Sufficiently Alleged?

Barone v Town of New Scotland, 145 A.D.3d 1416, 44 N.Y.S.3d 267 (3rd Dep't 2016). Resident brought action against town for injuries he sustained while helping town employees unload wood chips to his home. The threshold issue here pertains to the sufficiency of the notice of claim, which defendant argued failed to provide notice of plaintiff's "negligent supervision" claim and appeared to allege only a "defective tailgate" claim. The notice of claim spoke to the injury having been caused by a defect in the tailgate of the truck that was being hauldrolically lifted to dump wood chips on plaintiff's premises. At his 50-H, plaintiff acknowledged there was no defect in the tailgate that contributed to his injury. That said, although the notice of claim did not specify any "negligent supervision" of the operation, it did specify the date and time of the accident, as well as the nature of plaintiff's injuries, and spoke to defendant's "duty to supervise" the operation of the dump truck. Court held that the notice of claim, coupled with plaintiff's testimony at the General Municipal Law § 50–h hearing, adequately apprised defendant as to the theory of liability and was thus sufficient to enable defendant to investigate the claim.

Puello v. New York City Housing Authority, 150 A.D.3d 1164, 55 N.Y.S.3d 355 (2nd Dep't 2017). Paintiff's notice of claim alledged that while walking down a ramp in the lobby of a building owned and controlled by the defendant, she "was caused to slip and fall and/or trip and fall due to water flooding and/or leaking which was left by the [defendant] all throughout the lobby area of the premises ... [and] due to the defective, water logged ramp, causing her body to strike the ramp and floor." Plaintiff clarified at the General Municipal Law § 50–h hearing that she fell not because the ramp was wet, but because the ramp to the lobby "wobbled" and "moved," which caused her to fall. Court held that the notice of claim sufficiently described the nature of the plaintiff's claim, as well as the time, place, and manner in which the claim arose. The notice of claim had identified the cause of the plaintiff's fall as "the defective, water logged ramp," which led to an inspection of the ramp. Defendant's motion to dismiss denied.

DeGroat v City of New York, 148 A.D.3d 670. 48 N.Y.S.3d 495 (2nd Dep't 2017). The infant plaintiff was injured when a vehicle in which she was a passenger left the roadway and struck a tree. Plaintiff alleged a

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dip or depression in the roadway caused the driver to lose control of the vehicle, resulting in the accident. The defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to correctly identify the accident location in the notice of claim and for failure to plead prior written notice, or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against them on the ground that they lacked prior written notice of the alleged defect pursuant to Administrative Code of the City of New York § 7–201(c)(2) (hereinafter the Pothole Law). Defendants failed to establish, prima facie, the absence of any written notice or acknowledgment of the alleged dangerous condition. And there were no grounds to dismiss the complaint insofar as asserted against them for failure to accurately identify the location of the accident in the notice of claim. The plaintiffs consistently maintained that the accident occurred on Bay Street, at the northwest corner of the intersection with Slosson Terrace, and the fact that one of the individual defendants disputed the location of the accident during her deposition did not conclusively establish that the information contained in the notice of claim was incorrect.

2. Failure to Raise Derivative Claim in the Notice of Claim

Gonzalez v Povoski, 149 A.D.3d 1472, 53 N.Y.S.3d 423 (4th Dep't 2017). Infant plaintiff was struck by a car in the vicinity of some excavation work being carried out by defendant Village. Village demonstrated its entitlement to summary judgment dismissing the mother's derivative claim on the ground that the derivative claim was not set forth in the notice of claim served upon the Village. A claimant cannot raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that change the nature of the earlier claim or assert a new one. (NOTE: As indicated in the *Darrin* case immediately below, however, an application to serve a late notice of claim to allege a spouse's derivative claim will be almost certainly granted if the defendant had timely actual notice of the injured spouse's claim).

Darrin v. County of Cattaraugus, 151 A.D.3d 1930 (4th Dep't 2017). Plaintiffs, injured wife and derivative claimant husband, both applied to serve a late notice of claim for wife's injuries and husband's derivative claims. Defendant opposed the motion on the grounds that it did not receive actual knowledge of the facts constituting the husband's derivative claim because it did not receive knowledge of the damages claimed by the husband (although it had timely notice of the claims and injuries of the wife). Motion Court granted wife's petition to late-serve, but denied the application as to the husband (for his derivative claim). Appellate Division finds this result logically flawed. That's because derivative causes of action are predicated upon "exactly the same facts" as the injured party's claims. As a result, where it has been determined that a municipal defendant received timely notice of the injured claimant's claims, there can be no claim of prejudice to the defendant resulting from a late notice of a derivative claim. Thus, both applications granted.

D. Notice of Claim Requirement Waived or Equitably Estopped

Konner v New York City Tr. Auth., 143 A.D.3d 774, 39 N.Y.S.3d 475 (2nd Dep't 2016). Subway doors closed on plaintiff's hand. Plaintiff's attorney served a timely notice of claim together with a cover letter on the Metropolitan Transit Authority (MTA) (She should have served it on the New York City Transit Authority [NYCTA], a separate entity, which was the proper defendant). Approximately a month after the notice of claim was served, the plaintiff's attorney received a letter from the NYCTA requiring plaintiff to appear for a 50-h hearing. But this correspondence bore no letterhead, and did not indicate whether it was from the MTA or the NYCTA. Although this letter directed the plaintiff to appear at the "office of the Authority," it did not state which "Authority", the MTA or the NYCTA. After the 50-h hearing, the

of NYCHA." To the contrary, the notice of claim document properly listed both the "Comptroller of the City of New York" and "The New York City Housing Authority," because the plaintiff was also filing a claim against the City of New York. Had the envelope been rejected by NYCHA, the plaintiff would have been notified that NYCHA did not receive the notice of claim, and thereby provided an opportunity to resend the notice of claim or, if necessary, seek leave to serve a late notice of claim. Under these circumstances, the Court found that tthe envelope was properly addressed within the meaning of General Municipal Law § 50–e(3)(b) and the plaintiff properly served the notice of claim upon NYCHA within the requisite 90–day statutory period. Accordingly, motion to dismiss complaint denied and motion to deem the notice of claim sent to NYCHA granted. There was a dissent opining that "the plaintiff failed to properly address his notice of claim to the proper municipal designee as required by statute, and the certified mail receipt card was signed by an employee of the Comptroller of the City of New York, the plaintiff failed to fulfill the purpose and intent of the statute of affording NYCHA an opportunity to investigate the claim".

2. Failure to Object to Late Service Does Not Constitute Waiver

Fixter v County of Livingston, 143 A.D.3d 1294, 38 N.Y.S.3d 506 (4th Dep't 2016). Plaintiff concedeed that she served an untimely notice of claim without first obtaining leave of the court, which makes it "a nullity, requiring dismissal of the complaint". Defendants' failure to reject plaintiff's late notice of claim did not constitute a waiver of the defense of failure to serve a timely notice of claim.

II. LATE SERVICE OF NOTICE OF CLAIM

A. Late-Service of Notice of Claim Without Leave of Court Is Nullity

Mosheyev v New York City Dept. of Educ., 144 A.D.3d 645, 39 N.Y.S.3d 832 (2nd Dep't 2016). Plaintiff's service of a late notice of claim upon the defendant New York City Department of Education (hereinafter the DOE) was a nullity because it was made without leave of court. As the plaintiff failed to seek leave to serve a late notice of claim or to deem the notice of claim timely served nunc pro tunc before the statute of limitations expired, the Supreme Court properly granted that branch of the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint.

B. Permission to Serve Notice of Claim Cannot Be Granted Beyond SOL

Lubin v. City of New York, 148 A.D.3d 898, 50 N.Y.S.3d 405 (2nd Dep't 2017). Plaintiff, a passenger in a motor vehicle which struck an open manhole, sought leave to serve a late notice of claim the City and City DOT within the Statute of Limitations. The petition was denied. Later, after the SOL expired, plaintiff brought a motion for leave to renew the petition. Court held that a motion to renew a prior timely petition for leave to serve a late notice of claim, which renewal motion is made after the statute of limitations has expired, is untimely and does not relate back to the original petition. If the relation-back doctrine were to be applied to such a motion, "the [s]tatute of [l]imitations would have no practical effect for it would impose no time constraint on seeking renewal" (Matter of Rieara v City of N.Y. Dept. of Parks & Recreation, 156 AD2d 206, 207). While the statute of limitations was tolled from the time the petition was filed until the entry of the order denying the petition, that toll was insufficient to render the motion to renew timely.

C. Application to Late-Serve a Notice of Claim Must Include the Proposed Notice of Claim

Bethune v Nassau Univ. Med. Ctr. (NUMC), 149 A.D.3d 798, 49 N.Y.S.3d 909 (2nd Dep't 2017). The action for medical malpractice was properly dismissed on the ground that the plaintiff failed to serve a

staff, by its acts or omissions, inflicted any injury on" the plaintiff. Plaintiff also failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for the lengthy delay. Even assuming plaintiff met its initial burden to show that the late notice would not substantially prejudice defendant, upon consideration of the balance of the relevant factors the application was denied.

Raut v New York City Health & Hosps. Corp., 145 A.D.3d 1049, 44 N.Y.S.3d 479 (2nd Dep't 2016). Plaintiff's mother served an application to late-serve a notice of claim for her infant nearly three years after he was born, alleging medical malpractice. Application denied because plaintiff failed to demonstrate that the Hospital had actual knowledge of the essential facts constituting his medical malpractice claim. Although the relevant medical records indicated that the mother had suffered an asymptomatic cervical polyp during her pregnancy and that her cervix was friable, they did not suggest that the plaintiff's preterm delivery was attributable to the Hospital's alleged malpractice in failing to treat those conditions. Consequently, the entries in the Hospital's records did not equate with knowledge of the facts underlying the plaintiff's claim. In addition, the plaintiff did not offer an adequate excuse for the failure to serve a timely notice of claim.

c. "Actual Knowledge" of City defendant Gained through Police Reports or Police Involvement in the Incident

Matter of Jaffier v City of New York, 148 A.D.3d 1021, 51 N.Y.S.3d 108 (2nd Dep't 2017). Plaintiff was a passenger in a car struck by another car operated by a detective for the NYPD and owned by the NYPD. Upon plaintiff's application to late-serve a notice of claim, the Court held the City acquired timely, actual knowledge of the essential facts constituting the claim. Although a police report regarding an automobile accident does not, in and of itself, constitute notice of the claim to a municipality, where the municipality's employee was involved in the accident and the report or investigation reflects that the municipality had knowledge that it committed a potentially actionable wrong, the municipality can be found to have notice. Here, the NYPD responded to the scene and conducted an investigation into the facts and circumstances surrounding the accident. Indeed, the police accident report specifically noted that plaintiff, as well as the driver of the vehicle in which she was a passenger, made statements alleging that the detective was liable. The police accident report also noted that the plaintiff was injured and that a copy of the report was being provided to the Office of the Comptroller, as well as the Motor Transport Division and Personal Safety Unit of the NYPD. Thus, the overall circumstances supported an inference that the City effectively received actual notice of the essential facts constituting the claim. These same facts showed there was no substantial prejudice to the City in maintaining a defense. Motion to late-serve granted.

