Appellate Division and Court of Appeals Review

Jonathan M. Bernstein, Esq.
Kristin Klein Wheaton, Esq.

GOLDBERG SEGALLA

CAASNY 2017

New York State Case Law Update

New York | Illinois | Florida | Maryland | North Carolina
Pennsylvania | New Jersey | Connecticut | United Kingdom
www.GoldbergSegalla.com

Recent Case Law Update on Municipalities

COURT OF APPEALS

Sherman v. New York State Thruway Authority, 27 N.Y.3d 1019 (May 5, 2016)
Municipalities May Argue "Storm-in-Progress" Defense.
A New York State Trooper brought an action against the New York State Thruway Authority seeking damages for personal injuries. The suit was dismissed by the Second Department and upheld by the Court of Appeals. The plaintiff sought damages for a slip and fall that occurred during a winter storm. The Court of Appeals held that the New York State Thruway Authority was entitled to judgment as a matter of law because uncontroverted evidence was submitted documenting that a storm was ongoing at the time the trooper fell right outside his barracks. The New York State Thruway Authority's duty to abate the icy conditions had not yet arisen because the storm was still occurring.

Frezzell v. City of New York, 24 N.Y.3d 213 (2014)
Where plaintiff driver sued defendants, a city and a police officer, over injuries sustained in a collision with a patrol car, the trial court properly granted defendants summary judgment, finding the officer's operation of his patrol vehicle did not rise to the level of "reckless disregard" for the safety of others necessary for liability under Vehicle and Traffic Law § 1104. While the officer had been driving against the flow of traffic while responding to a radio call, he had activated his lights and siren, was traveling at only 15 to 25 mph in a 30 mph zone, and tried to avoid the collision by braking hard and veering.

Margerum v. City of Buffalo, 24 N.Y.3d 721 (2015)
There was no notice of claim requirement for the firefighters' disparate treatment racial discrimination claim under the New York State Human Rights Law based on the City permitting the promotion eligibility lists (PEL) to expire before their maximum legal duration as human rights claims were not tort actions under General Municipal Law §50-e and were not personal injury, wrongful death or damage to personal property claims under General Municipal Law §50-i. Whether the City had a strong basis to believe it would be subject to disparate-impact liability in the federal discrimination lawsuits when it terminated the PEL raised issues of fact that precluded summary judgment as there had to be a credibility assessment of the City's position as to the examinations' validity, the federal litigation prospects, and its reasons for expiring the PEL.

Wittorf v. City of New York, 23 N.Y.3d 473 (2014)
A supervisor with defendant city's department of transportation was engaged in a proprietary function at the time he failed to warn plaintiff of the dangerous conditions in a transverse. Consequently, the jury could assess the city's conduct under the ordinary rules of negligence. Although the city was not held liable for its failure to repair the defect in the road due to lack of adequate prior written notice, rejection of that position did not foreclose the jury's finding that the supervisor was negligent in carrying out the proprietary function of road maintenance. Therefore, the city was not entitled to judgment dismissing plaintiff's complaint as a matter of law, and a remittal was necessary to consider the weight of the evidence issues.

Matter of Town of N. Hempstead v. County of Nassau, 24 N.Y.3d 67 (2014)
A county could charge back to a town the amounts the county paid on behalf of town residents attending a community college, because under Education Law §6305(5) and (10), reimbursement could be accomplished using funds from the state (if available) or, in the alternative, from the local municipalities, and when the state failed to appropriate the required funding, the county could look to the town for reimbursement. The town was not limited to providing reimbursement for the school's two-year programs, as Education Law § 6302(3), which expanded the school's curriculum to include advanced degree programs, explicitly stated that it should be financed in the same manner provided for community colleges. The county could offset the amounts owed by the town, and a specific resolution for this purpose was not required.

Gammons v. City of New York, 24 N.Y.3d 562 (2014)
The intermediate appellate court properly affirmed the trial court's denial of a city and police department's motion for summary judgment dismissing a police officer's suit alleging she was injured while loading barriers onto a police flatbed truck that was unsafe and improperly equipped, in violation of Labor Law § 27-a(3)(a)(1), because that statute set forth an objective, clear legal duty that could serve as a predicate for a claim under General Municipal Law § 205-e.

Robles v. New York City Hous. Auth., 23 N.Y.3d 982 (2014)
The Appellate Division improperly concluded that defendant was entitled to summary judgment, as defendant failed to show that it was prejudiced by any defect in plaintiff's notice of claim (see generally General Municipal Law § 50-e [6]), and triable issues of fact remain.

Matter of Candino v. Starpoint Cent. Sch. Dist., 24 N.Y.3d 925 (2014)
In an action against several school districts in which claimant alleged that he had contracted a highly contagious virus while participating in a high school wrestling tournament, an order of the Appellate Division, which reversed an order granting claimant's application for leave to serve a late notice of claim and denied the application, was affirmed, since the Appellate Division did not abuse its discretion in denying claimant's application to serve and file the late notice of claim.

Thomas v. New York City Hous. Auth., 25 N.Y.3d 1087 (2015)
In a negligence action arising from plaintiff's alleged slip and fall on the second-floor landing of a stairway in defendant's building, the allegations in an amended notice of claim, which alleged that defendant was negligent in maintaining the second-floor landing area, were not sufficient to put defendant on notice of the allegations in the bill of particulars concerning the handrail.

FIRST DEPARTMENT

Police Vehicle – NYSVTL – Use and Operation of Vehicle

Guevara v. Ortega, 136 A.D.3d 508 (1st Dept. 2016)

A traffic enforcement agent for New York City police department gave the keys to a NYC police van to an unlicensed car wash attendant, who hit Plaintiff's car while she was stopped at a red light. The trial court denied NYC's motion for summary judgment. The appellate court unanimously reversed concluding that the trial court improperly denied the City's motion.

