Municipal Liability Update 2019

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NEW YORK COURT OF APPEALS

Prior Written Notice of Defect

Hinton v Vil. of Pulaski, 35 SSM 27, 2019 WL 722292 [Ct App Feb. 21, 2019]

Plaintiff brought an action against the Village of Pulaski for a personal injury caused by an alleged defect in an outdoor staircase leading from a sidewalk to a municipal parking lot. The Village of Pulaski Code required that no civil action shall be maintained against the Village for a personal injury caused by a defect in "any street, highway, bridge, culvert, sidewalk or crosswalk." The Village of Pulaski moved for summary judgment on the grounds that it had not received prior written notice of the alleged defect. Summary judgment was granted. On appeal the Appellate Division affirmed.

Where a municipality has enacted a prior written notice statute, General Municipal Law § 50–e (4) limits such statutes to streets, highways, bridges, culverts, sidewalks and crosswalks. Village Law § 6-628 in addition to the local Village of Pulaski Code requires prior written notice for such claims. Staircases have long been considered sidewalks, where they serve the same function as a sidewalk requiring a plaintiff to present proof that the Village had received prior written notice of the alleged defect and failed to remedy the same within a reasonable time. *See Woodson v City of New York*, 93 NY2d 936, 937 [1999].

Here, the Court of Appeals declined the Plaintiff's invitation to overturn *Woodson v City of New York*. The Court noted that in the 20 years since Woodson had been decided the legislature has taken no action to alter the *Woodson* rule. Here, the defect was in a staircase that served as a sidewalk so prior written notice was required.

NATURE OF DEFECTS REQUIRING PRIOR WRITTEN NOTICE

General Municipal Law 17-a

Waite v Town of Champion, 31 NY3d 586 [2018]

Petitioners brought an Article 78 proceeding to force the Town of Champion to form Fire Districts following a dissolution of a Fire Protection District pursuant to a dissolution of the Fire Protection District under General Municipal Law 17-a in accordance with the petition approved by a popular vote of the electorate. The Town of Champion complied with all of the notice and hearing requirements under General Municipal Law 17-a to dissolve the overly large Fire Protection District. The Town of Champion decided that in order to comply with its legal obligation to provide fire protection to its residents the best course was to create two smaller Fire Protection Districts to better apportion the tax levy instead of creating the only other option, a Fire District.

General Municipal Law 17-a was passed to allow for the dissolution of political subdivisions pursuant to various procedural steps. The first two steps at issue here are a petition by members of the electorate and a referendum vote on the entity's continued existence. Once the referendum is passed, the municipality is tasked with creating the plan to effectuate the dissolution and providing

sufficient time for public notice and hearing. If the public finds the plan objectionable they must again reach a sufficient number of signatures on a petition for a second referendum on the dissolution plan. However, if the electorate fails to pass a referendum and the municipality has complied with the referendum to dissolve, the manner of that dissolution and reassignment of obligations is a political matter to be decided by the municipality.

Here, the Court found that the replacement of one large fire district with two smaller fire districts complied with the referendum to dissolve the larger fire district. The Town of Champion complied with all notice requirements. Thus the court held that the Town could not be forced to adopt a different plan through an Article 78 proceeding.

POLITICAL DISCRETION WITHIN THE FRAMEWORK OF GENERAL MUNICIPAL LAW 17-a

Obligation to Maintain Bridges

Town of Aurora v Vil. of E. Aurora, 32 NY3d 366 [2018]

The Village of East Aurora built a bridge in 1973 within its borders. After its construction the Village undertook no action to maintain or modify the bridge. In 2006, New York State DOT began issuing notices of defects in the aging bridge. In 2010, the Village notified New York State DOT that the Town of Aurora was responsible for the maintenance of the bridge. The Town of Aurora brought an action to have the Village declared as the responsible party for the cost of the repairs to the bridge. The Village opposed the action and counterclaimed for a declaration that the Town was responsible for the maintenance of the bridge because the Village had not assumed control pursuant to Village Law § 6-606.

The default rule which is codified in Village Law § 6-604 presumptively makes all bridges which are at least partially within the boundaries of the Town the responsibility of the Town. The exception to this rule is found in Village Law § 6-606 which provides that a Village is responsible for any bridge that it exclusively controlled as of 1897 or that the Village had assumed control of pursuant to the process set forth in Village Law § 6-606.

Here, the Court interpreted the current statute, which was re-codified in 1974 with its predecessor, to find that the legislative intent of the law was to place bridges under the control of Towns unless a Village assumed control or was in control of a bridge prior to 1897. In so holding, the Court concluded that construction of a bridge by a Village did not mean that the Village had assumed control. Thus once a bridge has been built by a Village, the Town, by operation of law, is responsible for its maintenance.

