



GOLDBERG SEGALLA ^{LLP}

Government Liability and Civil Rights Newsletter

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Goldberg Segalla LLP's Government Liability and Civil Rights Newsletter provides a summary of the latest Court decisions shaping the landscape of civil rights and government liability. The intent of our review is to provide local governments, school districts, governmental agencies, governmental officials, private entities and insurance companies with an overview of the national decisions impacting the representation and defense of all entities that may be subject to claims involving individual civil rights and employment practices. We greatly appreciate your interest in our newsletter and ask for your commentary, as well as questions. We would also appreciate and ask that you share this newsletter with your colleagues. If after receiving this edition, you wish to continue to receive this newsletter, please email ecasell@goldbergsegalla.com. If you know of others in your organization who would like to be added to the mailing list, let us know. I hope that you find this publication informative, and we appreciate any suggestions that you might have. For information on these cases contact:

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SPOTLIGHT DECISIONS

New York Court Of Appeals Upholds Written Notice Law

Gorman v. Town of Huntington, 12 N.Y.3d 275 (Court of Appeals 2009)

Norma Gorman tripped on a sidewalk defect that had been previously reported in writing by a local church pastor to the Town Department of Engineering Services (DES). Huntington Town Code, §174-3 required written notice of sidewalk defects be given to the Town Clerk or the Superintendent of Highways. While written notice was given to DES it was not given to the Town Clerk or Highway Superintendent as required by Section 174-3.

Plaintiff could not prove the Town created the condition, nor could she prove there was a special use of the sidewalk by the Town. Plaintiff argued the Town should be estopped from relying on the written notice defense because it had delegated responsibility for fixing defects and keeping records of repairs to DES.

Supreme Court agreed with the Plaintiff, and the Appellate Division Second Department affirmed, striking the written notice defense.

The Court of Appeals reversed the Order of the Appellate Division Second Department and dismissed Plaintiff's Complaint in a 4-3 decision upholding the Town's written notice law. The Court strictly construed the written notice requirement in the Town Code and rejected Plaintiff's waiver and estoppel arguments.

In *Gorman*, Plaintiff argued that the Town was estopped from relying on the written notice defense because written notice was given to a different Town Department that was responsible for sidewalk repairs. In a close case, the Court of Appeals, 4-3, rejected the estoppel argument that had been adopted by both Supreme Court and the Appellate Division Second Department.

A written complaint to the wrong municipal designee, or a phone complaint that is later reduced to writing does not satisfy the written notice requirement.

Plaintiffs have been attacking the written defense for quite some time as it enables a municipality to have a case dismissed without a trial. The Courts have denied Motions for Summary Judgment when Plaintiff offers "proof" that the municipality negligently created the condition. That exception is construed narrowly and requires proof of a negligent repair, not a condition that deteriorated over time after a prior repair. *See, Oboler v. City of New York*, 8 N.Y.3d 888, 832 N.Y.S.2d 871.

The lack of written notice is a valuable defense for municipalities in New York State because it provides a basis for dismissal of cases where there is no written notice, and it reduces the legal fees that municipalities spend by avoiding trial expenses.

The Decision in *Gorman* was a close one, upholding strict interpretation of the municipal code requirement of written notice, rejecting the estoppel argument. Had the Decision gone in favor of Plaintiff, municipalities across the state would have faced numerous estoppel arguments by Plaintiffs when opposing Motions for Summary Judgment.

Contributed By: Brian W. McElhenny, Esq.

Court Clarifies that Discretionary Acts Can Never Be a Basis For Municipality Liability

McClellan v. The City of New York, 12 N.Y.3d 194 (2009)

In *McClellan*, the Court of Appeals held that discretionary acts by municipal officials can never be basis for municipal liability, notwithstanding contrary language in two of its recent governmental immunity cases. The plaintiff mother sued the City for its alleged negligence in permitting a family day care home provider to renew her registration despite two substantiated complaints regarding her care of other children. Plaintiff's child was seriously injured in the provider's care. The City's motion for summary judgment based on governmental immunity was denied and the Appellate Division affirmed. The Court of Appeals reversed, rejecting the plaintiff's argument that a "special relationship" need not be shown where the municipality's negligence involved

ministerial conduct. The Court found precisely the opposite, stating that government action that is discretionary may not be the basis for liability, while ministerial actions may be, but only if they violate a special duty owed to plaintiff, apart from any duty to the public in general. The Court explained that to the extent certain language in two recent cases may have suggested that discretionary acts could give rise to municipal liability if a special duty is shown, such statements were wrong and the Court's earlier holdings which provided complete immunity to discretionary acts stated the correct rule.