The First Department concluded that the plaintiff did not raise a question of fact as to whether the City was negligent in permitting an unlicensed driver to drive a NYPD traffic van. The court reasoned that it would not "impose an affirmative duty on a customer of a commercial car wash to investigate the driving qualifications of each employee who might operate his or her vehicle during the cleaning process would unduly extend liability."

In addition, the Court concluded that the City was not vicariously liable under New York State Vehicle and Traffic Law §388(1). Under VTL §388(1), an owner of a vehicle may be held vicariously liable for the negligence of another driver whom the owner allowed to drive their vehicle. However, Section 388(2) of VTL specifically exempts police vehicles from this provision.

Plaintiff attempted to argue that the NYPD traffic van did not qualify as a police vehicle because it was not being operated by the police department at the time of the accident. The Court in *Guevara v. Ortega* held that the term "operated" means not only "to cause to function" or "to drive," but also "to exert power or influence." Thus, the city was exempt from civil liability.

Article 78 – Zoning and Environmental Impact Statements

Matter of Residents for Reasonable Development v. City of New York, 128 A.D.3d 309 (1st Dept. 2016).

Petitioners brought an article 78 proceeding seeking to annul the City's approval of the East 74th Street project, which was the clinical arm of Memorial Sloan-Kettering Cancer Center. The trial court dismissed the petition and the appellate division unanimously affirmed. On appeal, the petitioners made several arguments, all of which were rejected. These arguments included the final environmental impact statement for a garage that was located 50 blocks away from the project. The Court reasoned that although the garage and project were subject to the same requests for proposals, the two projects were separate and independent projects, therefore a separate ongoing review of the garage was proper.

Next, the petitioners argued that final impact statement did not include a "no action alternative." The court rejected this argument explaining that "[n]ot every conceivable environmental impact, mitigating measure or alternative must be addressed."

Then, the Court rejected petitioners argument that an amendment to the zoning map to support the project was illegal spot zoning. The court reasoned that it did not constitute illegal spot zoning merely because it involved a single parcel. Rather, the zoning change was the part of "a well considered and comprehensive plan to serve the general welfare of the community."

South Bronx Unite! v. New York City Industrial Development Agency, 115 A.D.3d 607 (1st Dept. 2014)

The First Department considered whether an Supplemental Environmental Impact Study (SEIS) was required for a change in the Industrial Development Agency's plans for development of the Harlem River Yards, an industrial area in the South Bronx.

A Final Environmental Impact Study ("FEIS") had been prepared in 1993 for the agency's plans to develop the parcel, but during the following two decades the agency's development plans for the parcel were altered to respond to changing commercial demand. In 2012, Fresh Direct, an online food and grocery retailer, applied to the agency to relocate some of its facilities to the Harlem River Yards and submitted an Environmental Assessment Form ("EAF") using a "net-increment" approach to show that the incremental environmental impacts of Fresh Direct's proposed facilities over those impacts evaluated in the 1993 FEIS were not significant.

Based on that EAF, the agency adopted a negative declaration for Fresh Direct's proposal and issued tax subsidies and other financial incentives for the project. The First Department rejected the petitioners' argument that the agency should have prepared an SEIS for the Fresh Direct facility, holding that the agency "identified the relevant areas of environmental concern related to the proposed action (including traffic, air quality and noise impact), took the requisite "hard look' at them and, in its negative declaration, set forth a reasoned elaboration of the basis for its determination that an SEIS was not required."

This decision demonstrates that agencies receive deference from courts in deciding whether an SEIS is needed, provided that the agencies meet the fundamental requirements of taking a "hard look" at the change in the project's potential for significant adverse environmental impacts.

South Bronx Unite! v. New York City Industrial Development Agency, 138 A.D.3d 462 (1st Dept. 2016).

Petitioners brought a hybrid article 78 / declaratory judgment proceeding seeking a declaration that the sublease between Fresh Direct and Harlem River Yards Ventures, Inc. was invalid. The Court held that the Supreme Court properly denied their renewal motions. Petitioners did not have standing under State Finance Law §123-b.

Notice of Claim

Flowers v. City of New York, 2016 N.Y. Misc. LEXIS 2892 (Sup. Ct. Aug. 5, 2016)

Plaintiff was present during the execution of a search warrant by the NYC police department's narcotic division. Plaintiff did not live at the apartment. Rather, his "wife's family" lived at the apartment, which included his wife's brother whom was the target of the search warrant following a long investigation and several drug transactions with a confidential informant.

Plaintiff was in the shower at the time of the search warrant was executed. His clothes were in his wife's room. Drugs and drug paraphernalia was found in the apartment. Plaintiff was handcuffed and arrested as all those present in the apartment. Plaintiff was charged by the detective present during the execution of the search warrant with criminal possession of a controlled substance and criminally using drug paraphernalia. The ADA decided to bring charges against plaintiff and took the matter to a grand jury. A grand jury indicted plaintiff. Ultimately, the ADA recommended that the criminal charges against plaintiff be dismissed, which the Court accepted this recommendation.

Plaintiff filed a notice of claim with the city that did not name the individual officers. Plaintiff then commenced this litigation alleging false imprisonment, malicious prosecution, negligent performance of duties, negligent hiring, and negligent supervision.

The City moved for summary judgment and successfully argued that the claims against the several of the individual officers should be dismissed because plaintiff did not name these individuals in his notice of claim. Relying on previous precedent in the first department, the court held "that if a notice of claim does not name an individual, any state law claims in a subsequent action against the individual must be dismissed for failure to comply with General Municipal Law §50-e."

Court Upholds NYC's anti-profiling law

Patrolmen's Benevolent Association v. City of New York, 2016 N.Y. App. Div. LEXIS 4910 (1ST Dept. 2016)

The New York City Council passed a local law prohibiting officers from profiling by race national origin, color, creed, age, alienage, or citizenship status, gender, sexual orientation, disability, and housing status. In addition, the Council created a private right of action under the local law.