TOWNS CAN BE FORCED TO MAINTAIN BRIDGES CONSTRUCTED BY VILLAGES

Review of Administrative Decisions

Save Am.'s Clocks, Inc. v City of New York, 17, 2019 WL 1385906 [Ct App Mar. 28, 2019]

346 Broadway in New York City had several areas of its interior designated as historic sites under New York City's Landmarks Preservation Law by New York City's Landmarks Preservation

Commission (LPC). Included among the area's designated as historically significant was the clock tower. The Clock mechanism is one of only two such mechanism in the world with the other located in the famous Big Ben clock in England. In 2014, the LPC approved a plan by a private developer to restore several of the other historic features of the building and to switch the clock to an electronic mechanism along with other improvements. Two public hearings were held on the proposal and a vote of the LPC approved the issuance of a Certificate of Appropriateness (COA) to allow the work to commence. Plaintiff's brought an action to vacate the COA on the grounds that the same was arbitrary for allowing the clock to be electrified and violated the Landmarks Prevention Law because the proposed plan did not allow public access to the clock's mechanical room.

Review of administrative decisions by the courts is limited to whether the administrative decision determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion. The Court does not have the authority to weigh the desirability of any particular course of action or to substitute its own choice of alternatives. The Courts are limited to the determination of whether the administrative decisions had any rational basis. If there is a rational basis then the decision cannot be held to be arbitrary.

Here, the Court held that the Appellate Division had improperly found the COA to be arbitrary. The Court noted that the COA allowed for the restoration and maintenance of several of the historic features of the clock. The Court held that there was a rational basis for the issuance of the COA.

ARBITRARY CHALLENGES TO ADMINISTRATIVE DECISIONS ARE REVIEWED UNDER THE RATIONAL BASIS STANDARD.

Reporting Requirements

Madison County Indus. Dev. Agency v Authorities Budget Off., 14, 2019 WL 1282035 [Ct App Mar. 21, 2019]

Madison County Industrial Development Agency (MCIDA) and Madison Grant Facilitation Corporation (MGFC) sought permission to file consolidated reports required under the Public Authorities Accountability Act from the Authorities Budget Office (ABO). MCIDA argued that MGFC was a subsidiary and therefore was permitted to file a consolidated report. The ABO disagreed with the designation of the MGFC as a subsidiary and required separate filings based upon an Attorney General Opinion that Industrial Development Agencies could not form subsidiaries. MCIDA brought an Article 78 on the grounds that the decision of the ABO was arbitrary.

The ABO was created in an amendment to the Public Authorities Accountability Act to police municipalities. It was given broad authority to request and receive from any state or local authority such information, books, records, other documentation and cooperation as may be necessary to perform its duties. Thus, the ABO can require separate filings from entities covered under the Public Authorities Accountability Act under its own police authority. Additionally, there is no requirement under the Public Authorities Accountability Act to allow a subsidiary to file a consolidated report.

The Court held that there was no basis in the Public Authorities Accountability Act to support the petitioner's argument that the decision to require separate reporting was contrary to law. Further, the Court held that the ABO had the authority to compel separate reporting. Further, that declining to treat MGFC as a subsidiary was rational in light of the Attorney General's opinion that Industrial Development Agencies could not form subsidiaries, and therefore could not be arbitrary.

AFFILIATES CREATED BY OR IN CONJUNCTION WITH LOCAL AUTHORITIES CAN BE COMPELLED TO PROVIDE SEPARATE REPORTING BY THE AUTHORITIES BUDGET OFFICE

FIRST DEPARTMENT

O'Brien v. County of Nassau, 164 A.d.3d 684 (1st Dept, 2018)

Plaintiff brought suit against Nassau County and the County Department of Public Works asserting claims for premises liability, negligent infliction of emotional distress, general negligence, and fraudulent concealment, after allegedly being exposed to asbestos while working at the Nassau Coliseum.

The First Department upheld the ruling that all of the claims as to the municipalities were time barred by the 1 year and 90-day statute of limitations. The Court explained that the 1 year and 90 days statute is measured from the date of discovery of the injury, or from the date when, through the exercise of reasonable diligence, the injury should have been discovered, whichever is earlier.

This same statute of limitations was found to apply for the allegations of fraudulent concealment, as that claim begins to run when a plaintiff attains knowledge of facts from which the fraud could have been discovered with reasonable diligence. Plaintiff's allegations of fraud were based on the concealment of the presence of asbestos, and the Plaintiff admittedly became aware of this presence, over three years before the suit was brought.

Johnson v. County of Suffolk, 167 A.D.3d 742 (1st Dept, 2018)

Infant plaintiff was injured after being struck by a vehicle when crossing the street. A notice of claim was served on the Town of Babylon and the County. Over two years later, plaintiff commenced a proceeding for leave to amend the notice of claim, and for leave to serve a late notice of claim, to assert as a theory of liability that a Town employee stopped his vehicle in one lane of travel and waved to the family to cross the street, resulting in the injury.