Cuccia v. Metropolitan Trans. Authority, 150 A.D.3d 849, 55 N.Y.S.3d 83 (2nd Dep't 2017). Plaintiff contended that the MTA acquired actual knowledge of the essential facts of the claim by virtue of a police accident report prepared by an MTA Police office. However, neither the police accident report, nor the incident report, which indicated that no injuries were reported, provided actual notice of the facts constituting the claim that plaintiff sustained serious injuries as a result of the MTA's negligence. Further, plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The plaintiff failed to demonstrate through admissible medical evidence that she was incapacitated to such an extent that she could not have complied with the statutory requirement to serve a timely notice of claim. Finally, plaintiff failed to come forward with "some evidence or plausible argument" that the MTA would not be substantially prejudiced in maintaining a defense on the merits as a result of the lengthy delay (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 466).

d. "Actual Knowledge" Gained through School Records

D.M. v. Center Moriches Union Free School District, 151 A.D.3d 970, 54 N.Y.S.3d 161 (2nd Dep't 2017). Infant injured in gym class applied for leave to serve a late notice of claim almost a year after his injury. Plaintiff failed to establish that the School District acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter. Although a medical claim form was prepared and submitted to the School District four days after the accident, it merely indicated that the infant lacerated his eyebrow and fractured his wrist when he fell after hanging from a pull-up bar during physical education class. Where, as here, the incident and the injury do not necessarily occur only as the result of fault for which the School District may be liable, the School District's "knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim". Also, the medical claim form did not provide the School District with actual knowledge of the claim inter alia, that it was negligent in its ownership, operation, management, maintenance, and control of the area where the accident occurred, that it was negligent in its hiring, training, and supervision of its employees and agents, or that its employees were negligent in supervising the injured infant and responding to the accident. Furthermore, plaintiffs failed to demonstrate a reasonable excuse for the delay. Finally, as to the issue of substantial prejudice, plaintiff presented no evidence or plausible argument that their delay in serving a notice of claim did not substantially prejudice the School District in defending on the merits.

Matter of A.C. v West Babylon Union Free Sch. Dist., 147 A.D.3d 1047, 48 N.Y.S.3d 422 (2nd Dep't 2017). Student collided with another child during recess. Plaintiff failed to show that the school district obtained actual knowledge of the essential facts constituting the claim within 90 days after the incident or a reasonable time thereafter. While a medical claim form was prepared during the week of the incident and signed by the principal or a designated school authority, this form, which merely indicated that the infant was injured when another student collided into her during recess, did not provide the school district with actual knowledge of the claim that the school failed to properly monitor and supervise the students during school recess. Moreover, plaintiffs did not demonstrate a reasonable excuse for the failure to serve a timely notice of claim. The infant's mother failed to submit any evidence to support her allegations that the delay was attributable to the fact that she was more concerned about dealing with her daughter's alleged injuries than with retaining an attorney. Finally, as to the issue of substantial prejudice, although the conditions of the accident scene had not changed, this was irrelevant to the claim that the district was negligent in its supervision of students during a noon recess, and, thus, to the issue of substantial prejudice as well. Plaintiff failed to present any evidence or plausible argument that the defendant had not been substantially prejudiced by the delay, and thus defendant never became required to make "a particularized evidentiary showing" that they were substantially prejudiced (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d at 467, 45 N.Y.S.3d 895, 68 N.E.3d 714).

Matter of Turlington v Brockport Cent. Sch. Dist., 143 A.D.3d 1247, 39 N.Y.S.3d 338 (4th Dep't 2016). Mother brought application for leave to serve late notice of claim against school district for injuries that her daughter sustained as result of violation of order of protection one year earlier. The Order required that one of the school district's students stay away from school attended by daughter. In support of her application, claimant presented evidence that defendant was aware of the order of protection and argued this this showed defendant had "actual knowledge" of the claim. However, she failed to meet her burden of establishing that defendand had actual knowledge that her daughter sustained any *injury* as a result of any violation of the order of protection. She did not apprise the District of the injuries until she served a proposed notice of

excuse: Plaintiff offered only the fact that he was an infant at the time he was diagnosed with herpes. He did not demonstrate any specific nexus between his infancy and the delay. But plaintiff nevertheless was granted permission to late serve against one of the defendants, Salamanca. An excuse is not needed when the defendant had actual notice of the essential facts of the claim within 90 days or a reasonable time thereafter. Salamanca (plaintiff's school) had notice of his Herpes diagnosis with the 90-days (though Akron, which hosted the tournament, did not). Both school districts became aware of a herpes outbreak affecting other wrestlers in the same tournament and another student had timely filed a notice of claim based on the same herpes outbreak against both districts, but only Salamanca knew about *plaintiff's* diagnosis. Akron did not find out about *plaintiff's* diagnosis until it received his application to late serve. The Court found that, from this, one of the two school districts, Salamanca, had actual knowledge of the essential facts within the 90-day time period, and was not prejudiced by this plaintiff's 13 month delay. As for Akron, plaintiff here established, at most, that, Akron had *constructive* knowledge of the claim, which was insufficient. Actual knowledge of the claim is the most important factor, and is accorded "great weight" in determining whether to grant leave to serve a late notice of claim. Even if Akron suffered no prejudice from the delay, Court concluded that the lower court abused its discretion in granting claimant's application for leave to serve a late notice of claim against Akron. **(NOTE: this case was decided pre-*Newcomb*. Would the result have been different had it been decided after Newcomb?)**

Maldonado v. City of New York, 152 A.D.3d 522 (2nd Dep't 2017). The line of duty injury report and unusual occurrence report prepared on the date of the accident were insufficient to provide the defendants with actual knowledge of the essential facts underlying the sanitation worker's claim. These reports merely indicated that plaintiff was injured when his left foot got stuck in the grate of a step of a spreader as he was descending it, and made no reference to the claims listed in the proposed notice of claim, inter alia, that the "step" grate was defective and the defendants were negligent in their ownership, operation, maintenance, management, inspection, and control of the subject vehicle. Further, plaintiff presented no "evidence or plausible argument" that his delay in serving a notice of claim did not substantially prejudice the respondents in defending on the merits (Newcomb v. Middle Country Cent. Sch. Dist).

2 "Reasonable Excuse" for Late service

a. Lack of Reasonable Excuse Should Not Be Sole Grounds for Denying Application.

Brege v Town of Tonawanda, 148 A.D.3d 1792, 51 N.Y.S.3d 772 (4th Dep't 2017). Plaintiff moved for permission to file late notice of claim against town for defamation, malicious prosecution, false arrest and false imprisonment. The motion court denied the motion based solely on plaintiff's failure to provide a reasonable excuse for the delay. Appellate Division held that Supreme Court abused its discretion in denying the application based *solely* on plaintiff's failure to provide a reasonable excuse for the delay. Defendant had actual knowledge of the essential facts underlying those claims within the 90–day period. Application to late serve granted.

b. Medical Condition as Reasonable Excuse

Matter of Ramos v Board of Educ. of the City of N.Y., 148 A.D.3d 909, 49 N.Y.S.3d 539 (2nd Dep't 2017). Parent's excuse for the delay was that she was consumed with the infant's medical care and thus unable to serve a timely notice of claim. Court held this does not constitute a reasonable excuse unless it is supported by evidence demonstrating that the delay was directly attributable to the infant's medical condition.

entity might have constituted a reasonable excuse to support a motion for leave to serve a late notice of claim made within the available one–year–and–90–day statute of limitations, the plaintiff never made such a timely motion. To the extent that the plaintiff's cross motion could be deemed an application to serve a late notice of claim against CUNY, as the one–year–and–90–day statute of limitations has expired, the Supreme Court lacked the authority to extend the time to file a notice of claim beyond the statutory time limit for the asserted claim. Case dismissed.

e. "Ignorance of Notice of Claim Requirement" Is No Excuse

Humsted v New York City Health & Hosps. Corp., 142 A.D.3d 1139, 37 N.Y.S.3d 899 (2nd Dep't 2016). The plaintiff failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. The plaintiff's ignorance of the notice of claim requirement is not a reasonable excuse. The plaintiff also failed to offer any proof to show that either the defendants acquired actual knowledge of the essential facts constituting the claim within the 90–day statutory period or within a reasonable time thereafter. The plaintiff provided only her own unsubstantiated contentions and those of her attorney regarding the contents of a police accident report and her medical records. The plaintiff also failed to establish that the delay in serving her notices of claim would not substantially prejudice the respondents in maintaining their defenses on the merits with respect to the claims. Application denied.

Tate v. State University Construction Fund, 151 A.D.3d 1865 (4th Dep't 2017). Claimant failed to demonstrate a reasonable excuse for his failure to serve the notice of claim within 90 days of the claim's accrual or within a reasonable time thereafter. A claimant's mistaken belief that workers' compensation is his or her sole remedy does not constitute a reasonable excuse. Appliction denied.