The Patrolmen's Benevolent Association and the Sergeant's Benevolent Association brought an action challenging the law. The Associations argued that the local law was preempted and invalid because it was inconsistent with the New York State Criminal Procedure Law.

The Appellate division upheld the law and concluded that the local law was not preempted by State Criminal Procedure Law. The court noted that there was nothing in State law that prohibited a local government from addressing discrimination in the form of profiling.

The court rejected the Associations argument that under state criminal procedure law, officers were permitted to use race as a determining factor, while the local law did not. The court rejected this distinction, and reiterated that the correct standard under the NYS Criminal Procedure Law was consistent with the federal constitution, and was based off the totality of the circumstances. Under the CPL, an officer is authorized to stop an individual when the officer reasonably suspects that the person is committing, has committed, or is about to commit a crime. The officer may arrest someone when the officer has reasonable cause to believe that the person has committed a crime.

The court also rejected the Association's argument that a stop or arrest might be lawful on an objective basis under State law, but unlawful under the local law because the officer might be motivated by a subjective bias. The court explained that the CPL protected against unconstitutional searches and seizures whereas the local law protected against discrimination in violation of the equal protection clause. The Court reasoned that as the purposes behind the laws differed, it was appropriate to have different standards, which were objective for search and seizure, and subjective for anti-discrimination.

Issue of Fact on Probable cause

Mendez v. City of New York, 137 A.D. 3d 468 (1st Dept. 2016).

Plaintiffs Version of Events

Plaintiff was walking on the sidewalk on his way to a barbecue. Police in an unmarked vehicle "rolled up" on him. Plaintiff was told to freeze, officers exited the vehicle, handcuffed, and taken to the precinct.

Officers Version of Events

Officers on routine patrol observed plaintiff at approximately 10:40 p.m. standing on the sidewalk doing nothing suspicious. These officers ran into plaintiff again after circling the block. The officer in the passenger seat saw plaintiff "dip behind a parked vehicle" and heard a "metallic clink" as an object hit the ground. The officers stopped the vehicle and approached plaintiff. Underneath the parked vehicle was a gun in which the officers attributed to being in plaintiffs possession. The officer yelled "92" which was their code for an arrest. At that point, plaintiff lifted his right hand and dropped an object onto a pile of garbage bags on the sidewalk. The officers found a gun on the garbage bags. Both weapons were recovered and plaintiff arrested.

The appellate court noted that the trial court properly denied the city's and the officers motion for summary judgment based on the different version of events. There was a triable issue of fact as to whether the officers had probable cause to believe that plaintiff was in possession of

a gun, thereby precluding summary dismissal of his false imprisonment claim. The court reasoned that there was an issue over constructive possession of contraband in the area in which plaintiff was taken into custody.

The court dismissed the excessive force claim based on tight handcuffing, concluding that the use of tight handcuffing on an arrestee was not unreasonable.

Judgment setting aside plaintiff verdict in excessive force case reversed

Cardoza v. City of New York, 139 A.D.3d 151 (1st Dept. 2016)

Plaintiff was observed with an open container in front of an apartment building the Bronx where he lived. Plaintiff refused to provide identification when asked by the officers and he attempted to walk away from police. At that time, the officers sought to take plaintiff into custody. Plaintiff grabbed onto a fence along side of the building. One of the officers struck plaintiff five times with a baton to force him to let go and the officer used pepper-spray on the plaintiff. Plaintiff sustained a displaced, comminuted, open fracture to the second metacarpal bone of his right hand. He was diagnosed with major depressive disorder and post traumatic disorder. Plaintiff contended at trial that he did not speak English and he was attempting to comply.

In an action for malicious prosecution and excessive force action, the trial court granted defendant officers motion under CPLR 4404 to set aside the jury verdict finding the officers liable for malicious prosecution and liable for punitive damages. The trial court ordered a new trial on damages on the excessive force claim unless plaintiff agreed to reduce the verdict from $500,000 to $200,000 for past pain and suffering and from $2 million to $150,000 for future pain and suffering.

After conducting a review of cases, the court concluded that although the jury awards for past and future pain and suffering were excessive, that the amounts set by the trial court were not reasonable. The appellate division reinstated a new trial on damages unless plaintiff stipulated to a reduction of the jury award for past and future pain and suffering to $400,000 and $1,250,000 respectively, and a reduction on punitive damages of $75,000 for each of the two officers.

Negligent Supervision

Emmanuel B. v. City of New York, 131 A.D.3d 831 (1st Dept. 2016).

Summary judgment was proper on a student's negligent supervision claim. The infant plaintiff was a seven year old boy in the second grade at a NYC public school. He suffered serious physical injuries when another student caused him to strike his head against a bookcase. Earlier in the day, the infant plaintiff informed his teacher that the other student whom he later got into a physical altercation with was picking on him. Throughout the school year, the infant plaintiff was subjected to teasing and bullying in which his mother complained to the school, but she did not identify the offenders by name. The school principal testified that there were no prior

complaints about the other student involved in terms of any physical altercations, improper touching, or hitting other students.

The appellate court concluded that although the school was aware of plaintiff being "picked on" by the other boy only showed that the school knew he was being picked on verbally. This knowledge, did not however, provide sufficient notice of "prior conduct similar to the unanticipated injury-causing act" by the other boy to support a conclusion that the school had actual or constructive notice that the other boy would engage in violent or physically aggressive behavior toward plaintiff.

Public Authorities Law Interest Rate applied to judgment instead of CPLR

Soltero v. City of New York, 132 A.D.3d 545 (1st Dept. 2016)

Although the city did not object to the initial 9% statutory interest rate per year from the date of the liability verdict awarding plaintiff lost wages, the appellate court relying on Public Authorities Law §1212(6), concluded that the rate of interest could be no more than 3% per year. The court reasoned that since the transit authority, which is the party that will ultimately pay the judgment, would indemnify the city and as such, the interest rate is set forth in Public Authorities Law.