The First Department held that the addition of a new theory of liability was not permitted as an amendment to a notice of claim under General Municipal Law 50-e (6), as it was not technical in nature.

Additionally, the First Department held that the Supreme Court was without authority to grant leave to serve a late notice of claim, when the petitioners sought leave to serve the notice of claim after the one year and 90-day statute of limitations accrued. Moreover, although the infant

plaintiff was entitled to a tolling of the statute of limitations, he was still not entitled to serve a late notice of claim; as the petitioners failed to establish that the Town acquired actual knowledge within 90 days, of the essential fact constituting the claim, and petitioners failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim.

Mercedes v. City of New York, 169 A.D.3d 606 (1st Dept, 2019)

Plaintiff was allegedly injured due to the sudden malfunction of weight lifting equipment in a recreation center owned by the City of New York. Plaintiff petitioned for leave to file a late notice of claim under General Municipal Law 50-e (5), approximately three months after the 90-day statutory period elapsed. While the First Department found the plaintiff's claim of law firm clerical error was not a reasonable excuse, the Court also found that this was not fatal to their application. Rather, the petitioner was able to make a prima facie showing that the municipality received actual notice of the pertinent facts of the underlying claims by showing that he signed an incident report prepared by the municipalities' employee shortly after the accident, and that the equipment was repaired a few months later. The burden then shifted to the City to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice were allowed. The City's assertions that the delay will prejudice its investigation due to fading memories and the possible changed condition of the equipment was found to be insufficient to demonstrate prejudice. Thus, the First Department granted the application to serve a late notice of claim.

Kales v. City of New York, 169 A.D.3d 585 (1st Dept, 2019)

Motorist appealed ruling, which deemed the Defendant-City's Motion for summary judgment dismissing the complaint a motion to dismiss pursuant to CPLR 3211(a), and dismissed the complaint. The First Department upheld the ruling, holding that Plaintiff failed to assert in the notice of claim or plead in the complaint that the defendant had prior written notice of the roadway defect that allegedly caused her accident. Moreover, plaintiff did not assert the theory that the City created the dangerous condition in her notice of claim or complaint. Thus, despite defendant framing its motion as seeking summary judgment dismissing the complaint for failure to state a meritorious cause of action, the First Department held that the Supreme Court did not err in treating it as a motion to dismiss pursuant to CPLR 3211(a)(7), and did not err in granting that motion.

Small v. St. Barnabas Hospital, 165 A.D.3d 576 (1st Dept, 2018)

St. Barnabus hospital contracted with New York City to provide medical care to individuals at Manhattan House of Detention. Plaintiff brought a Section 1983 claim against the hospital alleging deliberate indifference to medical needs of the decedent, who ultimately died following aortic dissection. The Hospital moved for partial summary judgment dismissing the claim alleging deliberate indifference to medical needs under 42 USC 1983.
The First Department found that the plaintiff failed to show that the acts or omissions of St. Barnabus in the course of its treatment of the decedent were sufficiently harmful to evidence deliberate indifference to serious medical needs. Specifically, the plaintiff was unable to show

that St. Barnabus was deliberately indifferent by deterring or delaying access to off-premises medical care, including an off-site CT scan months prior to the terminal aortic dissection.

Ingrao v. New York City Transit Authority, 161 A.D.3d 683 (1st Dept, 2018)

Plaintiff slipped and fell on an escalator inside the Port Authority train station. It was alleged in the Notice of Claim and the subsequent 50-h hearing that the New York City Transit Authority controlled the escalator and failed to maintain it. As such, the First Department held that NYCTA was on notice of plaintiff's theory of lability, and thus the Notice of Claim was sufficient.

Sears v. City of New York, 160 A.D.3d 471 (1st Dept, 2018)

Decedent passed away due to dehydration while performing the Functional Skills Training (FST) exercise course in the Fire Academy. The First Department held that Plaintiff is not entitled to recover under General Municipal Law 205-a, as the injuries decedent sustained were not the type of occupational injury that Labor Law 27-a was designed to protect. Instead, the injuries arose from the unique risks associate with firefighting work, as the FST is designed to simulate the dangers in actual firefighting.

Dominguez v. City University of New York, 166 A.D.3d 540 (1st Dept, 2018)

Plaintiff petitioned to deem the notice of claim served upon the City University of New York timely. Plaintiff served the notice of claim 91 days after the accident occurred and therefore only one day outside of the 90 day period. The First Department held that this one day delay could not have prejudiced the defendants' ability to investigate and defend the claim. Thus, the late notice of claim was permitted.

SECOND DEPARTMENT

Axt v. Hyde Park Police Department et al., 162 A.D.3d 728 (2d Dep't, 2018)

Plaintiff's decedent was shot to death by the decedent's husband several hours after she reported that the husband had violated an order of protection to the Hyde Park Police Department. The Police Department phoned the husband's mother and instructed her to inform the husband not to contact the defendant.