3 Whether Public Corporation Has Suffered "Substantial Prejudice". **NEW RULE REGARDING BURDENS OF PROOF**

Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 N.Y.3d 455, 45 N.Y.S.3d 895 (2016). The issue here involves one of the factors considered in deciding whether to grant an application to late-servev a notice of claim. The specific factor is in the GML is "*whether the public corporation has suffered substantial prejudice from the delay*". The Court here resolves a split in Appellate Division authority regarding which party has the burden of proof to demonstrate that a late notice of claim substantially prejudices the public corporation. While there were decisions in all four departments that placed the burden on the petitioner to show a lack of substantial prejudice, there were also decisions in all four departments that either placed the burden on the public corporation or shifted the burden to the corporation after the petitioner has made an initial showing of a lack of prejudice. The Court resolves the "spilt" by setting forth a new shifting-of-burdens standard for analyzing the factor. The facts of the case are very sad: A 16-year old highschool boy was struck by a hit-and-run vehicle while attempting to cross an intersection near the high school. He suffered severe brain damage from the incident so he was unable to ever testify. The driver fled the scene but was subsequently arrested. Within days, plaintiffs (student's parents) reported details of the accident, including the location and the nature of his son's injuries, to his son's high school. Less than one month later, plaintiffs' counsel asked the police for the accident file, but the police told him that the record could not be supplied until the police investigation of the hit-and-run driver was closed. Unable to obtain the police file, plaintiffs' attorneys had an investigator photograph the accident site within 90 days of the accident. Plaintiffs timely served timely notices of claim on the State, Town, and County, but at that time had no reason to suspect the school district's involvement in the accident. Over the next several months, plaintiff and his counsel repeatedly asked the police department and district attorney for access to

defendant to locate witnesses because, with a new school year, some of the students "might have" graduated and some of the staff might no longer be employeed there. Application to late serve granted (finally!).

Eboni B. v New York City Hous. Auth., 148 A.D.3d 486, 49 N.Y.S.3d 126 (1st Dep't 2017). Mother of infant burned by hot water pipe in his family's apartment brought action against city housing authority. *Although plaintiff did not present a reasonable excuse for the delay in serving a notice of claim, and although defendant did not have actual knowledge of the facts constituting the claim within the statutory period or a reasonable time thereafter, leave to serve a late notice of claim was granted based on other relevant factors (note: This is a highly unusual result and probably was not possible before the Court of Appeals Newcomb case.)* The infant plaintiff was approximately nine months old when he sustained the injuries. Court found that his infancy weighed in favor of granting leave to serve a late notice of claim, regardless of the lack of a nexus between the delay and infancy. In addition, *defendant failed to address plaintiff's showing that defendant would not be substantially prejudiced* by the 10–month delay in seeking leave since the condition of the exposed pipes remained unchanged from the time of the accident. (NOTE: *In the pre-Newcomb world, the defendant did not generally have to prove it was not substantially prejudiced; the burden was on plaintiff to show no substantial prejudice).* Thus, the motion court improvidently exercised its discretion in dismissing the infant plaintiff's claim. Application to late serve granted. To the extent that the complaint stated a derivative claim on behalf of the infant plaintiff's mother, she was not entitled to leave to serve a late notice of claim on her behalf.

Camins v. New York City Housing Authority, 151 A.D.3d 589, 55 N.Y.S.3d 247 (1st Dep't 2017). Pedestrian brought personal injury action against property owner, a city housing authority, alleging negligence regarding trip and fall accident on sidewalk in front of city housing authority's property. Application to file a late notice of claim granted as it was made only 22 days after the statutory deadline had passed. Plaintiff had a reasonable excuse for the delay in that he was in the hospital and then a nursing home, showing that plaintiff was physically incapacitated for 30 days after his alleged accident. Further, plaintiff sustained his initial burden of showing that the late notice of claim would not substantially prejudice defendant, as the record demonstrated that defendant fixed the allegedly defective condition on its premises the day after plaintiff's fall. In response, defendant did not rebut plaintiff's showing of lack of substantial prejudice, and therefore could not convincingly argue that it was prejudiced by any delay in serving the notice of claim. On the contrary, even had plaintiff timely served his notice, the allegedly defective condition would no longer have existed by the time of service, as that condition had already been repaired by the day after the incident. Defendant therefore could not be heard to say that the late notice of claim prejudiced its ability to conduct an investigation of the premises. Similarly, although defendant noted that its security recordings were erased from the database in the normal course of business, it notably failed to mention how often those recordings were actually erased. If recordings were erased, for example, every 30 days, even timely service could have prejudiced defendant, as the recordings would already have been erased even had a notice of claim been timely served 45 days (or even fewer) after the incident. Application to late serve granted.

Matter of Diegelman v City of Buffalo, 148 A.D.3d 1692, 51 N.Y.S.3d 279 (4th Dep't 2017). Police officer and his wife sought leave to serve late notice of claim on city, relating to officer's exposure to asbestos at city-owned properties used by police department. This Court previously held that the application should have been denied as patently without merit on the ground that the claim was barred by General Municipal Law § 207–c, but the Court of Appeals then concluded that the claim was not so barred (Matter of Diegelman v. City of Buffalo, 28 N.Y.3d 231, 43 N.Y.S.3d 803, 66 N.E.3d 673, revg. 129 A.D.3d 1527, 11 N.Y.S.3d 762). The Court of Appeals reversed this Court's Order and remitted the matter"for consideration

claim and that the County would not be prejudiced by the delay in serving the notice of claim. Inasmuch as the County acquired timely, actual knowledge of the essential facts of the claim and actually conducted an investigation, the plaintiff made an initial showing that the County was not prejudiced by his delay in serving a notice of claim. The County nevertheless claimed that it would be prejudiced by the delay because the roadway where the accident occurred has been repaved and because it would be unable to locate witnesses. The County, however, had recognized the need for repairs of the roadway *before* the plaintiff was appointed as administrator, and it issued work orders to repair the roadway only a few days after the plaintiff was appointed. Thus, any prejudice resulting from the changed condition of the road was not caused by the plaintiff's delay in serving a notice of claim. The County also failed to make a showing that any of the witnesses were unavailable.

K.A., ex rel D.A. v. Wappingers Cent. School Dist., 151 A.D.3d 828, 54 N.Y.S.3d 683 (2nd Dep't 2017). A mostly nonverbal 18–year–old with developmental disabilities was sexually assaulted by a bus attendant employed by the defendant School District while traveling between her parent's home and the residential facility where she lived. The bus attendant eventually pleaded guilty to criminal sexual act in the first degree. The motion to late-serve was here granted. Under the circumstances of this case, the School District acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose. Pursuant to her individualized education plan (IEP), the School District transported the child and hired the bus attendant who sexually assaulted her during the course of his employment. Thus, an employee of the School District was not only "directly involved" in the incident but he committed the intentional tortious conduct giving rise to the claim. Further, the School District itself conducted the investigation that yielded the bus attendant's admission of abuse, and reported its findings to the police. Accordingly, the School District acquired timely, actual knowledge of the essential facts constituting the claim, which enabled it to conduct an appropriate investigation. With respect to the issue of whether the School District would have been prejudiced by a late notice of claim, the plaintiffs were not required to make an extensive initial showing, merely "some evidence or plausible argument that supports a finding of no substantial prejudice" (Matter of Newcomb v. Middle Country Cent. Sch. Dist., 28 NY3d 455, 466). Under the circumstances present here, the fact that the School District acquired actual knowledge of the essential facts constituting the claim within only a few weeks of the abuse, coupled with the fact that the notice of claim was served only two days late, demonstrated that a late notice would not have substantially prejudiced the School District.

Ronness v. City of New York, 151 A.D.3d 976, 55 N.Y.S.3d 450 (2nd Dep't 2017). Pedestrian tripped and fell in a tree well. More than five months later, he served a notice of claim on the City of New York and then applied for leave to serve a late notice of claim. The late notice of claim, served upon the City 76 days after the 90–day statutory period had elapsed, was served too late to provide the City with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period. The petitioner also failed to demonstrate a reasonable excuse for her failure to serve a timely notice of claim. Finally, the petitioner failed to make an initial showing that her delay in serving a notice of claim would not substantially prejudice the City in maintaining a defense on the merits (*see, Newcomb*).

Shun Mao Ma v. New York City Health & Hospitals Corp., 2017 WL 3273230 (2nd Dep't 2017). Plaintiff's decedent died at the defendant hospital and, almost a year later, plaintiff filed a notice of claim with the municipal hospital alleging conscious pain and suffering and wrongful death and at the same time applied for permission to late-serve. Plaintiff failed to establish that the defendant had actual knowledge of the essential facts constituting the claim to recover damages for conscious pain and suffering within the

Thus, General Municipal Law § 50–e(6), which "authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" did not apply. Further, General Municipal Law § 50–e(5) (permission to late-serve a notice of claim) does not authorize serving a new (late) where, as here, the limitations period has expired.

Bowers v City of New York, 147 A.D.3d 894, 47 N.Y.S.3d 409 (2nd Dep't 2017) In her verified bill of particulars, the plaintiff alleged that the accident took place on March 3, 2012, at approximately 12:00 a.m. (just after midnight), whereas in her previously filed notice of claim she had alleged it was March 2, at 11:30 p.m. The Transit Authority moved to dismiss the complaint on the ground (among others) that the notice of claim did not apprise it of the correct *date* of the accident. The plaintiff cross-moved pursuant to General Municipal Law § 50–e(6), for leave to amend the notice of claim and the pleadings to reflect that the correct date of the accident as March 3, 2012. In support of her cross motion, she submitted, inter alia, a police department aided report containing a March 3, 2012, date and a pre-hospital care report summary indicating that an ambulance was dispatched shortly after midnight on the morning of March 3, 2012. The The Court denied the Transit Authority's motion to dismiss and granted the plaintiff's cross motion. Court noted that "mere minutes" constituted the difference between whether the plaintiff's fall occurred on March 2, 2012, or March 3, 2012. There was no indication that the date originally set forth in the notice of claim was set forth in bad faith, and the Transit Authority did not demonstrate any actual prejudice.