Breach on Nondelegable duty – Failure to reinstall previous traffic controls

Chang v. City of New York, 2016 N.Y. App. Div. LEXIS 5583 (1st Dept. 2016).

This action arose from a motor vehicle accident. Plaintiff alleged that the city was negligent because it failed to reinstall stop signs and stop bar at the intersection where the accident occurred. It was undisputed that two months prior to Plaintiff's accident stop signs and a stop bar were present at the intersection, and on the date of the accident, the traffic controls were not present.

The Court stated the general proposition that the "installation of a traffic control signal, where it had not previously existed, is a discretionary governmental function that does not give rise to liability." However, "liability is imposed where there is a 'failure properly to maintain an already established traffic control' and where that failure was a proximate cause of the accident." As such, the Court concluded that the City breached nondelegable duty to maintain a roadway in safe condition by failing to reinstall a previously established traffic controls, there was a question of fact as to whether this breach was the proximate cause of the accident. Therefore, the appellate court reversed the lower court's grant of summary judgment.

Notice of Claim is not required for a Civil Service Law §75-b

Castro v, City of New York, 2016 N.Y. App. Div. LEXIS 5472 (1st Det. 2016)

Plaintiff filed a notice of claim alleging improper termination from his position as a Manager and Certified Fire Safety Directory because he refused to "make false certifications." Plaintiff commenced this action asserting improper termination under Labor Law §740 (the private sector Whistleblower Law).

The City made a motion to dismiss the action arguing that Labor Law §740 was not applicable. Plaintiff amended his complaint to assert an improper termination claim under Civil Service Law §75-b (Public Sector Whistleblower Law).

The trial court granted the city's motion to dismiss on the basis that the notice of claim did not give the City adequate notice of his Civil Service §75-b claim because an improper termination claim could be brought under a "myriad of state and federal statutes," each requiring different inquiries and investigations, and he waived his right to bring a Civil Service §75-b by bringing the Labor Law §740 claim.

The appellate court reversed and denied the city's motion to dismiss. Relying on *Margerum v City of Buffalo*, in which the Court of Appeals held that the notice of claim requirements of General Municipal Law §§50-e and 50-i did not apply to the firefighters' disparate treatment racial discrimination claim under New York State Human Rights Law to reverse the lower court's decision.

The court adopted the reasoning in *Margerum* stating "[a]s with the Human Rights Law claims...Civil Service Law §75-b claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i, and there is no reason to encumber the filing of a retaliatory termination claim.

Denial of Summary Judgment motion on assault & battery claim following a strip search

Shields v. City of New York, 2016 N.Y. App. Div. LEXIS 5192 (1st Dept. 2016)

The appellate court concluded that Plaintiff established triable issues of fact as to whether Defendant officers committed assault and battery when they conducted strip searches of the plaintiffs. Plaintiffs were arrested following execution of a search warrant for the possession of marijuana. The court stated that the "mere fact that someone has been arrested and taken into custody does not justify police intrusion into a person's body." A strip search of a person charged with a minor offense or a misdemeanor violates the Fourth Amendment "unless there is a reasonable suspicion that the arrestee is concealing weapons or contraband." There were no facts to establish any belief that the plaintiffs were concealing weapons or contraband.

SECOND DEPARTMENT

Late Notice of Claim

Royes v. City of New York, 136 A.D.3d 1042 (2d Dept. 2016)

The petitioner, an arrestee, filed a petition under General Municipal Law § 50-e(5) for leave to serve a late notice of claim against the city for malicious prosecution, false arrest and imprisonment, and federal civil rights violations. Petitioner had been arrested and charged with various crimes, but several months later the charges were dismissed. He served an original notice of claim within 90 days after the charges were dismissed, but almost six months after the arrest. The original notice of claim did not explicitly allege a claim for malicious prosecution, but it did contain the essential facts constituting that claim. The city conducted a 50-h examination. Petitioner then filed this petition.

The Second Department permitted petitioner to proceed with his malicious prosecution claim because the original notice of claim was timely (the 90 day clock on a malicious prosecution claim does not start to run until the underlying proceeding terminates in petitioner's favor). Further, although the original notice of claim did not identify the malicious prosecution claim by name, it did provide the facts in support of such claim.

Petitioner was not, however, allowed to proceed with his false arrest and imprisonment claim because the original notice of claim was untimely and he did not demonstrate a reasonable excuse for his failure to serve it timely (the 90 day clock starts when the arrest occurs) or for his delay in filing the petition. Moreover, petitioner did not establish that the city had actual knowledge of the essential facts constituting the claim within 90 days after the arrest or a reasonable time thereafter. The court did not find two and a half months to be a reasonable time thereafter. And lastly, petitioner did not establish that his delay in serving the notice of claim did not substantially prejudice the city in maintaining its defense.

As for the federal civil rights claims, the petition was unnecessary because a notice of claim is not required for federal law claims (the statute of limitations for filing suit under 42 U.S.C. § 1983 is three years).

Property Damage Caused by Hurricane Sandy

Heeran v. Long Island Power Authority, 36 N.Y.S.3d 165 (2d Dept. 2016)

Plaintiffs sustained fire damage to their property in Queens in the wake of Hurricane Sandy in 2012. They filed a negligence action against the Long Island Power Authority and National Grid. Plaintiffs, who were defendants' customers, alleged that the defendants should have foreseen that salt water from the storm surge would come into contact with electrical transmission lines, that fires would result if the lines were live, and that fires would cause property damage. Plaintiffs alleged that in light of what was foreseeable, defendants were

negligent in their preparation for and reaction to the hurricane, in particular their failure to de-energize the Rockaway Peninsula.

Defendants filed a joint motion to dismiss, arguing that the governmental function immunity doctrine applied. The Second Department disagreed and denied the motion.

Governmental entities perform a variety of functions. Some are purely proprietary, others are purely governmental, and others have characteristics of both. The distinction is important because the governmental function immunity doctrine applies only to actions categorized as governmental functions. Governmental entities acting in furtherance of a proprietary function will be subject to liability under ordinary principles of tort law.