The executor of the decedent's estate commenced an action against the police department and Town of Hyde Park to recover damages for wrongful death, with the allegation that the police were negligent in failing to protect the decedent. Defendants moved for summary judgment on the grounds that they could not be liable for negligence because there was no special relationship between the police department and the decedent, and that their actions were protected by governmental immunity. The Supreme Court, Dutchess County, granted defendants' motion, and Plaintiff appealed.

The Second Department upheld the Supreme Court's decision, holding that the defendants owed no special duty to the decedent. The Court stated, "while the police endeavored to contact the husband in order to instruct him not to further communication with the decedent, the police did not promise to arrest the husband and the decedent could not have justifiably relied upon assurances of police protection." Thus, without the assumption by the municipality of an affirmative duty to act, there can be no special duty.

Madonia v. City of New York, 164 A.D.3d 1320 (2d Dep't, 2018)

Plaintiff alleges injury from a trip and fall on a sidewalk defect in Brooklyn. Action was commenced against the City of New York, New York City Department of Transportation and the adjoining property owners. The municipalities were granted summary judgment, as they had no prior written notice of the alleged defect. The Second Department affirmed this holding as to the City entities, holding that Plaintiff's argument the city had constructive notice of the defect is unpersuasive, as "constructive notice of a defect may not override the statutory requirement of prior written notice."

Riabaia v. New York City Health and Hospitals Corp., 2019 NY Slip Op 02136

80-year-old plaintiff served a notice of claim on the New York City Health and Hospitals Corporation after a fall at Coney Island Hospital. Defendant served Plaintiff with a demand for oral examination pursuant to General Municipal Law 50-h. Plaintiff adjourned the oral examination multiple times over the next 9 months, and then subsequently commenced the subject action. Defendant moved to dismiss for failure to comply with General Municipal Law 50-h. Plaintiff opposed the motion, with several letters written by her doctors, stating that she was homebound, weak and had multiple medical and mental problems.

The Second Department held that under the circumstances of this particular case, the plaintiff's failure to appear for the 50-h examination should have been excused in light of the nature and extent of her documented medical issues. Therefore, defendant's motion to dismiss was denied.

Moroz v. City of New York, 165 A.D.3d 799 (2d Dept, 2018)

Plaintiff was injured when he was struck by a falling scaffold plank while performing renovation work at a Brooklyn school. Seven months following the accident, Plaintiff commenced the proceeding for leave to serve a late notice of claim upon the City of New York, New York City Department of Education, and the New York City School Construction Authority. The Supreme Court granted the petition and the municipal parties appealed.

The Second Department reversed, holding that the petitioner failed to provide a reasonable excuse for the delay in serving a notice of claim, and the municipal parties did not acquire actual knowledge of the essential facts of the claim within the 90-day period or a reasonable time after. The Court additionally noted that the transitory nature of the injury-producing condition weighs against the granting of an application to file a late notice of claim.

Ade v. City of New York, 164 A.D.3d 11998 (2d Dept, 2018)

Infant plaintiff was struck by a vehicle, after leaving school, when crossing the street. Typically, there was a crossing guard assigned to the intersection one block away from the intersection where the accident occurred, however the crossing guard was on vacation and no substitute was assigned. Suit was brought against the City of New York and the Board of Education of the City of New York, alleging that they were negligent in failing to place a substitute crossing guard and the intersection, and alleging negligent supervision.

The municipal defendants moved for summary judgment, arguing that there was no special relationship with the plaintiff, and thus no duty was owed. The Second Department agreed, finding the that municipal defendants' duty was limited to providing a crossing guard at the intersection where it typically provided one, and did not extend to the intersection where no crossing guard has been assigned. Moreover, the Second Department found that the failure of having a crossing guard at the intersection of the accident was not a proximate cause of plaintiff's injuries.

As to the negligent supervision cause of action, the municipal defendants were also entitled to summary judgment, as the accident occurred after the infant plaintiff was dismissed from school, and he was not released into a foreseeably hazardous setting that they had a hand in creating.

Constantino v. City of New York, 165 A.D.3d 1225 (2d Dept, 2018)

Pedestrian was injured after a slip and fall on a patch of ice on the sidewalk abutting a gold course owned by the city. The pedestrian moved for leave to serve a late notice of claim, and the city cross-moved to dismiss. The case was dismissed, and leave to serve a late notice of claim denied. The Second Department held that the plaintiff did not establish the defendants acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose.

O'Dowd v. Jericho Fire Department, 161 A.D.3d 981 (2d Dept, 2018)

Plaintiff allegedly sustained injury when he slipped and fell on the kitchen floor for the Jericho Fire Department while maintaining medical equipment supplied by his employer. It is alleged the accident occurred because a fire department employee had just mopped the floor and failed to put up warning signed. It is also alleged that the fall was witnessed by employees of the fire department, who provided medical assistance and transported him to the hospital.