IV 50-H EXAMINATION ISSUES

Doe v. Onondaga County, 151 A.D.3d 1743, 53 N.Y.S.3d 847 (4th Dep't 2017). Plaintiff sued County for injuries that she sustained as a result of her placement in a foster home where she was subjected to sexual abuse. Defendant's motion to dismiss the claims based plaintiff's alleged failure to comply with their demand for a hearing pursuant to GML § 50–h was denied. Plaintiff complied with the statute inasmuch as, after defendants demanded a General Municipal Law § 50–h hearing, she requested and was granted an adjournment of the hearing. It was incumbent upon them to reschedule the adjourned hearing.

V DISCOVERY ISSUES INVOLVING MUNICIPALITIES

Abate v. County of Erie, 152 A.D.3d 177, 54 N.Y.S.3d 821 (4th Dep't 2017). An unusually intense winter storm stranded plaintiff's decedent inside his vehicle during early morning hours. The decedent called 911 at 3:50 a.m. to report his predicament. The dispatcher instructed the decedent to remain in his vehicle, and assured him that help would be forthcoming. Help did not arrive for almost 24 hours, and by that time the caller was dead, still inside his vehicle. Plaintiff, the estate representative, sued the County and County Sheriff's Office alleging the decedent's death resulted from defendants' negligent failure to rescue him during the storm. As for the required "special duty", plaintiff claimed decedent's communications with defendants' 911 service formed that duty. In the course of discovery, plaintiff sought disclosure of 911 records concerning the decedent and his plight but also *sought disclosure of 911 records pertaining to other stranded persons at eight specified locations in the decedent's vicinity*. Defendants voluntarily disclosed the decedent's 911 records, but they refused to disclose any 911 records pertaining to other stranded persons, relying on County Law § 308(4), which states, in pertenint part, that 911 records "shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services . . .". Defendant argued that, since neither plaintiff nor his lawyer were a member of any of the entities listed in the Statute, the 911 records "shall not be made available to them". Plaintiff moved to compel production. Court here hold that, though the words of this Statute seem to support

Abrahams v. City of Mount Vernon, 152 A.D.3d 632 (2nd Dep't 2017). Infant plaintiff was attacked by a pit bull while visiting his brother who was volunteering at an animal shelter owned and run by the City. It was undisputed that the City operated the Shelter pursuant to a statutory mandate (Agriculture and Markets Law § 114) which required each town or city that issues dog licenses to establish and maintain a pound or shelter for dogs. Court found that the City's act of providing an animal shelter constituted a g*overnmental function* and, therefore, it could not be held liable absent the existence of a special relationship between it and the plaintiffs giving rise to a special duty of care. Here, there was no special relationship as a matter of law between it and the plaintiff. The City's employees at the shelter did not voluntarily assume a duty toward the plaintiff and it did not affirmatively act to place the plaintiff in harm's way (see Sutton v. City of New York, 119 AD3d 851). In any event, the City neither knew nor should have known of any vicious propensities on the part of the dog that attacked and bit the infant plaintiff.

Moore v. Del-Rich Properties, Inc., 151 A.D.3d 1817 (4th Dep't 2017). Infant plaintiff was exposed to lead paint while he was visiting and then residing with his grandmother in an apartment owned by a private landlord. The landlord applied to enroll in the Lead Hazard Control Project (Project), which is a federally-funded grant program designed to address the high rate of lead poisoning in and around defendant City of Buffalo. Employees of defendant City of Buffalo Urban Renewal Agency (BURA) helped manage the Project, and properties enrolled in the Project would receive lead abatement work performed by contractors chosen by the Project. The lead abatement work was performed at plaintiff's apartment but a year later retested at dangerous levels of lead. Plaintiff sued, *inter alia,* the City and BURA for alleged negligent lead abatement work performed. The municipal defendants moved for summary judgment contending their role was "*governmental*" and not "*proprietary*", and thus governmental immunity rules applied, and that plaintiff had no "special relationship" with them and, even if there was a "special relationship, they were immune from suit because their actions were discretionary. The Court held that as a matter of law that defendants' actions were *proprietary* and therefore not subject to governmental immunity. *The acts and omissions of defendants essentially substituted for or supplement traditionally private enterprises. Contrary to defendants' contentions, they did not merely inspect the premises and order that abatement work be performed. They coordinated and oversaw the entire abatement process at plaintiff's residence.* It is well established that maintenance and care related to buildings with tenants is generally a proprietary function. Defendants thus voluntarily assumed the homeowner's duty to remediate the lead paint at plaintiff's residence. Once defendants assumed that proprietary duty, they "also assumed the burdens incident thereto".

Nachamie v County of Nassau, 147 A.D.3d 770, 47 N.Y.S.3d 58 (2nd Dep't 2017). Homeowners brought actions against county and contractors, seeking damages for flooding that damaged their homes after pond owned by county overflowed while County and contractors were performing environmental improvement project. The County failed to show that it was entitled to summary judgment based on its prior written notice statute (see Nassau County Administrative Code § 12–4.0[e]) because plaintiffs alleged in their respective pleadings that it affirmatively created the alleged defect that caused their damages, and it failed to establish, prima facie, that it did not do so. Defendant's qualified governmental immunity defense also failed because, although a governmental entity may be entitled to immunity from liability arising out of claims that it negligently *designed* a sewerage or storm drainage system, *the immunity does not extend to claims that it negligently maintained the* system (see Weiss v. Fote). Here, even assuming the subject project fell within the ambit of a governmental function, the plaintiffs were contending that the County was negligent, inter alia, in its maintenance of the pond and oversight of the dredging operations. Accordingly, defendant was not immune. The County also failed to prove as a matter of law that

jury could rationally conclude that the studies were inadequate and the City's negligence contributed to the accident. The Court of Appeals affirms. Regarding the argument that governmental immunity applied such that plaintiff needed to show a "special duty", the Court noted that there are categories of actions that have long been held to fall definitively within either the proprietary or the governmental end of the spectrum. For example, police and fire protection are examples of long-recognized, quintessential governmental functions. Highway planning, design, and maintenance, by contrast, are proprietary functions, arising from a municipality's "proprietary duty to keep its roads and highways in a reasonably safe condition. In the specific proprietary field of roadway safety, a municipality is afforded only qualified immunity' from liability arising out of a highway planning decision." The Court also addressed the City's argument that that plaintiffs' claims actually arose from an alleged police failure to enforce the speed limit in the area, and that this was not roadway design or maintenance, but rather "police activity" and thus a quintessential government function triggering governmental immunity. The Court disagreed. The determination of the primary capacity under which a governmental agency was acting turns solely on the acts or omissions claimed to have caused the injury. (World Trade Ctr., 17 N.Y.3d at 447, 933 N.Y.S.2d 164, 957 N.E.2d 733). The essence of the complaint was that the City failed to maintain this particular street in a reasonably safe condition, including by failing to implement traffic calming measures that would have reduced speeding on that roadway. Plaintiffs did not allege that the City was negligent in failing to allocate adequate police resources to enforce the speed limit. To the contrary, part of plaintiffs' theory of the case was that although ICU referred the speeding problem to the police for enforcement, the problem was not, and could not be, alleviated solely through police enforcement. The **dissent** found that the City was acting in a *governmental capacity* because plaintiffs claimed that the City failed to prevent unlawful behavior (speeding), and thus that all the "governmental immunity" rules applied, including the need to show a special duty. But the **majority** countered that "it is not the characterization of the behavior sought to be prevented that determines whether the municipality was acting in a proprietary or governmental capacity, but rather the specific act or omission by the municipality claimed to have caused the injury". Although the behavior sought to be prevented (speeding) was unlawful, plaintiffs presented evidence that roadway design changes in the form of traffic calming measures were available to the City to accomplish that purpose. Caveat: The Court left a window open to future municipal defendants by stating, "we do not suggest that a municipality has a proprietary duty to keep its roadways free from all unlawful or reckless driving behavior, [but rather] ***under the particular circumstances of this case*** . . . plaintiffs demonstrated that the City was made aware through repeated complaints of ongoing speeding along [this particular] Avenue, that the City could have implemented roadway design changes in the form of traffic calming measures to deter speeding, and that the City failed to conduct a study of whether traffic calming measures were appropriate and therefore failed to implement any such measures. Finally, as for the City's contention that the driver's reckless and criminal speeding was the sole proximate cause of the accident, and that the jury's conclusion that the City's negligence was a proximate cause of the accident was irrational, the Court disagreed. There was a rational process by which the jury could have concluded that traffic calming measures deter drivers such as this driver from speeding, and that the City's failure to conduct a traffic calming study and to implement traffic calming measures was a substantial factor in causing the accident. Based on the evidence presented at trial, there was a rational process by which the jury could conclude that the ICU studies—which were intended primarily to determine whether traffic control signals were appropriate for particular intersections on this particular Avenue—did not study the "very same" question of risk that was before the jury, i.e., the danger presented by vehicles speeding down the length of the Avenue. In other words, the jury could have reasonably concluded that the ICU studies were "plainly inadequate" because they did not examine the speeding problem of which various local residents and elected officials complained.

assumed control over the ongoing fire. By making affirmative representations to plaintiffs that the fire had been fully extinguished and that it was safe to reenter the home, the Department assumed an affirmative duty to plaintiffs. As for the second and third elements, knowledge on the part of the Department that inaction could result in harm can be reasonably inferred from the circumstances, and the Department's employees undisputedly had direct contact with plaintiffs. With respect to the final element (justifiable reliance), plaintiffs allege that they relied upon the Department's assurances that the fire was completely extinguished in choosing to leave their home unattended for the evening. Under these circumstances, a jury could find that plaintiffs' reliance on the Department's assurances was reasonable and that such assurances "lulled [them] into a false sense of security and ... thereby induced [them] ... to forego other available avenues of protection" with regard to the property (*Cuffy*). As for the governmental immunity defense, the governmental function of fighting fires involves the exercise of judgment and discretion based upon a divergence of factors varying from fire to fire and the urgencies of a particular situation. However, focusing on "the conduct on which liability is predicated" as the law requires, the Court could not conclude as a matter of law that the decisions involved the exercise of "reasoned judgment which could typically produce different acceptable results" (*Tango v. Tulevech*). The negligence asserted by plaintiffs here was the Department's failure to overhaul the area underneath the window well which, according to the Department's own investigation, was the location at which the second fire originated. More specifically, plaintiffs alleged that, in violation of its own standard operating procedures and protocols, the Department failed to remove loose debris and damaged material—including a stack of firewood and the remains of certain lawn furniture—from the area of the window well following the first fire. Also, the firefighters could not remember pulling the burned lawn chair or the wood pile away from the building over the casement window well. Thus, it could not be said that the asserted negligence—failing to remove and fully extinguish a stack of firewood and damaged lawn furniture—was the consequence of an actual decision or choice on the part of the Department (*Haddock v City of NY).* Instead, the proof adduced at this stage of the proceeding showed that the Department had not "made a judgment of any sort" (*Haddock*) in connection with the nonremoval of the debris and damaged material. Thus, defendants did not demonstrate their entitlement to governmental immunity.