Quintessential governmental functions include police and fire protection. In contrast, a governmental entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. Proprietary functions include maintenance of roads and highways in a reasonably safe condition.

In New York, electric utilities have traditionally been private enterprises. Moreover, the Legislature enacted the Long Island Power Authority Act for the express purpose of replacing a private entity with the Long Island Power Authority. As such, the court determined that the provision of electricity is properly categorized as a proprietary function. Defendants were therefore not immune from suit.

Injury Caused by Fallen Tree

Connolly v. Village of Lloyd Harbor, 139 A.D.3d 656 (2d Dept. 2016)

Plaintiff was injured when a dead and decaying tree fell onto the roadway, from private property, causing him to lose control of his car and hit a telephone pole. The village won summary judgment but the Second Department reversed.

A municipality has a duty to maintain its roadways in a reasonable safe condition. This duty extends to trees adjacent to the road that could pose a danger to travelers. However, a municipality will not be held liable unless it had actual or constructive notice of the dangerous condition.

The village failed to establish its prima facie entitlement to summary judgment because it did not demonstrate that it lacked actual or constructive notice of the dangerous condition of the tree, nor did it demonstrate that any breach of duty was not a lack of proximate cause.

Injury Caused by Defective Sidewalk

Stanciu v. Bilello, 138 A.D.3d 824 (2d Dept. 2016)

The city issued a notice of violation to private property owners for a sidewalk defect adjacent to their property. The property owners contacted the city numerous times in an attempt to get a permit to repair the sidewalk, but the city kept putting them off and telling them to wait. Ten months after the notice of violation, plaintiff tripped and fell on the sidewalk defect. Plaintiff sued the property owner, and the property owner filed a third party complaint against the city for contribution. At trial, the jury found the city 65% at fault and the property owners 35% at fault.

The city appealed but the Second Department affirmed. Although the city owed no duty directly to the plaintiff, there was sufficient evidence based on the communications between the city and the property owners to find that the city owed a special duty to the property owners. As such, the city was liable in contribution.

Qualified Immunity for Excessive Force and Governmental Immunity for Negligence

Davila v. City of New York, 139 A.D.3d 890 (2d Dept. 2016)

Plaintiff filed suit against the city and its police officers for excessive for in violation of 42 U.S.C. § 1983 and for negligence. At trial, the jury found in favor of plaintiff on both causes of action. The Second Department, however, dismissed the complaint, holding that defendants' motion for judgment as a matter of law should have been granted.

The officers confrontation with plaintiff was in an apartment building where he lived with his parents. Plaintiff was mentally ill, had started a fire, was throwing items out of the window, and was essentially naked. When officer attempted to approach him, he punched an officer in the face and fled up the stairs. The officers thus rushed plaintiff and attempted to handcuff him but they all fell down the stairs. On the Fourth Amendment excessive force claim, which is analyzed under the objective reasonableness standard, the court found that the officers used objectively reasonable force given that they viewed him as a danger to himself or others.

The court also found that the officers were entitled to qualified immunity as a matter of law. An issue in the case was whether the officers should have waited for the Emergency Services Unit to arrive instead of approaching plaintiff at the outset. If found to be objectively reasonable, an officer's actions are privileged under the doctrine of qualified immunity. The court determined that officers of reasonable competence could disagree on whether the defendant officers should have waited for ESU to arrive.

Regarding the negligence cause of action, defendants were shielded from liability by the governmental function immunity doctrine. Government action, if discretionary, cannot be a basis for liability. Conversely, ministerial actions may be a basis for liability, but only if they violate a special duty owed to the plaintiff apart from any duty to the public in general. Discretionary acts involve the exercise of reasoned judgment that could typically produce different acceptable results, whereas ministerial acts envision direct adherence to a governing rule or standard with a compulsory result. The court held that the officers' negligent acts were discretionary. Therefore, governmental function immunity precluded liability.

THIRD DEPARTMENT

Special Duty and Liability When Issuing Permits for Festival

Bynum v. Camp Bisco, LLC, 135 A.D.3d 1060 (3d Dept.)

Plaintiff was a music festival attendee who was severely injured when she took drugs at the festival. She sued the town and county, alleging that their issuance of permits for the festival was negligent insofar as they knew or should have known that the permit applications significantly underestimated the anticipated number of attendees, resulting in a level of medical staffing at the festival inadequate to promptly respond to plaintiff's condition. Defendants moved for summary judgment on governmental immunity grounds. The trial court denied the motions. The Third Department reversed.

Where, as here, a municipality engages in a function so quintessential as the issuance of a permit, then even if the permit was issued negligently, the municipality is immune from liability unless it owed a special duty to the injured person. To prove a special duty, a plaintiff has to establish the elements of a special relationship including direct contact between the municipality's agents and the plaintiff, and the plaintiff's justifiable reliance on the municipality's affirmative promise to act.

The court determined that plaintiff never had any direct contact with defendants, nor did she rely upon any promise that defendants would keep her safe. Plaintiff claimed only that she relied upon the permit applications. Those were completed by festival organizers, not by defendants.

Injury at School

Elbadwi v. Saugerties Central School District, 141 A.D.3d 805 (3d Dept. 2016)

A 10 year old student sued her school after she broke her arm on a snowy slide during recess. She alleged negligent supervision and premises liability.

Schools are under a duty to adequately supervise the students in their charge, and they will be held liable for foreseeable injuries proximately caused by inadequate supervision. Schools are not, however, the insurers of their students' safety. Rather, schools need only exercise the same degree of care as would a reasonably prudent parent in comparable circumstances. Where the accident occurs in so short a span of time that even the most intense supervision could not have prevented it, lack of supervision is not the proximate cause.