Plaintiff moved for an extension of time to serve a notice of claim, approximately one year after the accident. The Second Department held that as the fire department has actual knowledge of the facts constituting the claim, due to the witnesses, leave to file a late notice of claim was appropriate.

Coventry v. Town of Huntington, 165 A.D.3d 750 (2d Dept, 2018)

Infant Plaintiff was injured when he cut his foot on a rusty drainage pipe in the water at a beach in the Town of Huntington. The Town moved for summary judgment, as there was no prior written notice of any alleged defective condition, pursuant to the requirements of the Town

Code. Plaintiff argued that the written notice requirement of the Town Code did not apply as the pipe was not a culvert. The Town submitted an affidavit from an expert engineer asserting that the pipe at issue was a culvert used for run-off rainwater from a nearby roadway. The Court agreed with the Town, and the Second Department affirmed summary judgment, holding that the Town established that it did not have prior written notice of the alleged defect, and the Plaintiff failed to raise a triable issue of fact, as actual or constructive notice of the alleged hazardous condition does not override the statutory requirement of prior written notice.

THIRD DEPARTMENT

Necessity of Special Duty and Government Immunity

Normanskill Cr., LLC v Town of Bethlehem, 160 AD3d 1249 [3d Dept 2018]

Plaintiff Normanskill Creek, LLC (Normanskill) operated a golf course along the Normanskill river in the Town of Bethlehem. Normanskill began placing fill on their property without the required permit from the town engineer. Normanskill alleges that the town engineer was aware of the fill being placed without a permit and directed the third-parties to dispose of fill at Normanskill. After town residents raised concerns about the fill, the town engineer ordered the fill to stop until Normanskill filed an abbreviated application for a permit. After filing the abbreviated application, the town engineer issued the permit. A short time later the bank gave way causing a landslide. Normanskill sued the Town of Bethlehem for damages arising from the landslide. The Town of Bethlehem moved to dismiss the complaint for failure to state a claim and based upon governmental immunity.

In order to bring a negligence action against a municipality a plaintiff must show that the municipality owed the Plaintiff a special duty of care. A special duty can be established when a municipality voluntarily creates special relations by the following: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking. Further, governmental immunity does not apply where the actions of the municipality were ministerial and not discretionary.

Here, the Court found that based upon the actions of the town engineer the plaintiff had pled sufficient facts to establish a special duty. Particularly, the court focused on the allegations that the town engineer was aware of the fill prior to the permit and allegedly stated that the fill would make the bank more stable. Further the court found that the town engineer in directing fill to be placed on site and approving the abbreviated application was sufficient to demonstrate control over the actives such to give rise to a special duty. The Court further rejected the immunity defense on the grounds that the town engineer was not authorized to exercise authority in allowing Normanskill to file an abbreviated application.

SPECIAL DUTY CAN BE ESTABLISHED THROUGH THE ACTIONS AND WORDS OF A SINGLE EMPLOYEE

Special Duty of Care

Szydlowski v Town of Bethlehem, 162 AD3d 1188 [3d Dept 2018]

Normanskill Creek, LLC (Normanskill) operated a golf course along the Normanskill river in the Town of Bethlehem. Normanskill began placing fill on their property and continued to do so for several weeks before the Town of Bethlehem required it to obtain a permit for placing fill. After the permit was issued, Normanskill continued placing fill. Shortly thereafter there was a landslide that resulted in the damming of the Normanskill River flooding the Plaintiff's property. Plaintiff brought an action against the Town of Bethlehem alleging negligence. The Town of Bethlehem moved to dismiss.

In order to bring a negligence action against a municipality, a plaintiff must show that the municipality owed the Plaintiff a special duty of care. A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant, and dangerous safety violations. A municipality only violates a statutory duty where the statute violated also creates a private right of action in favor of the Plaintiff.

Here, the Court found that the Plaintiff had not pled a special relationship. They could not establish a statutory violation because the statute they relied on did not provide for a private right of action. The Court further held that though Normanskill in separate litigation was able to establish a voluntary assumption of the duty, that the scope for that duty did not extend to the Plaintiff who was located on the river.

SCOPE OF SPECIAL DUTY CAN BE LIMITED BY THE PROXIMITY OF THE PLAINTIFF TO THE ACTIONS OF THE MUNICIPALITY.