Alvarado v. City of New York, 150 A.D.3d 500, 57 N.Y.S.3d 3 (1st Dep't 2017) Plaintiff was assaulted by a neighbor's boyfriend after the police had requested her assistance translating for a domestic dispute. She sued NYC claiming the police failed to protect her and that the boyfriend targeted her due to her involvement in this incident. Court finds no "special duty" established. Even if a jury could have found that defendants told the boyfriend to leave the area and that they told plaintiff that they would be on patrol in the area, and plaintiff justifiably relied on this promise, plaintiff could not have "justifiably relied" on defendants' assurances after the boyfriend returned and asked to borrow her cell phone, and then crossed the street and sat on a bench before returning to attack her. At that point, it was clear that defendants had not prevented the boyfriend from returning and therefore plaintiff did not justifiably rely on the police' promises.

2. Special Duty from Statute

Green v. City of New York, 150 A.D.3d 439, 57 N.Y.S.3d 1 (1st Dep't 2017). Plaintiff was standing on the sidewalk when a taxicab hopped the curb and struck her. The taxi driver had numerous penalty points on his license that might have supported a suspension of his license prior to the accident, and plaintiff alleges that the failure to suspend the driver sooner was the result of a "computer glitch" at defendant Taxi & Limousine Commission. Plaintiff sued the City for failure to enforce their own rules and regulations. However, absent a

further the general goal of protecting the health and safety of persons with developmental disabilities. Thus, the actions, or inactions, in question were governmental in nature. The next question was whether defendant owed the resident a ***special duty***. Plaintiff argued that the requisite special relationship was formed by Statute: Mental Hygiene Law former § 13.07(c), which charged the State agency with ensuring that the care and treatment provided to persons with developmental disabilities were of high quality and that the personal and civil rights of persons receiving such care and treatment were protected. Although the statutory and regulatory provisions were enacted for the benefit of persons with developmental disabilities, a class within which the resident certainly fell, and thus they might appear to create a duty from the State to the plaintiff, the Court found no private right of action was created. The Legislature did not leave residents or their legal guardians without recourse to address those perceived instances in which the State agency did not adequately discharge its duty to protect the personal and civil rights of residents. Indeed, the Legislature created a Commission, which was responsible for, among other things, reviewing and investigating complaints of patient abuse and mistreatment and, where necessary, recommending to the State agency that preventative and remedial actions be taken (Mental Hygiene Law § 45.07[c][1], [3]). Given the detailed statutory scheme of which Mental Hygiene Law § 13.07(c) was a part and the creation of a means by which residents or legal guardians could seek the Commission's independent review of the actions or inactions of the State agency, it was fair to infer that the Legislature considered carefully the best means for enforcing the statutory duties bestowed upon [the Agency], and would have created a private right of action against [said Agency] if it found it wise to do so". Accordingly, claimant failed to demonstrate that defendant owed the resident a special duty. Case dismissed.

D. Discretionary v. Ministerial

Feeney v. County of Delaware, 150 A.D.3d 1355, 55 N.Y.S.3d 737 (3rd Dep't 2017). An angry, violent husband had resisted arrest in a domestic dispute and was taken into custody, subdued and transported by ambulance to a local hospital. While in the ambulance, he was administered a sedative and his hands were handcuffed to the sides of a gurney. The arresting deputy sheriffs followed the ambulance in separate vehicles while another deputy accompanied plaintiff in the ambulance. A State Trooper took over at the hospital where the husband was still belligerent and uncooperative. The State Trooper handcuffed him to a bed. Later, as a physician's assistant approached the bed to provide medical treatment to the husband, he kicked at and injured the PA. In his lawsuit against the county and the sheriff, the injured PA alleged that the husband's legs should have been restrained. Court held that the County defendants did not owe any special duty to plaintiff because plaintiff was not in their custody at the time of his alleged assault on plaintiff. Although plaintiff may have been in the custody of the County defendants while riding in the ambulance, plaintiffs failed to proffer any evidence suggesting that he remained in such custody at the time of his alleged attack on plaintiff. Accordingly, the complaint against the County defendants was dismissed. With regard to the State Trooper, even assuming that triable issues of fact existed as to whether he voluntarily assumed a special duty to protect plaintiff based on his communications with plaintiff and the hospital staff, his *discretionary acts* of not restraining plaintiff's legs and leaving the examination room before the attack took place were protected by governmental immunity. The State Police field manual provides that, when prisoners are not being transported to or from jail, the decision to use leg restraints is left to the troopers' discretion based on the consideration of various factors, such as "the gravity of the offense(s), the temperament of the prisoner, the propensity of the prisoner to attempt to escape, and whether or not assistance is immediately available." Although the State Trooper had access to plastic leg restraints, the undisputed evidence established that, at the time that he left the examination room, the husband was still handcuffed, was "extremely calm" and had allowed a nurse to remove pieces of glass from his feet without

impairments, are unable to manage their own resources or carry out the activities of daily living. Social Services Law § 473(3) provides immunity from any civil liability that might result by reason of providing such services, provided that the municipal employees were "acting in the discharge of [their] duties and within the scope of [their] employment, and that such liability did not result from the willful act[s] or gross negligence" of those employees (Social Services Law § 473[3]). Here, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that they are immune from liability pursuant to Social Services Law § 473(3) by demonstrating that the caseworkers assigned to the plaintiff's decedent acted in the discharge of their duties and within the scope of their employment. In response, the plaintiff failed to raise a triable issue of fact as to whether the decedent's death was the result of willful acts or gross negligence of those caseworkers.

F. Judicial Immunity

Town of Turin v. Chase, 151 A.D.3d 1873, 54 N.Y.S.3d 269 (4th Dep't 2017). Town brought action against former town justice to recover damages arising from alleged mishandling of fines and fees and failure to maintain complete and accurate books and records while in office. Defendant's motion for summary judgment dismissing the complaint was granted on the grounds that the alleged actions and omissions took place within the context of his judicial capacity and thus were cloaked with judicial immunity. None of the acts or omissions alleged in the complaint were outside of defendant's judicial capacity or were beyond the scope of his jurisdiction and thus were protected by judicial immunity.

VII DEFECTIVE ROADWAY DESIGN AND MAINTENANCE

A. Defective Roadway Design – Qualified Immunity

Ramirez v State of New York, 143 A.D.3d 880, 39 N.Y.S.3d 220 (2nd Dep't 2016). Plaintiffs, passengers of a a cargo van with 12 unrestrained passengers drifted into the median of Interstate 87 over the tapered, turned-down portion of a guardrail, and struck a concrete support pillar of a pedestrian bridge, sued the State of New York and the New York State Thruway Authority, alleging liability for not installing a longer guardrail which could have greatly reduced the severity of their injuries. While a municipality owes the traveling public the absolute duty of keeping its highways in a reasonably safe condition and that duty extends to furnishing guardrails, a the State is accorded *qualified immunity* from liability arising out of a highway safety planning decision. To establish qualified immunity, the State must demonstrate "that the relevant discretionary determination by the governmental body was the result of a deliberate decision-making process." Therefore if the decision made by the municipality or was not the product of a governmental plan or study, the doctrine of qualified immunity is inapplicable. Qualified immunity was applied in this case based the State's evidence that the guardrail was designed pursuant to design standards set forth by the New York State Department of Transportation, which were the result of a deliberate decision-making process of the type afforded immunity from judicial interference. Case dismissed.

Warren v Evans, 144 A.D.3d 901, 42 N.Y.S.3d 37 (2nd Dep't 2016). Motorcyclist's estate brought action against county, alleging county's negligence in failing to install appropriate traffic control devices for left turns at intersection. Motorcyclist was attempting to make a left turn into a shopping center at intersection controlled by a traffic light. Intersection had a designated left turn lane, but the traffic light did not have a separate indicator for traffic turning left. County claimed it was entitled to qualified immunity arising out of a highway planning decision. Under the doctrine of qualified immunity, a governmental entity may not be held liable for a highway safety planning decision unless its study of a traffic condition is plainly

Chang v. City of New York, 142 A.D.3d 401, 37 N.Y.S.3d 236 (1st Dep't 2016). Plaintiff motorist sued city for injuries sustained in car accident because the intersection lacked a "stop here on red" sign and a stop bar. Several years earlier, the City had determined that "stop here on red" signs with a stop bar should be placed at the intersection, but at the time of the accident, the "stop here on read" sign had been absent from the intersection for two months (probably knocked down by another vehicle). The Court noted that installation of a traffic control signal, such as a "stop here on red" sign, where it had not previously existed, is a *design* decision, and thus a discretionary governmental function that does not give rise to state liability. However, failure to properly *maintain* signs that are already posted constitutes a highway *maintenance* failure, and is not subject to the governmental immunity rule. The Majority held that in failing to reinstall a previously established traffic control (the "stope here on read" sign) the City breached its nondelegable duty to maintain the roadway in safe condition. As for proximate cause, the plaintiff testified that he had never been to the intersection before the accident and when he started to turn across the median at the intersection, he was "confused" as to whether or not the lights facing eastward traffic on E. 65th Street controlled plaintiff's movements. The Majority held that in light of plaintiff's testimony that he was confused by which lights controlled his movements, a question of fact exists as to whether plaintiff had all the notice of danger that a stop sign would have afforded and as to whether the City's failure to reinstall the required "stop here on red" signs at the intersection was a proximate cause of the accident, even if plaintiff's conduct was also negligent and a proximate cause of the accident. Summary judgment denied.