Here, the school told the student not to use the slide because it was covered in snow. When the accident happened, the student was not actually using the slide but had merely jumped up on to it because she was trying to avoid a collision with another student. The accident occurred only 45 seconds after she exited the school building. No amount of supervision could have prevented the accident, thus her negligent supervision claim failed.

The premises liability claim failed for similar reasons. The school's expert opined that the playground was maintained in an appropriate condition, it is within the standard of care to allow children to play outside when there is snow, there was no requirement that the school clear the slide of snow since the school told the students not to play on it.

Defective Condition on Roadway

Shufeldt v. City of Kingston, 140 A.D.3d 1464 (3d Dept. 2016)

Plaintiff fell from his bicycle and was knocked unconscious as a result of a recessed water valve in the pavement. He sued the city for negligence on the grounds that the city did not properly cover the water valve, thereby creating a hazardous depression in the roadway.

The city won summary judgment and the Third Department affirmed. The city had enacted a prior written notice law. No one gave prior written notice of this defect. Therefore, plaintiff had to rely on the exception from the notice requirement that even when there is no prior written notice, a municipality can be liable for defects that the municipality affirmatively creates. Plaintiff argued that the city created the defect when it assumed supervisory authority over the repaving of the road a few months before the accident. However, the argument failed because there was no evidence that the paving project increased the depth of the recessed water valve or otherwise exacerbated any hazard.

Suspension of Correction Officer's GML § 207-c Benefits

Baker v. Clinton County, 134 A.D.3d 1218 (3d Dept. 2015)

Petitioner, a correction officer for the county sheriff's office, was allegedly injured at work. He was placed on leave, filed a workers' compensation claim, and began receiving benefits pursuant to General Municipal Law § 207-c. When petitioner's doctor cleared him to return to work, the county did not allow him to return and instead served him with disciplinary charges alleging that he falsely reported his injuries. The county suspended his § 207-c pay pending his disciplinary hearing.

The officer, who was eventually determined to have engaged in misconduct and was terminated from employment, filed a combined proceeding pursuant to CPLR Article 78 and an action for declaratory judgment to challenge the suspension of his § 207-c pay during the pendency of his disciplinary proceeding. The county's defense was that the officer forfeited his right to the benefits under the doctrine of unclean hands.

Section 207-c provides that, when an officer suffers a disabling injury in the line of duty, the officer is entitled to continue to receive his or her full salary during the pendency of the disability. The benefits are a property interest giving rise to procedural due process protection under the Fourteenth Amendment before those benefits can be terminated. As such, while a

municipality may discipline an officer even if that officer is receiving the benefits, the benefits cannot be withheld without an evidentiary hearing.

The Third Department held that the county illegally withheld the officer's benefits. The unclean hands defense was inapplicable because the issue was whether the officer received due process before the benefits were terminated, not whether the officer was entitled to the benefits. The officer was only challenging the withholding of the benefits during the pendency of his disciplinary hearing, not his termination from employment. Even where, as here, there is a finding that the officer engaged in misconduct, there is no legal authority to recoup the payments made prior to the finding.

Employer Retaliation Against Union Members

Hudson Valley Comm. College v. New York State PERB, 132 A.D.3d 1132 (3d Dept. 2015)

Certain employees of Hudson Valley Community College were members of the Non-Instructional Employees Union (NIEU). The college paid overtime for work that NIEU members performed in second jobs outside the scope of their regular employment duties. A dispute arose between the college and the NIEU regarding the overtime rate. The college then decided it would no longer hire NIEU members for any second jobs and would instead hire non-NIEU members. The NIEU filed an improper employer practice charge against the college, and the Public Employment Relations Board (PERB) upheld a finding that the decision not to hire NIEU members was retaliation against NIEU for its advocacy in the underlying overtime rate dispute. The college was ordered to restore NIEU members to their second jobs and pay them back wages.

The college filed a CPLR Article 78 proceeding to annul PERB's decision. The Third Department found in favor of the NIEU. To prove an improper practice claim, the NIEU had to establish that it was engaged in activities protected by the Taylor Law, that the college knew of these activities, and that the college took the challenged action because of the activities. If the NIEU proves a prima facie case of improper motivation, the burden shifts to the college to establish that its actions were motivated by legitimate business reasons.

Here, the parties agreed that the NIEU's advocacy on the overtime issue was a protected activity and that the college was aware of the advocacy. The only dispute was whether the college's decision to stop hiring NIEU members for second jobs was improperly motivated. The court determined that the motivation was improper and not for business reasons, because the college wrote a memo specifically stating that its reason was because of the clash with the NIEU about overtime pay and because the college actually paid higher rates to the non-NIEU members who replaced the NIEU members in the second jobs.

FOURTH DEPARTMENT

In the Matter of Wellsville Citizens for Responsible Development, Inc. v. Wal-Mart Stores, Inc. et al., 33 N.Y.S.3d 653 (4th Dep't 2016)
Town Did Not Perform Adequate Environmental Impact Study in Approving New Walmart. The Fourth Department held that a town failed to take the requisite hard look at the environmental impact of the construction of a Walmart store and annulled the town's negative (impact) declaration. The court held further that the effects of the construction upon wildlife, community character, and surface water were not adequately investigated. This holding was based on the premise that judicial review of an agency's determination is limited to whether the determination was made with lawful procedure. Much of the study upheld scrutiny; however the court held that the portion involving the study regarding impact on wildlife, community character, and surface water was inadequate and further study must take place prior to allowing the construction to proceed. Therefore, the opposition to the project was allowed to continue until such time as the proper study is performed.

Vassenelli v. City of Syracuse, 138 A.D.3d 1471 (4th Dep't 2016)
Plaintiff, a disabled and retired police officer, commenced this action seeking damages for injuries he allegedly sustained in connection with the management of his health care benefits pursuant to General Municipal Law §207-c. It was error for the trial court to grant motions to dismiss negligence and gross negligence causes of action brought by a disabled and retired police officer against assorted health care services management companies and employees, seeking damages for injuries he allegedly sustained regarding the management of his health care benefits pursuant to General Municipal Law § 207-c, as the defendants each assumed duties in making health care decisions that were breached and which caused him injury in the form of improper medical treatment and declining health. The trial court properly determined that the police officer's state law causes of action were not barred by collateral estoppel because they were not actually litigated in a prior federal action.