Justiciable Controversy

Salvador v Town of Queensbury, 162 AD3d 1359 [3d Dept 2018]

In 1992, the legislature enacted a library district which covered the Town of Moreau, the Town of Queensbury and Warren County. The enabling legislation provided that the library district would prepare a proposed budget, hold a public hearing on the proposed budget and submit the budget for approval by the voters of the district. The municipalities were required by law to levy a tax on real property to provide for the expenditures in the library budget, but cannot alter the library budget in any way. Plaintiff, a resident of the Town of Queensbury, brought a declaratory judgment action alleging that the Town of Queensbury approved its budget prior to the library budget coming up for a popular vote without a separate line item for library expenditures, thus depriving the citizens of their right to vote upon the library budget. Plaintiff sought a declaratory judgment finding that Warren County and the Town of Moreau, which each approved their respective budgets after the Library district voted on its budget, were using the correct procedure under the enabling statute. The municipalities moved to dismiss the action.

Where a municipality is not required to take an action pursuant to a statute such action is discretionary in nature. In order for there to be a justiciable controversy there must be a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect.

Here, the passage of a budget before or after the passage of the library budget did not affect the library budget or the levy necessary for the same by operation of statute. Nor was there any requirement, or practical effect of including a line item for library expenditures. The Court therefore dismissed the complaint on the grounds that there was no justiciable controversy.

DECLARATORY JUDGMENT ACTIONS REQUIRE A REAL DISPUTE FOR WHICH A DECLARATION WILL HAVE A PRACTICAL EFFECT.

Late Notice of Claim

Holbrook v Vil. of Hoosick Falls, 168 AD3d 1263 [3d Dept 2019]

In 2014, the Town of Hoosick Falls (Town) became aware of the presence of perfluorooctanoic acid (PFOA) in its municipal water system. As early as 2015 the Town was involved in remediation talks with the local manufacturing companies believed to have caused the pollution. In January of 2016 the Department of Environmental Conservation issued an emergency regulation that determined for the first time that PFOA was hazardous to health. That month the Department of Health began offering blood tests to the residents of the Town. In May and July of 2016 the blood tests returned showing elevated levels of PFOA. On May 3, 2017, by Order to Show Cause several residents of the Town sought leave to file a late notice of claim.

The Supreme Court has broad authority to grant or deny a motion to file late notice of claim. The Supreme Court is required to consider a number of factors including reasonable excuse for the delay. However, even in the absence of a reasonable excuse for the delay where the municipality had actual knowledge of the essential facts of the claim it is not improper to grant leave to file a late notice of claim.

Here, the Court found that the Town was intimately aware of the problem faced by the Plaintiffs even before the Plaintiffs were aware. The Town knew of the dangers of PFOA and that the residents' blood tests were showing elevated levels. Therefore, the Town had actual knowledge of the essential facts of the claim and could show no prejudice caused by the late notice of claim.

LATE NOTICE OF CLAIM IS APPROPRIATE WHERE THE MUNICIPALITY HAS ACTUAL KNOWLEDGE OF THE ESSENTIAL FACTS OF THE CLAIM.

Qualified immunity

Enker v County of Sullivan, 162 AD3d 1366 [3d Dept 2018]

Plaintiff was a pedestrian who was injured when he was struck by a car while attempting to cross a road. Plaintiff chose not to use the pedestrian push signals located at the intersection of two roads, choosing instead to enter the roadway between two cars. Plaintiff alleged that the municipality had

failed to properly regulate and control traffic. The municipality had undertaken a 3 year study of traffic conditions prior to designing the traffic plan for the subject intersection in the 1970s.

Municipalities have a non-delegable duty to construct and maintain roads in a reasonably safe manner. However, a municipality enjoys a qualified immunity from liability from road planning decisions where it undertook sufficient study of traffic conditions and the decision was the result of sufficient deliberative process. A party cannot show that the municipality failed to conduct a proper study by merely showing that other options are available.

Here, the Court found that the study conducted by the municipality and the subsequent maintenance of the traffic control devices meet their prima facie burden to show that its safety planning decisions resulted from a deliberative decision-making process. Plaintiff failed to raise a triable issue of fact with an expert affidavit that showed alternative traffic control plans were feasible.

QUALIFIED IMMUNITY ATTACHED WHERE THE MUNICIPALITY UNDERTAKES A REASONED DELIBERATIVE DECISION-MAKING PROCESS

FOURTH DEPARTMENT

Late Notice of Claim

Powell v Cent. New York Regional Transportation Auth., 169 AD3d 1412, 1413 [4th Dept. 2019]

Plaintiff sought damages for personal injuries that she allegedly sustained when exiting a bus owned and operated by Central New York Regional Transportation Authority. She did not submit a timely notice of claim within 90 days of the accident to the municipal entity and instead sought leave to serve a late notice of claim. The lower court emphasized the three main factors when determining to grant a late notice of claim as 1) whether there was a reasonable excuse for the delay; 2) whether the municipal entity had actual knowledge of the facts surrounding the claim within 90 days of which they occurred; and 3) whether the delay would cause substantial prejudice to the municipal entity. The lower court further noted that it is the Plaintiff who "bears the burden of demonstrating that the respondent had actual timely knowledge." Plaintiff's motion seeking leave to serve a late notice of claim was denied as the Central New York Regional Transportation Authority lacked any knowledge of her alleged injuries within 90 days of the occurrence. The Plaintiff did not say anything to the bus driver at the time the accident allegedly occurred and her only communication with the municipal entity after the accident was an anonymous phone call she made wherein she failed to describe the accident or her injuries. Further, there was no reasonable excuse for such a delay based upon Plaintiff's allegations that she became aware of her injuries shortly after the incident in which she claims she was injured. As such, the denial of the application for leave to serve a late notice of claim was affirmed by the appellate court.