A case currently being litigated in Westchester Supreme Court presents an interesting twist on this rule. There, a municipal officer engaged in both discretionary and ministerial acts -- he participated with other municipal officials in adopting a specific air pressure test for forced sewer mains and he also was the inspector in the field who enforced this testing requirement on the plaintiff, who made multiple complaints that it was dangerous. Based on *McLean*, the defense of governmental immunity will stand or fall on the Court's determination of whether the municipal conduct is discretionary or ministerial.

Contributed By: William T. O'Connell, Esq.

SPOTLIGHT CIVIL RIGHTS

VARIOUS FEDERAL AND STATE COURT DECISIONS

I. QUALIFIED IMMUNITY

Droz v. McCadden, 2009 U.S. App. LEXIS 20370 (2d Cir. 2009)

Police Officer Awarded Qualified Immunity

The Second Circuit held that the Defendant State Trooper was entitled to qualified immunity. The Court held that the facts established that the officer reasonably believed that he was acting at the behest of a Judge, and, therefore, had arguable probable cause to arrest the Plaintiff for criminal contempt and probable cause to commence a criminal contempt proceeding against the Plaintiff. The Court held that qualified immunity existed with respect to the Plaintiff's claims for false arrest and malicious prosecution pursuant to 42 U.S.C. §1983. The Court held that qualified immunity applied for the false arrest charge because the officer reasonably believed the Judge instructed the officer to arrest the Plaintiff for disorderly behavior when the Plaintiff arrived at a Courthouse and refused to show a Town Officer what was in a brown paper bag that the Plaintiff was carrying. The Court held that qualified immunity applied to the malicious prosecution claim because the Defendant spoke to the Judge and was instructed by the Judge on the charge to be brought against the Plaintiff. Therefore, the Court concluded that there was probable cause for instituting the criminal proceeding against the Plaintiff.

Finigan v. Marshall, 574 F.3d 57 (2d 2009)

Court Grants Police Officer Qualified Immunity

In this case, the Defendant was the Deputy Sheriff of Saratoga County. On December 26, 2003, the Plaintiff went to her former marital residence, where her estranged husband resided, while

the ex-husband was not at home and without his permission, to remove personal property. The Defendant responded to a “911” burglary in progress report. When the Defendant arrived on the scene he put the Plaintiff into custody. After the Plaintiff was released without having been charged with a crime, Plaintiff brought a civil rights action against the Defendant for false arrest and abuse of process. The Court held that even though the Plaintiff shared title to the house with her estranged husband, the Defendant had probable cause to arrest the Plaintiff.

After responding to the “911” call, the Defendant recognized the premises as the residence of the ex-husband. The Defendant had personal knowledge that the ex-husband resided at the premises, that Plaintiff had moved out sometime before, and that divorce proceedings were pending. The Plaintiff informed the Defendant that she had legal title to the residence, that she was removing only her own property, and that her divorce attorney told her she could do so. The Court held that the Defendant had probable cause to arrest the Plaintiff for criminal trespass. At the time of the arrest, the Defendant knew of the report of burglary at the address of the premises. The Defendant knew that the Plaintiff was no longer residing at the premises, a divorce proceeding between the Plaintiff and ex-husband was pending, the ex-husband had changed the locks, the ex-husband was away, the Plaintiff had entered the premises and removed property, and a neighbor indicated having no idea how the Plaintiff entered the premises. The Court held that the information the officer relied on constituted probable cause for an arrest for criminal trespass.

The Court held that where title of property is jointly held by the tenants in their entirety and was once the sole residence, the consent of the non-resident spouse alone does not, as a matter of law, establish a right to enter. The Court held that under New York law a non-resident spouse who is a titled owner of a house and enters without the permission of the resident spouse, may be convicted of burglarizing his or her own property. The Court held that the facts available to the Defendant at the time of the arrest would cause a reasonable person to believe that a crime was about to be committed.

Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009)

Israeli Security Agent Immune From Suit

The Plaintiffs were survivors of an Israeli military attack on a suspected terrorist residential apartment building in Gaza City. The Plaintiff sued the former head of the Israeli Security Agency. The Plaintiffs alleged war crimes and violations of international law and sought damages pursuant to the Alien Tort Statute and the Torture Victim Protection Act. The District Court dismissed the Complaint on the grounds that the Defendant was immune from the suit under the Foreign Sovereign Immunities Act (FSIA). The Second Circuit affirmed, but on different grounds. The Court held that the Defendant was immune from suit under common-law for the acts alleged.

The Defendant was the former head of the Israeli Security Agency, so the question became whether a former official could be held liable. The Court did not address the issue of whether FSIA applied to former officials or not. The Court did not address the issue because former officials enjoy immunity under common-law. The Court held that FSIA is silent with regard to former foreign government officials. Because FSIA was silent on the issue, the Court looked to

the common-law. The Court held that if Congress intended to overrule the common-law, then it would have done so when enacting FSIA.

II. DUE PROCESS

Okin v. Village of Cornwall-on-Hudson Police Dept., 2009 U.S. App. LEXIS 18422 (2d Cir. 2009)

Court Holds Triable Issue On Due Process Violation

The Second Circuit held that a triable issue of fact existed on whether police officers violated the due process rights of the Plaintiff. The Plaintiff alleged a pattern of behavior by the police in responding to domestic abuse. Plaintiff alleged that the police did nothing in response to the Plaintiff's boyfriend's violence. The Court held that a due process violation can exist when a police officer's implicit message is that police condone conduct. The due process clause may be violated when a police officer's affirmative conduct creates or increases a risk of private violence and thereby enhances the danger to the victim. Inaction by government officials in the face of potential acts of violence may constitute assurances giving rise to the level of condonation of private violence. In this case, the Court held that the reasonable trier of fact could find that the Defendant's behavior enhanced the danger to the Plaintiff by encouraging or condoning the boyfriend's alleged domestic violence. The Court held that a reasonable fact-finder could conclude that the police, by their affirmative conduct, enhanced the danger to the Plaintiff because they conveyed to the boyfriend that he could continue to engage in domestic violence.

III. PRO SE LITIGANTS

Sledge v. Kooi, 556 F.3d 137 (2d Cir. 2009)

Second Circuit Criticizes Treatment Of Pro Se Litigants

The Second Circuit granted summary judgment to the Defendant. The Court dismissed the Plaintiff's Complaint alleging that the Defendant violated the Plaintiff's Eighth Amendment right while the Plaintiff was incarcerated at the Auburn Correctional Facility. The lower Court held that the Plaintiff lost his special pro se status because he had filed numerous lawsuits in the past. The Second Circuit disagreed. The Court held that when considering whether to withdraw a pro se litigants special status, the Court should consider not only the litigant's lifetime participation in all forms of civil litigation, but also the specific experience with the particular procedural setting presented. After a strong showing that a pro se litigant had an adequate experience generally, so as to render special solicitude unnecessary and potentially inappropriate, a Court should limit the withdrawal of special status to specific circumstances in which the litigant's experience indicates that he may be fairly deemed knowledgeable and experienced with the proceeding at hand. The Court held in this case that broad relocation of the Plaintiff's special status as a pro se litigant was unwarranted. Although the Plaintiff had appeared in approximately a dozen Federal and State actions, he had minimal competence in the type of proceeding involved in this action.