Putrelo Constr. Co. v. Town of Marcy, 137 A.D.3d 1591 (4th Dep't 2016)
The trial court abused its discretion in denying a contractor's motion to amend the ad damnum clause to increase it. "[I]n the absence of prejudice . . . , a motion to amend the ad damnum clause, whether made before or after the trial, should generally be granted." The town and the architect's successor-in-interest, however, were entitled to summary judgment on three of the contractor's change orders because those claims accrued no later than the date of substantial completion but the notice of claim was not filed within six months of that date and, as such, was untimely pursuant to Town Law § 65(3).

Boyle v. Caledonia-Mumford Cent. Sch., 140 A.D.3d 1619 (4th Dep't 2016)
A school district was entitled to summary judgment on a claim under Education Law § 2801-a by the parents of two middle school students because the district subjecting the students to various disciplinary actions, culminating in a proposed one-year suspension for the ensuing school year, did not constitute outrageous conduct causing emotional distress, and the parents had no private right of action based upon those alleged statutory violations. The students' due process rights were not violated when faced with the long-term suspension because while the students had a constitutionally protected interest in the continuation of their education and a right to be heard, the father waived the students' due process right to a hearing when he opted not to follow through with a hearing and instead enrolled them in another school district.

Acquest Wehrle, LLC v. Town of Amherst, 129 A.D.3d 1644 (4th Dep't 2015)
A complaint challenging a town's actions in rescinding a sewer tap-in waiver request and terminating an office park project was not time-barred under CPLR 205(a). Plaintiff had a cognizable property interest for his § 1983 substantive due process claim as the town board had no further discretion to exercise after the Environmental Protection Agency advised it that plaintiff's revised site plan would form the basis of an acceptable waiver request. Plaintiff submitted sufficient evidence that the town's conduct was solely politically motivated and was without legal justification. Plaintiff's § 1983 equal protection claim failed as plaintiff's property was not similarly-situated to two other properties. The town was not entitled to qualified immunity on the state constitutional claims.

Benedetti v. Erie County Med. Ctr. Corp., 129 A.D.3d 1462 (4th Dep't 2015)
The one-year and 90-day period for commencement of a suit against the Erie County Medical Center Corporation under Public Authorities Law §3641(1)(c) was not a condition precedent to suit but was a statute of limitations. CPLR 205(a) applied and the commencement of this suit was timely. While § 205(a) did not apply when an act had to be performed within a statutory time requirement and was a condition precedent to suit, § 3641(1)(c) did not contain express conditional language. Section 205(a) applied to proceedings commenced under General Municipal Law § 50-i, which was identical to § 3641(1)(c). Section § 3641(1)(c) did not create the medical malpractice and wrongful death claims alleged as Public Authorities Law art. 10-C, tit. 6 did not condition ECMCC's waiver of sovereign immunity and consent to suit on timely commencement.

Austin Harvard LLC v. City of Canandaigua, 2016 N.Y.App. Div. LEXIS 5305 (4th Dep't 2016)
Petitioner-plaintiff commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that it is unlawful for respondents-defendants to impose a fee equaling two-thirds of the admission charges collected by plaintiff in the operation of its annual arts festival at a public park. The Appellate Division concluded that the plaintiff's motion for summary judgment was properly denied because it failed to meet its initial burden of establishing its entitlement to judgment as a matter of law.

Matter of Spring v. County of Monroe, 2016 N.Y.App.Div. LEXIS 5307 (4th Dep't 2016)
Petitioner commenced this CPLR article 78 proceeding seeking disclosure of approximately 200 documents, emails, memoranda, and reports pursuant to the Freedom of Information Law (FOIL). After conducting an in camera review, Supreme Court directed the disclosure of several documents. The Fourth Department modified on the law by denying the petition insofar as it sought certain documents in the confidential record.

Pater v. City of Buffalo, 2016 N.Y.App.Div. LEXIS 5318 (4th Dep't 2016)
The trial court properly granted a motion by a city and its police department for summary judgment in the victims' actions alleging personal injuries arising out of incidents of sexual abuse committed by a police officer while he was on duty because the city established as a matter of law that it lacked notice of the officer's propensity for the type of behavior causing the victims' harm where the officer never exhibited any behaviors indicative of his alleged propensity to target vulnerable victims for sexual abuse, neither the officer nor his physicians ever detected any "neuropsychological issues" warranting treatment, and the victims' experts did not offer any detail with respect to the procedures or testing the city should have engaged in following the officer's second motor vehicle accident.

Diez v. Lewiston-Porter Cent. Sch. Dist., 140 A.D.3d 1665 (4th Dep't 2016)
Supreme Court abused its discretion in granting claimant's application for leave to serve a late notice of claim almost three years and eight months after the accident in question occurred.

Dodge v. County of Erie, 140 A.D.3d 1678 (4th Dep't 2016)
The negligence of a plaintiff in violating the rules of the road will not relieve a municipality of liability for its negligence in the design, construction, or maintenance of a highway. Appellate Division held that the defendant failed to establish on its motion its entitlement as a matter of law to qualified immunity.

Matter of Castiglia v. County of Ontario, 140 A.D.3d 1648 (4th Dep't 2016)
Petitioner commenced this proceeding seeking to annul the determination finding him guilty of disciplinary charges and terminating his employment as a correction officer for respondents. The Appellate Division unanimously confirmed the determination.