Duty to defend municipal employee

Krug v City of Buffalo, 162 AD3d 1463 [4th Dept 2018]

A police officer commenced an article 78 proceeding challenging the City's denial to defend and indemnify him in a civil action alleging assault of a civilian. The lower Court granted the petition

and the City appealed. The civil action arose when Petitioner was on patrol and allegedly attacked the civilian complainant. Petitioner was indicted in connection to the incident and the civil suit followed. The Court held that the City had a duty to defend the petitioner "if his alleged conduct occurred or allegedly occurred while he was acting within the scope of his public employment or duties." It was undisputed that the Petitioner was on duty and working at the time if the incident. The case turned on the interpretation of a 30 second video recording. This recording did not capture the entirety of the encounter between petitioner and the civilian complainant. Rather, it depicted a part of the encounter wherein Petitioner struck the complainant in the legs and feet with his baton unaccompanied by further factual context. The video further depicted a chaotic intersection with heavy police presence. Three other officers appeared to be carrying batons like the Petitioner had, and one other officer appeared to be engaged in a physical struggle with another civilian. The lower Court held that although an employee's conduct does not fall within the scope of their employment when actions are taken for wholly personal reasons unrelated to the job, the Court did not find this to be the case. Rather, it held that the City's decision to deny a defense in the civil action was arbitrary and capricious. The appellate court affirmed this decision.

Negligence regarding repair of fire hydrant

Preaster v City of Syracuse, 160 AD3d 1423 [4th Dept. 2018]

Homeowners brought a negligence action against the City alleging that the failure to repair a fire hydrant increased the damages they sustained when their house caught on fire. The lower Court granted the City's motion to dismiss. The Court noted that the City providing and supplying water to assist in extinguishing fires was a governmental function pursuant to the City's police powers which would entitle it to immunity as the City was working to help protect the safety of the public. The Court distinguished this from a municipal entity being engaged in a proprietary function. Pursuant to such immunity the City could not be held liable based upon an alleged failure to repair a fire hydrant. The City's motion was further granted as the Claimant failed to allege or establish any such special relationship with the City that would establish any liability. Claimant failed to allege any promises or actions by the City that would have indicated an affirmative duty to act on their behalf. As such, the appellate court affirmed the dismissal of the action.

Statute of limitations

Baity v City of Buffalo, 159 AD3d 1380, 1380 [4th Dept. 2018]

The lower court granted the City's motion to dismiss the complaint as time-barred. Plaintiff commenced the action making claims of false arrest and detention when she was arrested and released on August 7, 2006 without any charges being filed. While she timely served a notice of claim she did not commence the action against the City until July 15, 2008. Plaintiff contended that the motion to dismiss should not have been granted alleging that the City waived the statute of limitations defense because their motion was made more than 60 days after interposing an Answer. However, the Court held that the 60 day waiver rule does not apply to such defenses based upon the statute of limitations. The Court further held that the applicable statute of limitations to commence the action against the municipality was the 1 year and 90 day limitation period as stated

in General Municipal Law 50-i(1)(c) and not the three year period as stated under New York's constitutional tort law. Such dismissal was affirmed by the appellate court.

Late notice of claim on school district

Kennedy v Oswego City School Dist., 148 AD3d 1790, 1790 [4th Dept. 2017]

Claimant's application for leave to serve a late notice of claim was denied in relation to his allegations of labor law violations for injuries suffered while working on a school construction project against the city school district. The Court examined the considerations of granting a late notice of claim including any reasonable excuse for the delay, if the municipality had actual and timely knowledge of the facts surrounding the claim, and any substantial prejudice to the municipality. Claimant contended that an accident report given to his construction manager constituted actual and timely notice to the school district. However, the Court found that along with the construction manager not being an agent of the school district for purposes of service of any notice of claim, the accident report failed to describe any of the essential facts constituting a claim as it made no connection between claimant's accident and any liability on the school district. "Respondent's knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim." Further, the Court found no reasonable excuse for such delay after Claimant argued he was initially unaware of the severity of his injuries, despite seeking leave to serve a late notice of claim seven months after undergoing surgery. As such, the appellate court affirmed the denial of the late notice of claim.