Johnson v State of New York, 151 A.D.3d 1672, 56 N.Y.S.3d 723 (4th Dep't 2017). Claimant's tractor-trailer rolled over on State Road. Claimant alleged State was negligent in failing to install "rumble strips" in the proper location on the shoulder to properly alert driver of hazard and in failing to repave the entire shoulder, resulting in a two-to-four-inch drop-off in the shoulder. State claimed that claimant's inattention and failure to reduce her speed were the cause of accident. "When the State or one of its governmental subdivisions undertakes to provide a paved strip or shoulder alongside a roadway, it must maintain the shoulder in a reasonably safe condition for foreseeable uses" Claimant's expert opined that the two-to-four-inch drop-off on the highway's shoulder was unsafe and was a contributing cause of claimant's accident, this was credited by the Court. Defendant's expert opined that the placement of the rumble strips was a proper exercise of engineering discretion and was not a proximate cause of claimant's accident, but that claimant's inattention and failure to reduce her speed were significant factors contributing to the accident. This was also credited by the Court. Appellate division affirmed Court of Claims apportionment of 30% liability to Defendant State and 70% to claimant.

Brown v. State of New York, 144 A.D.3d 1535, 41 N.Y.S.3d 628 (4th Dep't 2016). Motorcycle's passenger sued a pickup truck driver and the State on her own behalf and on behalf of the estate of her deceased husband who was driving the motorcycle State for her husband's wrongful death resulting from right-angle motor-vehicle accident with pickup truck in intersection. The Court of Claims dismissed the claims, the Fourth Department reversed and remitted to the lower Court to find whether the State's negligence was a proximate cause of the collision. On remittal, the court found that "the sight restrictions created by the vertical curve ..., when combined with the 55 miles per hour speed limit ..., prevented [the pickup truck driver] from observing [the motorcycle] as [it] approached the intersection on Route 350." The trial court thus concluded that the dangerous condition of the intersection was a proximate cause of the accident. In determining that the pickup truck driver was not negligent, the trial court concluded that he "carefully entered the intersection after looking both ways, but simply was unable to see the motorcycle ... at any time before the accident occurred." The court thus found that the State was 100% liable for the accident. Here, the Fourth Department rejects the State's argument that the trial court's apportionment of liability should be

on some of the wooden poles along Ocean Parkway during the prior 15 years was insufficient to provide notice regarding the specific pole involved in the accident. Case dismissed.

VIII PRIOR WRITTEN NOTICE AND OTHER SIDEWALK/STREET LIABILITY ISSUES

A. Prior Written Notice

Mood v City of New York, 53 Misc.3d 1205, 43 N.Y.S.3d 768 (Queens Co. Sup. Ct. 2016). Pedestrian injured when he tripped over a slab of concrete raised two inches near a Fire Alarm Box. The City claimed no prior written notice of the defect. The City produced a FDNY Electrician's work request which took place two months after the accident, and could not explain what instigated the work request. The plaintiff argued that this lack of explanation precluded summary judgment. However, City was able to show, based on an earlier email correspondence, that the work request was likely due to subsequent discovery of the defect and subsequent repair. Since there was no prior written notice, summary judgment was granted.

Benjamin v City of New York, 55 Misc.3d 1217 (New York Co. Sup. Ct. 2017). On a rainy night, Plaintiff driver lost control of his vehicle and veered from the middle lane of traffic to the left, crashing into a concrete median and then across traffic where it collided with a guardrail rendering him paralyzed. Plaintiff claimed that City: a) had a duty to shore, guard, equip, repair construct and illuminate the roadway at or near the accident location and by not doing so, created a "trap-like condition" on the roadway, b) was negligent in its ownership, maintenance and design of the particular section of guardrail that plaintiff's vehicle encountered on the right hand side of the Parkway after he had collided with the center concrete median; c) was negligent in its maintenance of the catch basins in the roadway which allegedly resulted in an accumulation of water on the roadway; and, d) was negligent in failing to maintain the lane markings on the roadway were deficient and contributed to his accident. As to the guardrails and road design claims, plaintiff's attempts to demonstrate that there were prior similar accidents was lacking; the proof simply did not demonstrate the existence of a dangerous condition that would have triggered the City's obligation to upgrade the roadway to conform to the standards noted by plaintiff and his experts. As for the "turned-down" guardrail, the record failed to show that the City had notice of any safety issues pertaining to it. As to the catch basins and lane markings, which would (unlike the other claims) require prior written notice, the City did not have prior written notice, nor did it fall into any of the exceptions to the prior written notice law, Administrative Code § 7–201(c).

Ragolia v City of New York, 143 A.D.3d 596, 40 N.Y.S.3d 63 (1st Dep't 2016). Bicyclist brought action against city to recover for personal injuries sustained while riding her bicycle through intersection. In support of her motion, Plaintiff's submitted a January 2010 inspection report identifying a roadway defect at a different location in the area. The Court granted summary judgment holding "[A]wareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident."

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

Lewak v Town of Hempstead, 147 A.D.3d 919, 47 N.Y.S.3d 412 (2nd Dep't 2017). Bicyclist claimed he fell when he encountered depression on a roadway maintained by defendant City. Bicyclist claimed city affirmatively created defect when Sewer Maintenance Department opened street. The City claimed it had no prior written notice, nor did it create the defect. Since City did not establish prima facie it did not create the alleged defect, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact. Summary Judgment denied.

defendant "at most established that environmental effects created the alleged defect over time, which is not sufficient to establish the defendant's liability." Therefore written notice was required, of which there was none. Summary Judgment granted.

Cornish v City of Ithaca, 149 A.D.3d 1321, 52 N.Y.S.3d 565 (3rd Dep't 2017). Pedestrian tripped and fell after catching her foot on exposed pipe protruding through the surface of the public walkway alleging that the defective condition was affirmatively created as a result of the walkway surface around the pipe having sunken in or eroded. The Court held that since plaintiff alleged that the defective condition resulted from the sidewalk either sinking or eroding, rather than immediately resulting from action taken by defendant, the affirmatively created defect exception to the written notice law did not apply. While written notice of other nearby defects were made, none applied to this particular defect. As there was no prior written notice, summary judgment was granted.

Arkin v. Village of Owego, 55 Misc.3d 1219 (Tioga Co. Sup. Ct. 2017). Pedestrian fell while walking on a defective sidewalk in Defendant Village. Village moved to dismiss in lieu of answering (CPLR § 3211(a)(7)) arguing that Plaintiff did not allege in its complaint that defendant received prior written notice or any exception. Plaintiffs argued that they alleged the defendant created the defect and cross moved to amend their complaint to add an allegation of prior written notice, and to further allege that the defendant created the defect. The Court held that the allegations in the complaint were of defects that occurred over time, and existed for years, rather than immediate. Dismissal of the complaint was proper. The plaintiffs' motion to amend was accompanied by a proposed Amended Complaint. In the amended complaint, there was no claim of prior written notice to the Defendant, merely actual notice. The proposed complaint also alleged that the village could have created the defect through an affirmative act of negligence by improperly installing the walkway atop tree roots which cause heaving. However, the Court held that these allegations do not amount to *immediate* defects, rather effects that occur gradually over time and therefore, the amended complaint failed to allege prior written notice or an exception to that rule. Case dismissed.

Simpson v City of Syracuse, 147 A.D.3d 1336, 46 N.Y.S.3d 347 (4th Dep't 2017). Pedestrian tripped and fell on a sidewalk owned and maintained by defendant where bricks had become depressed. Pedestrian conceded that the Defendant City had no prior written notice, however plaintiff was unable to present evidence that depression of bricks were present immediately after completion of work following removal of a temporary traffic pole. The affirmative negligence exception to the prior written notice rule does not apply to defects which occurred gradually over time.

Ahern v. City of Syracuse, 150 A.D.3d 1670, 53 N.Y.S.3d 787 (4th Dep't 2017). Pedestrian tripped and fell on a broken curb that he claimed had been caused by excavation work. Plaintiff alleged that the defendants affirmatively created the defect. Defendant claimed any defect occurred over time after they had performed the work. *Plaintiff countered that he often had occasion to pass through this area on foot and had observed, immediately after the excavation work, that the curb had been damaged.* Plaintiff also testified that no other repairs took place at the site from the time of the excavation until his fall approximately six months later. The Court held that plaintiff created an issue of fact that the Defendant's acts immediately resulted in the existence of a dangerous condition. Summary Judgment was denied.

D. Snow And Ice And Affirmative Creation

Larenas v Incorporated Vil. of Garden City, 143 A.D.3d 777, 39 N.Y.S.3d 204 (2nd Dep't 2016). Pedestrian slipped and fell on sidewalk with a dangerous ice condition. Plaintiff claimed the condition was caused by

Additionally, Defendant failed to submit evidence establishing the precise location of the debris basin to determine whether or not it was within the metes and bounds of a "City street". Summary Judgment denied.

Chance v County of Ulster, 144 A.D.3d 1257, 41 N.Y.S.3d 313 (3rd Dep't 2016).Bicyclist fell from bicycle riding along portion of State Road maintained by Defendant County. She alleged she fell as a result of improper maintenance of the road and failure to provide adequate road shoulder. Plaintiff claimed that County's prior written notice law did not apply to a State road, however, as the code, Ulster County Code § 258–2, encompasses defects in "any road" within the County, the prior written notice law applied. Plaintiff also claimed that defendant created the condition through affirmative act and that the dangerous pavement edge drop off that caused the fall resulted from a lack of monitoring and maintenance. This did not qualify as an affirmative act as it did not immediately result from defendant's actions. As there was no prior written notice, the case was dismissed.

IX NEW YORK CITY SIDEWALK LAW

A. "Sidewalk" v. "Curb" v. "Pedestrian Ramp"

Martin v Rizzatti, 142 A.D.3d 591, 36 N.Y.S.3d 682 (2nd Dep't 2016). Pedestrian tripped and fell after stepping into a hole in a sidewalk abutting a storefront deli. The premises were owned by the defendant Rizzatti, and the storefront was leased by a Deli. The plaintiff commenced an action against Rizzatti and the deli, and a separate action against the City of New York. The City argued that it had no prior written notice of the alleged defect and that the owner of the premises was responsible for sidewalk defects pursuant to Administrative Code § 7–210. The Plaintiff argued that the City failed to establish that the subject defect was not part of a "curb-cut/pedestrian ramp," such that the City's liability was not transferred to the abutting property owner pursuant to Administrative Code of the City of New York § 7–210. The Court held that the City established its entitlement to summary judgment by submitting evidence that the plaintiff fell on an alleged defect located on the sidewalk and not on the pedestrian ramp and therefore Administrative Code § 7–210 precluded City's liability.