Matter of Elam Sand & Gravel Corp. v. Town of W. Bloomfield, 140 A.D.3d 1670 (4th Dep't 2016)
Fourth Department held that the trial court erred in granting a cross-motion filed by an individual and two citizens groups to dismiss a sand and gravel company's cause of action against a town and its agencies for bad faith and intentional delay of the company's application for a special use permit because the company complied with the requirements for a special use permit before the new zoning law was enacted, no determination on the company's application was made, and the company stated a cause of action for applying the special facts exception to its application.

Villar v. Howard, 126 A.D.3d 1297 (4th Dep't 2015)
Fourth Department held that the trial court erred in granting a sheriff's motion to dismiss based on a prisoner's failure to serve a timely notice of claim because under General Municipal Law § 50-e[1][b] the prisoner was not required to file a notice of claim naming the sheriff in his official capacity prior to commencing an action against him. Pursuant to Correction Law § 500-c, the sheriff owed a duty of care to the prisoner, and the trial court erred in ruling otherwise. In the context of the sheriff's CPLR 3211 motion, the issue of whether the sheriff's alleged acts of negligence were discretionary and making him immune from liability was an actual question that could not be determined at the pleading stage. The trial court properly granted the sheriff's motion to the extent that the prisoner alleged that the sheriff was vicariously liable for the negligence of his deputies.

Doe v. Rochester City School Dist., 137 A.D.1761 (4th Dep't 2016)
Appellate Division found that denial of a mother's motion for leave to amend the notice of claim, complaint, and bill of particulars was error in her action, alleging that her special needs daughter was raped at a high school, as a good faith basis for the amendment pursuant to General Municipal Law § 50-e(6) and CPLR 3025(b) was provided by the daughter's documented cognitive and social functioning delays, as well as her fear of the assailant and her post traumatic stress disorder that resulted from the attack. The school district did not suffer prejudice from the proposed amendment because no substantive changes in the theory of liability were made, and the loss of video surveillance footage was due to the district's own actions.

Matter of Becallo v. Zambrano, 132 A.D.3d 1261 (4th Dep't 2015)
Petitioner, a citizen in the Town of Cicero, commenced this original proceeding pursuant to Public Officers Law § 36 seeking the removal of respondent as the Town Supervisor. In her answer and responding affidavit, respondent admitted many of the factual allegations of the petition, particularly that she had a romantic relationship with an employee of the engineering firm that was hired by the Town and that she signed the contract with the engineering firm and approved invoices for work completed by the employee; that she purchased a one-half interest in the employee's residence and that he held a mortgage from her; and that she used campaign funds to pay for a bulk mailing of a Town newsletter to senior citizens. She denied, however, that the above acts created a conflict of interest or constituted wrongdoing and sought dismissal of the petition. The Fourth Department concluded that the petition must be dismissed, and concluded that the petitioner failed to establish a conflict of interest with respect to respondent's personal relationship with the employee.

Town of Macedon v. Village of Macedon, 129 A.D.3d 1639 (4th Dep't 2015)
A town's claim for a permanent injunction, alleging that a village improperly threatened to discontinue sewage treatment service without reasonable notice and violated an Intermunicipal Agreement for Sewage Treatment, accrued when the village first acted inconsistently with the Agreement, and was timely under CPLR 9802 under either the 18-month contract limitations period or the one-year limitations period for all other actions. The exception to the notice of claim requirement applied since the village threatened termination of sewage treatment services only two weeks before the Agreement was set to expire. The preliminary injunction was proper as there was a likelihood of success on the merits as the action was not barred under CPLR 9802.

Klein v. Man Sui, 132 A.D.3d 1358 (4th Dep't 2015)
Plaintiff, a police officer employed by the Town of Amherst, commenced this action pursuant to General Municipal Law § 205-e seeking damages for injuries he sustained while chasing and apprehending defendant, who had fled on foot from the scene of a traffic stop. Following joinder of issue, plaintiff moved for partial summary judgment on the issue of liability. Supreme Court granted the motion and the Fourth Department affirmed.

Swietlikowski v. Village of Herkimer, 132 A.D.3d 1406 (4th Dep't 2015)
Plaintiff commenced this action seeking damages for injuries he sustained when he fell from his bicycle while riding on a road owned and maintained by defendant. According to plaintiff, the accident was caused by a defective condition in the road. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and the Fourth Department affirmed. Defendant asserted and plaintiff conceded that the defendant did not have prior written notice of a defect. The case turned on whether defendant created the allegedly defective or dangerous condition with an "affirmative act of negligence." Plaintiff's expert opined that the dangerous condition was caused by the intentional removal of paving material from the area adjacent to the water valve box cover at the time the roadway was resurfaced, and the Appellate Division therefore concluded that plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident.

Matter of Dorfman v. City of Salamanca Bd. Of Pub. Utils, 138 A.D.3d 1424 (4th Dept 2016)
Respondents appealed from a judgment granting that part of the petition pursuant to CPLR article 78 seeking a judgment annulling the determination of respondent Commission of City of Salamanca Board of Public Utilities that doubled the rates charged for water for consumers with a one-inch or larger water meter in order to raise revenue necessary to meet the obligation of respondent City of Salamanca Board of Public Utilities to make bond payments. The Fourth Department concluded that Supreme Court properly annulled the Commission's determination, but disagreed with the court that the Commission improperly treated water meter owners differently based upon the size of the water meters. It therefore modified the judgment.

Wright v. City of Buffalo, 137 A.D.3d 1739 (4th Dep't 2016)
Fourth Department held that summary judgment was properly denied to a police department and various employees with respect to claims of wrongful arrest/false imprisonment in a widow's action, alleging that police used excessive force in restraining the decedent due to his refusals to be transported to the hospital for medical treatment, as the widow raised triable issues of fact as to whether the police actions under Mental Hygiene Law § 9.41 were reasonable. A question of the reasonableness of the police, for purposes of qualified immunity, was raised based on evidence as to whether the decedent had a mental illness and whether he was likely to harm himself or others in the circumstances. As issues of fact remained regarding whether the police used excessive force in taking the decedent into custody, summary judgment was properly denied on a battery claim.