Defamation against county official

Spring v County of Monroe, 169 AD3d 1384 [4th Dept. 2019]

County employee made allegations of defamation against the county, county attorneys, and county executive. The lower court granted in part and denied in part defendants' motion for summary judgment. Upon appeal the Appellate Division held that the County executive was absolutely immune from the claim of defamation and further that such statements were entitled to qualified privilege. Plaintiff was the executive health director of a community hospital. The Department of Health received complaints about Plaintiff's treatment of patients. Such complaints were found to be substantiated after a DOH investigation and Plaintiff was subsequently terminated from his position. The County executive thereafter provided statements to the press regarding Plaintiff's termination and stated that after an independent review, Plaintiff was found not to be living up to the standard of excellence required for the position, further it was in the best interests of the hospital to replace Plaintiff as executive director. The appellate Court found that absolute privilege applied to the County executive as she made the statements in her official capacity and made such statements in the discharge of her responsibilities as County executive. The Court found that qualified privilege would also apply as the County executive was discharging her public responsibility to keep the public informed about a sensitive issue that was receiving extensive media attention. As such, the allegations of defamation were dismissed.

Probable cause as defense for claim of malicious prosecution

Owen v State, 160 AD3d 1410, 1411 [4th Dept. 2018]

Arrestee brought action against the state alleging *inter alia* malicious prosecution after he was arrested at a sobriety checkpoint for several traffic infractions along with suspicion of driving while intoxicated. The Court of Claims dismissed Plaintiff's claim and the appellate court affirmed same. When approaching the sobriety checkpoint, Plaintiff was instructed to pull over so other cars could pass and the State trooper could write him a ticket for a missing registration sticker and test Plaintiff's window tint. Upon questions Plaintiff the trooper observed Plaintiff having bloodshot eyes, slurred speech, and a flushed face. The trooper smelled alcohol and the Plaintiff refused to make eye contact. Although when Plaintiff's blood was tested at the hospital two hours later he was found to have a blood alcohol content of 0.00%, the Court found that the trooper had sufficient probable cause for a DWI arrest. Such probable cause doomed Plaintiff's malicious prosecution claim as a required element of the claim for malicious prosecution is a lack of probable cause for the arrest. As such, Plaintiff's claim for malicious prosecution was dismissed.

Judicial Immunity

Town of Turin v Chase, 151 AD3d 1873, 1874 [4th Dept. 2017]

Town commenced suit against a former town justice seeking to recover damages from the justice's mishandling of fines and fees as well as a failure to keep complete and accurate records while in office. The lower court granted the defendant's motion for summary judgment seeking dismissal of the complaint contending that the defendant was entitled to judicial immunity for actions committed while acting as town justice. The Court held that when a judge is carrying out his/her mandated duties such actions "fall within the scope of judicial immunity though done maliciously or corruptly." While such immunity does not protect a judge who acts exceed the scope of his/her jurisdiction, it will protect actions within their jurisdiction regardless of intent. Dismissal of the case was warranted and affirmed as the judge's actions were cloaked with judicial immunity as the handling of fees and keeping of books are mandated by statute and regulation.

Notice of claim

Gonzalez v Povoski, 149 AD3d 1472 [4th Dept. 2017]

An infant, by his parent, filed a lawsuit against the Village and an energy company after sustaining injuries after being struck by a car where excavation work was being carried out by the Village and a construction company. The Village's motion for summary judgment was denied and thus appealed to the Fourth Department. While the Fourth Department affirmed the order of the lower court with respect to the claims made by the infant, it concluded that the derivative claims advanced by the infant's parent should have been dismissed. While a notice of claim was served on the Village as it relates to the infant's claims, the Village received no such notice pertaining to the derivative claims. The Court held that while a claimant does not need to precisely state each cause of action in a notice of claim it must contain enough factual information to either directly or indirectly provide notice of the claims to be asserted against the municipality. The complaint cannot contain any new causes of action or legal theories not referred to in the notice of claim. As such, the parent plaintiffs were "foreclosed from asserting a derivative claim against the [Village]."

Duty to protect student

Hale v Holley Cent. School Dist., 159 AD3d 1509, 1510 [4th Dept. 2018]

A high school student's father commenced an action individually and on behalf of his son after another classmate came up from behind him, placed him in a choke hold, causing the student to lose consciousness and fall to the floor. The lower court denied the school district's motion for summary judgment, however the appellate court reversed this decision finding that the school district lacked any knowledge or notice of such potential behavior that could have been found as any breach of a duty to provide adequate supervision. Through the course of discovery it was found that plaintiff's son and the classmate did not have a history of animosity, nor where there any such physical altercations prior to the date of the accident. Further, while the classmate did have an extensive disciplinary history this was primarily related to insubordinate and disruptive behavior during class. The last time the classmate was involved in any prior instances of violence was more than three years prior to the date of the incident. As such, the appellate court concluded that such information was too remote in order to impugn any knowledge to the school district that the classmate posed a danger to any other students. Therefore the lower court's ruling was reversed.