IV. FAILURE TO PROSECUTE

Lewis v. Rawson, 564 F.3d 569 (2d Cir. 2009)

Plaintiff Refusing To Testify At Trial Results In Dismissal

The Plaintiff on the first day of trial refused to testify because he was detained during trial at the same prison facility where his rights had allegedly been violated. The District Court dismissed the case with prejudice. The Plaintiff filed suit alleging his constitutional rights were violated when he was held at Great Meadow Correctional Facility. After the alleged event at Great Meadow, the Plaintiff was moved to a different facility. The Plaintiff was then moved back to that facility because it was close to the venue where the trial was to be held. On the first day of trial, the Plaintiff refused to testify on the grounds that he wanted to be moved from Great Meadow because he was concerned about testifying against individuals that were currently in charge of his well being while at Great Meadow. The dismissal was due to the Plaintiff's failure to prosecute. The Second Circuit affirmed the dismissal of the Complaint. The Court held that the presumption was that the Plaintiff would be treated properly and lawfully at any correctional facility in which he was held during the course of the trial, including Great Meadow. The Court held that there was no error on the part of the District Court for relying on that presumption in the absence of objective evidence to the contrary. The Court held that when a party refuses to proceed with a trial after a jury has been selected, then dismissal with prejudice may be particularly appropriate.

V. PLRA

Parker v. Conway, 2009 U.S. App. LEXIS 20723 (3d Cir. 2009)

Third Circuit Further Clarifies The PLRA

In this case, the Court considered whether the PLRA is unconstitutional in that it denies prisoners equal protection under the law. The Court held that the PLRA fee caps are constitutional. The Plaintiff was victorious in a jury trial and was awarded \$17,500 in damages. The Plaintiff then filed a Motion for Attorneys Fees, seeking a total of \$64,089. The District Court awarded only \$26,250 in compliance with the PLRA's limit of 150% of the total Judgment. The PLRA limits a prevailing Plaintiff's attorney's fee award. The PLRA also requires that the Court apply some portion of the Judgment not to exceed 25% to satisfy the attorney's fee award. The Court found the fee caps to be related to the legitimate goal of reducing attorney's fee awards in prisoner cases. The Court held that the fee cap was rationally related to the legitimate government objective of deterring frivolous lawsuits and deterring lawsuits that generate litigation costs that exceed any potential recovery. The Court held that capping the amount of attorneys' fees a Court may award to a prevailing prisoner's attorney may cause a prisoner to evaluate more carefully the merit of the action he/she intends to file, therefore, reducing the likelihood that the Plaintiff will file an insubstantial lawsuit. The plaintiff will be reluctant to file suit when the ability to find an attorney to take the case is obstructed by the attorneys' inability to recover a large fee by the PLRA.

Marella v. C.A. Terhune, 2009 U.S. App. LEXIS 15330 (9th Cir. 2009)

Ninth Circuit Addresses PLRA Exhaustion Of Administrative Remedies

The Plaintiff appealed the District Court's dismissal of his civil rights action for failure to exhaust administrative remedies as required by the PLRA. The Plaintiff was a prisoner at the Clipatria State Prison. Plaintiff filed a civil rights action after being involved in a knife fight with fellow inmates. Following the knife fight, the Plaintiff spent two days in the hospital, was subsequently moved to the infirmary and was finally placed in administrative segregation. The Plaintiff contended that he was unable to acquire and complete the grievance form during that time. Following his release, 33 days after the knife fight, the Plaintiff filed his grievance regarding the knife fight at the prison. This grievance was filed at the first and formal level of appeal. The grievance was denied as untimely, and the grievance form stated that the Plaintiff may only appeal the denial if the reason for the denial was inaccurate. The Plaintiff appealed the denial to the Director of Corrections and was informed that his appeal was rejected because he did not first complete a second level of appeal.

In the Federal Court proceeding, the Magistrate Judge concluded that the Plaintiff had not exhausted administrative remedies because his initial grievance was not timely filed and determined that there was no exception to the timely filed requirement. A District Court adopted the Magistrate's report and recommendations, and also held that the Plaintiff failed to exhaust the administrative remedial measure because the Plaintiff failed to appeal his grievance properly through the third and final level of the prison grievance system. The District Court dismissed the Plaintiff's Complaint without prejudice.