Puello v Georges Units, LLC, 146 A.D.3d 561, 46 N.Y.S.3d 28 (1st Dep't 2017). Pedestrian tripped on defect near corner pedestrian ramp. City maintains control over corner pedestrian ramp pursuant to Administrative code § 7-210[a]. Defendant City claimed defect was on sidewalk and not pedestrian ramp and supported claim through photos and plaintiff testimony. Co-Defendant private owners of sidewalk claimed that "pedestrian ramp" definition encompasses the landing area on top of the ramp and entire corner quadrant. Court held this to broad a definition and held that the area in which the plaintiff fell was considered the co-defendant's sidewalk. Summary judgment granted.

B. Abutting Land-Owner Liability

Koronkevich v Dembitzer**,** 47 A.D.3d 916, 48 N.Y.S.3d 188 (2d Dept. 2017). Pedestrian tripped and fell on a sidewalk defect abutting premises owned by private defendants. Plaintiff sued private defendants and City. Private defendants claimed that they were exempt from liability pursuant to Administrative Code Section 7-210 as owners of a two-family residential real property, which was entirely occupied by them and their children, and used exclusively for residential purposes. Plaintiff claimed that since private defendant used basement as office space, City was responsible. 7-210 of the Administrative Code of the City of New York does not shift liability from City when the premises is "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (*see* Administrative Code of City of NY § 7-210 [b]). Court held the defendants' partial use of the basement

a Big Apple map with a "key to map symbols" served upon the New York City Department of Transportation in 2003. Plaintiff contended that the Big Apple map constituted prior written notice of the defect since it contained a straight vertical line in the area where the accident occurred. According to the key to the Big Apple map symbols, a straight vertical line denoted a "[r]aised or uneven portion of sidewalk." The big apple map's indication of raised or uneven portion of the sidewalk did not give notice of what plaintiff tripped on which broken sidewalk "something like a hole." Case dismissed.

E. Special Use Exception

Spencer v City of New York, 149 A.D.3d 557, 52 N.Y.S.3d 342 (1st Dep't 2017). Pedestrian claimed he fell when his foot became caught in a crack on a sidewalk in front of a building owned by private defendant. The crack was next to a metal plate, or marker, owned by the City. City established that it did not have prior written notice of the alleged defective sidewalk and that none of the exceptions to the statutory rule requiring such notice applied nor did the marker on the sidewalk confer a special use or benefit upon the City, and therefore the "special use" exception does not apply. Summary Judgment granted.

Chambers v City of New York, 147 A.D.3d 471, 47 N.Y.S.3d 17 (1st Dep't 2017). Bicyclist sued city alleging bicycle's front wheel came into contact with gravel located around large hole near manhole cover. Bicyclist claimed that city's ownership of manhole cover, which allows city access to sewer system to perform maintenance and repairs, provided city with a "special benefit" from the property unrelated to public use, therefore falling into exception of prior written notice requirement. Court held this does not provide city with "a special benefit" from that property unrelated to the public use and therefore Administrative Code § 7–201(c)(2) applies, requiring written notice. Summary Judgment granted.

F. 15-Day Grace Period

Brown v. City of New York, 150 A.D.3d 615, 56 N.Y.S.3d 67 (1st Dep't 2017). Pedestrian tripped and fell over the stump of a pole sign protruding about three to four inches from the sidewalk near the bus stop. Defendant city claimed lack of prior written notice of the sidewalk defect, that the sign was in good condition two years before the accident; and that the Defendant City received a citizen complaint through 311 less than 15 days before plaintiff's accident, repairing it a few days after her accident. The Court held that even if the complaint less than 15 days before the accident was in writing, it could not constitute prior written notice for purposes of the statute, since it was received within the 15–day grace period provided by the statute for the City to make repairs after receiving notice. Case dismissed.

G. Snow and Ice – Responsibility of Out of Possession Landlord

Cepeda v. KRF Realty LLC, 148 A.D.3d 512 (1st Dept. 2017). Plaintiff slipped and fell on snow and ice outside of premises owned by out-of-possession landlord. Landlord established that it was an out-of-possession landlord where, pursuant to its lease with tenant, landlord was not responsible for removing snow or ice from the sidewalk of the subject premises. Administrative Code 7-210 imposes a nondelegable duty upon property owners to remove snow and ice from abutting sidewalks. However, 7-210 only applies to out-of-possession landlords where: 1. the landlord is contractually obligated to maintain the premises or maintains a right to reenter in order to repair, and 2. the defective condition is a significant *structural or design defect* that is contrary to a specific statutory safety provision. Here, the Court held that since snow or ice is not a significant structural or design defect for which an out-of-possession landlord may be held liable, summary judgment was granted as to them. **Note: There is a split in the departments and the Second**

accident, the Officer entered an intersection while responding to a call of a fellow officer requesting assistance. The Court held that the City defendants failed to establish, prima facie, that the Officer did not act in reckless disregard for the safety of others in proceeding into the subject intersection where accident occurred (pursuant to 1104(e)) and the denial of summary judgement was proper regardless of the sufficiency of the plaintiff's opposition papers.

Lacey v. City of Syracuse, 144 A.D.3d 1665, 41 N.Y.S.3d 830 (4th Dep't 2016). Bicyclist sued city after his bicycle collided with a police vehicle. Shortly before the collision, defendant officer observed a motorist commit a traffic violation and followed the motorist with the intention of giving the driver a verbal warning. The motorist stopped at a red light and Defendant Officer moved the vehicle into the intersection in an attempt to speak with the driver about the violation. Plaintiff entered the intersection on his bicycle with the green light and collided with the police vehicle. According to plaintiff, defendant was moving the police vehicle into plaintiff's path of travel at the time of the collision. Defendants moved for summary judgment on the ground that defendant officer's conduct was measured by the "reckless disregard" standard under Vehicle and Traffic Law § 1104 and that his operation of the vehicle was not reckless as a matter of law. Plaintiff cross-moved for summary judgment. Court held it was irrelevant whether defendant officer *believed* he was involved in an emergency operation. But Court nevertheless concluded that defendant officer's actions constituted an "emergency operation" as contemplated by VTL § 114–b and that defendants established as a matter of law that defendant officer's conduct did not constitute the type of recklessness necessary for liability to attach. Case dismissed.

C. Lights and Sirens

Rice v. City of Buffalo, 145 A.D.3d 1503, 44 N.Y.S.3d 281 (4th Dep't 2016). Vehicle passengers proceeding through a green light at an intersection were struck by a Fire Department Vehicle which was responding to a call regarding a suspicious package that possibly contained an explosive device. Defendants claimed that the correct standard to determine liability was not ordinary negligence, but reckless disregard for the safety of others pursuant to VTL 1104(e) and that their conduct had not risen to the reckless disregard level as a matter of law. Plaintiffs contended that ordinary negligence applied as the defendant was not using his siren (NOTE: Sirens and lights must be used to trigger VTL 1104(e) for emergency responders but not police officers). Defendant testified that he "would turn the siren on and off" as he "was trying to communicate with the alarm office." However, he testified the sirens were on just before he turned into the intersection. Court found issue of fact as to whether the officer sounded his siren "loud enough to be heard and soon enough to be acted upon". The Court thus denied Plaintiff's motion inasmuch as it sought to apply an ordinary negligence standard. Additionally, the Court found the defendant was engaged in an "[e]mergency operation" as undisputed evidence demonstrated that he was responding to a call regarding a possible explosive device. Plaintiff's motion for summary judgment denied.

Bonafede v. Bonito , 145 A.D.3d 842, 43 N.Y.S.3d 523 (2nd Dep't 2016). Plaintiff's vehicle collided with an ambulance which proceeded against a red light. The defendant claimed privilege under VTL 1104(e), however the Court held that the defendants failed to eliminate triable issues of fact as to whether the ambulance's sirens were activated at the time of the accident, so as to give rise to the privilege to proceed against a red signal light. Summary judgment denied.

cited no industry standard, treatise or other authority to support the opinion. There is no VTL or other rule mandating that a school bus driver stop at a designated bus stop if no child is waiting there for the bus. The expert also contended that that the bus driver's testimony that he used the lights to illuminate the roadway was an improper use of those lights, but again cited no authority to support the opinion. The Court found the Defendants had set forth, prima facie, that the bus driver acted reasonably and therefore plaintiff was unable to raise an issue of fact. Case dismissed.

Destefano v City of New York, 149 A.D.3d 696, 52 N.Y.S.3d 374 (2nd Dep't 2017). Middle school student grabbed bus's steering wheel, causing driver to brake suddenly and plaintiff "bus matron" to fall. Although a school district owes a special duty to its students, that duty does not extend to teachers, administrators, or other adults on or off school premises, and as such this bus matron was required to show a "special duty" from the School toward her. Here, there was no rational process by which the jury could have found that a special relationship was formed between the plaintiff and the school district, i.e., no promises of protection or assumption of duty upon which the plaintiff relied to her detriment. (NOTE: If a student had been injured, he/she would not have to show "special duty").

B. Negligent Supervision

J.M. v North Babylon Union Free Sch. Dist., 145 A.D.3d 978, 42 N.Y.S.3d 860 (2nd Dep't 2016). Infant child in Pre-K program fell onto the surface of a suspension bridge, part of a playground apparatus. The school was under the control of the defendant, and the infant fell as a result of other students jumping up and down on the surface of the bridge. Defendant failed to submit evidence sufficient to establish, prima facie, that it properly supervised the infant plaintiff or that its alleged negligent supervision was not a proximate cause of his injuries. Summary Judgment denied.

Roth v Central Islip Union Free Sch. Dist., 145 A.D.3d 1056, 43 N.Y.S.3d 525 (2nd Dep't 2016). Plaintiff, a middle school student injured after another student had been running around gym throwing basketballs at another student before he fell on plaintiff and this behavior had been transpiring, unimpeded for approximately 10 minutes prior. Defendants were unable to establish prima facie entitlement to summary judgment and it was properly denied.

Simon v Comsewogue Sch. Dist., 143 A.D.3d 695, 39 N.Y.S.3d 180 (2nd Dep't 2016). Plaintiff, attending her high school pep rally at dusk with 700-1,000 attendies was walking from football field to a bonfire and plaintiff tripped over a chain suspended between two poles. Defendant claimed it was open and obvious, but the Court found the defendant was unable to establish this given the crowd and the lighting conditions at the time of the accident. Summary judgment was denied.

Cruz-Martinez v Brentwood Union Free Sch. Dist., 147 A.D.3d 722, 46 N.Y.S.3d 180 (2nd Dep't 2017). Infant plaintiff, claiming negligent supervision, at the beginning of gym class ran toward a fellow classmate, placed his hands on his shoulders, and jumped over him. The classmate asked the infant plaintiff to do it again, and the infant plaintiff jumped over the classmate again, without incident. The classmate then asked the infant plaintiff to jump over him once again, and when the infant plaintiff attempted to do so, "something popped" in his knee, which caused him to fall to the gym floor and allegedly sustain an injury. At the time of the incident, two teachers were nearby but neither saw the incident. The infant plaintiff stated that about four to five minutes elapsed between the first and third time he jumped over his classmate. The Court held that the school failed to establish, prima facie, that it adequately supervised the plaintiff or that,

baseball player who voluntarily assumed the risk of being struck by a ground ball. Plaintiff testified he had previously been hit with a baseball while at bat, that he had witnessed a line drive hit a third baseman and that he had observed, on televised games, instances in which professional baseball players were hit by baseballs and acknowledged that it was common for baseballs to take unexpected bounces. Additionally, as to the conditions of the gymnasium, defendant established that, prior to the accident, Plaintiff had an adequate opportunity to observe the less than optimal conditions of the gymnasium, and how baseballs reacted to the particular flooring of the gymnasium. In opposition, plaintiffs failed to raise a triable issue of fact plaintiff's expert who testified that the defendant conducted the practice in a manner that unreasonably increased the risk level inherent in the activity, but failed to cite industry standards, scientific studies, regulations or other objective bases for his conclusory opinions. The Court held the expert's speculative and conclusory opinions were insufficient to raise a triable issue of fact. Split appellate division dismissed the case.

Yuan Gao v City of New York, 145 A.D.3d 939, 43 N.Y.S.3d 493 (2nd Dep't 2016). Infant plaintiff fell from monkey bars at playground in citypark claimed that monkey bars and flooring were maintained in dangerous and defective condition. Defendants established that the monkey bars and the flooring below them were not in a dangerous or defective condition. Plaintiff's unworn expert affidavit in opposition was inadmissible and the sworn version submitted in surreply was not entertained. Case dismissed.

D. Assault on School Grounds

Hernandez v City of New York, 147 A.D.3d 821, 47 N.Y.S.3d 362 (2nd Dep't 2017). The infant plaintiff and her father were both assaulted outside of the defendant's school by students of the school. The assaults took place approximately 30 to 100 feet beyond the school's entrance, and off school grounds. Plaintiffs claimed defendants failed to provide the infant plaintiff with adequate supervision and failed to provide both plaintiffs with adequate security. Generally, "When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases." The defendants established that, at the time of the assault, the infant plaintiff was no longer in their custody or under their control and was, thus, outside the orbit of their authority. Additionally, Court held that there was no liability for failure to provide adequate security, since the defendants did not affirmatively assume a duty to protect either plaintiff from criminal activity which occurred off the school premises.

XII FIREFIGHTER AND POLICE CAUSES OF ACTION

A. 205-E Right of Action against Employers Who Opt for 207-C as Opposed to Workers' Compensation

Matter of Diegelman v City of Buffalo, 28 N.Y.3d 231, 43 N.Y.S.3d 803 (2016). Retired Police Officer sued City, his former employer, for lung injuries from exposure to asbestos that he had sustained during his long period of employment with City. An action against an employer pursuant to GML § 205-e is, pursuant to the precise language of § 205-e, barred by the Workers' Compensation Law, however, the City of Buffalo elected not to provide Workers Compensation benefits, and instead provided statutory benefits of GML § 207–c. The Plaintiff argued that since benefits under GML § 207–c is not "workers' compensation", it is not a bar to a claim under GML § 205-e against his employer. The City argued that GML § 207–c is "essentially a super workers' compensation scheme" and that the Workers' Compensation Law "features a more lenient and more inclusive standard of covered activity than is intended to be covered and

Law" (Blake v. City of New York, 109 A.D.3d 503, 504, 971 N.Y.S.2d 4). The plaintiff then commenced an action pursuant to GML § 205–e, predicated upon Labor Law § 27–a(3)(a)(1), *alleging the same facts* as the first complaint but merely adding the verbiage that the plaintiff's injuries resulted from a "recognized hazard within the meaning of Labor Law § 27–a(3)(a)(1)." The City moved to dismiss pursuant to CPLR 3211(a)(5) as barred by the doctrine of res judicata, which motion was granted. Although, generally, a matter dismissed pursuant to CPLR 3211(a)(7) is not a determination on the merits, *there is* a preclusive effect as to "a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" The Appellate Division explained that it did not dismiss the prior General Municipal Law § 205–e for a mere failure to include the statutory language in the complaint, but rather determined the complaint, when taken as a whole, even if true, did not state a cause of action predicated upon violation of that statute. Since the present complaint alleged the same facts as alleged in the first complaint, and merely added an express allegation that the plaintiff's injury was caused by a recognized hazard within the meaning of the Labor Law, the present complaint failed to cure the defect in the first complaint. The Complaint was dismissed.

XIII COURT OF CLAIMS ISSUES

Kealos v State of New York, 150 A.D.3d 1211, 55 N.Y.S.3d 411 (2nd Dep't 2017). Claimant, while recovering from kidney transplant surgery at State Hospital fell, sustained subdural hematoma requiring two craniotomies. He remained in a coma until his death a year later. Nearly two years later, and more than 2 ½ years after the surgery, Estate moved for leave to file late claim for medical malpractice, lack of informed consent, negligence and wrongful death. Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim. However, the claim must be filed within the statute of limitations provisions set forth in CPLR article 2. CPLR 208 tolls the statute for disability. Claimant established that the decedent was under a legal disability from the day of the accident until the disability was removed by his death. Thus, the claimant's motion to file late notice of claim was within the 2 1/2 year statute. The claim for lack of informed consent was dismissed, however, as the physician did not address this claim in his affidavit. (*NOTE: Although the time to file a Claim or Notice of Intention of Claim against the State is tolled by infancy and disability, the time to serve a notice of claim against a public corporation is* ***not*** *tolled by either (although both may constitute a "reasonable excuse" for the delay and thus may be grounds for getting leave to late-serve the notice of claim. The Statute of Limitations for filing the S&C against the public corporation is tolled by both infancy and disability*).

Artibee v. Home Place Corp., 28 N.Y.3d 739, 49 N.Y.S.3d 638 (2017). Court of Appeals issue: Can a Factfinder in Supreme Court apportion fault to the State under Article 16 when plaintiff claims State and private party are liable for noneconomic losses in personal injury action. Split Court held this apportionment is not permitted. Plaintiff driver was driving on state highway when a tree branch bordering the road broke off and fell through plaintiff's car striking her in the head. Private Defendant owned property where tree is located. Plaintiff claimed private defendant should have trimmed/removed dead/diseased tree and filed a Court of Claims action against the state alleging that DOT failed to monitor this open and obvious hazard along state highway. In State Court, Private Defendant moved for permission to introduce evidence at trial of the State's negligence and for a jury charge directing the apportionment of liability for plaintiff's injuries between private defendant and the State. Plaintiff objected to allowing the jury to apportion fault against the State. The Court noted that apportionment against a nonparty tortfeasor (here the State) is available under CPLR 1601 unless "the claimant proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor "in said action (or in a claim against the state, in a

the immediate area. With a clothing description of the plaintiff. He stopped plaintiff and another police officer informed the arresting officer that he had just observed plaintiff crouching near a parked van. The police recovered the gun. The Court held that this testimony from the plaintiff and defendant prima facie entitled defendants to summary judgment insofar as premised on false arrest and false imprisonment as the evidence establishes that plaintiff was arrested based on ample probable cause. Specifically he was arrested because he was observed by two witnesses with a gun and by a police officer who saw him deposit something under a car—that something, turning out to be a gun. Plaintiff failed to raise an issue of fact in opposition. Summary judgment was also granted as to plaintiff's claim for malicious prosecution because of the existence of probable cause for the arrest and, therefore, the subsequent prosecution.

B. Excessive Force

Boyd v City of New York, 149 A.D.3d 683, 52 N.Y.S.3d 370 (2nd Dept 2017). Plaintiff, a 72 year old woman, made claim against the city for excessive force, alleging high blood pressure, racing heart and head and stomach pain. Defendant claimed qualified immunity and that injuries were insufficient to carry 1983 claim. Defendant police officers executed search warrant for drugs and paraphrenalia at plaintiff's home where she was handcuffed for several minutes. At trial, judgment in the total sum of $847,087.48 was entered in favor of the plaintiff. Appellate division set aside verdict holding that Defendant did not use excessive force, established qualified immunity and lack of sufficient injury. Court held that there was no dispute here as to the validity of the search warrant authorizing defendants to detain an occupant of the place to be searched and to use reasonable force. An excessive force claim is analyzed under the objective reasonableness standard of the Fourth Amendment and here, the actions of the officers in handcuffing a 72 year old were reasonable given that they had reason to believe that illegal drugs were being sold from the premises, and that a known drug dealer might be present. The Court also held that a plaintiff did not sufficiently establish injury-although that injury need not be severe- emotional pain and suffering cannot form the basis of an excessive force claim. The Court found that Defendant's actions were privileged under qualified immunity, as they were objectively reasonable and the police conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known: mere handcuffing the plaintiff did not violate the plaintiff's clearly established statutory or constitutional rights.