The Ninth Circuit held that the Magistrate Judge and the District Court erred in concluding that, as a matter of law, there was no exception to the timely filing requirement. The Plaintiff contended that he was unable to file his grievance in a timely manner because he did not have access to the necessary forms and he did not have the ability to complete them during the 15 day filing requirement. The Court held that the California Code of Regulations provided that an inmate must submit the grievance within 15 working days of the event, but the appeals coordinator is only permitted to reject a grievance if time limits for submitting the grievance are exceeded and the inmate had the opportunity to file within the prescribed time constraints. The California Department of Corrections and Rehabilitation Operating Manual directs the Appeals Coordinator to ensure that the inmates have the opportunity to file in a timely manner. The Court held that prisoner regulations provided an exception to the timely filed requirement. If the Plaintiff is unable to file within the 15 day filing period, his failure to file timely does not preclude his claim. The Ninth Circuit remanded for the District Courts to determine whether the Plaintiff had the opportunity to file within the 15 days following the fight.

In addition, the Court held that the District Court erred in dismissing the Plaintiff's Complaint for failure to exhaust administrative remedies beyond the second level of the prison appeal system because the Plaintiff had been informed that the appeals process was unavailable to him. After the Plaintiff filed his first level appeal, he received a form rejecting the appeal because it had not been timely filed. According to the form, the Plaintiff was not permitted to appeal the Decision. Therefore, the Ninth Circuit held that the District Court's dismissal of the case for failure to appeal properly was inappropriate when the appeals process was unavailable to the Plaintiff.

VI. SECOND AMENDMENT

Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009)

Second Circuit Rejects Second Amendment Application To The States

In this case, the Plaintiff was arrested at his home on August 24, 2000 and charged with illegal possession of a chukka stick. Plaintiff sought to hold the New York law banning chukka sticks to be unconstitutional and in violation of the Second Amendment. The Second Circuit agreed with the lower Court's dismissal of the case. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment conferred individual rights on citizens to keep and bear arms. However, the Second Circuit held that the Second Amendment and the *Heller* decision applies only to limitations that the Federal Government seeks to impose on this right. It does not apply to a State's limitation on the right to bear arms. The Court held that the chukka stick is designed primarily as a weapon and has no purpose other than to maim, or in some instances, kill. The Court held that the statute does not interfere with a fundamental right or single out a suspect class. The Court held that the prohibition against chukka sticks was constitutional in light of the legislative purpose.

VII. ADEA

Halpert v. Manhattan Apartments, Inc., 2009 U.S. App. LEXIS 20156 (2d Cir. 2009)

Employer May Be Held Liable For Discrimination By Third Parties

The Second Circuit held that an employer may be held liable for discrimination by third parties, including independent contractors, that the employer authorizes to make hiring decisions on its behalf. In this case, the Court held that an issue of fact existed on whether the Defendant Manhattan Apartments, Inc., actually or apparently authorized a third party to make hiring decisions for it with respect to the Plaintiff. The Age Discrimination and Employment Act (ADEA) makes it unlawful for an employer to refuse to hire any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of that individual's age. The prohibition of the ADEA applies regardless of whether an employer uses its employees to interview applicants for an open position, or whether it uses intermediaries, such as independent contractors. The Second Circuit held that if a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable for that individual improperly discriminating against applicants on the basis of age. The Plaintiff was interviewed by a third party. During the course of the interview, the third party told the Plaintiff that he was "too old" for the position of showing rental apartments. The Second Circuit held there was a question of fact whether the third party was acting as the hiring agent for the Defendant when he interviewed the Plaintiff for the position of showing apartments. If the third party was hiring for his own account, then there would be no liability on the Defendant employer.

VIII. EIGHTH AMENDMENT

Caiozzo v. Korman, 2009 U.S. App. LEXIS 20928 (2nd Cir. 2009)

Second Circuit Clarified Deliberate Indifference Standard

The Second Circuit held that the standard for analyzing a claim of deliberate indifference to the health and safety of a convicted prison inmate held in State custody in violation of the right to be free from cruel and unusual punishment under the Eighth Amendment is also applicable to claims brought by a pre-trial State detainee under the due process clause of the Fourteenth Amendment. A subjective standard is to be employed in assessing the merits of a pre-trial detainee's claim of deliberate indifference. The standard is whether the Defendant knew of and disregarded an excessive risk to the health and safety of an inmate. This is a tough burden for a Plaintiff that is a pre-trial detainee. The Plaintiff must demonstrate that the Defendant was aware of the risk of harm to the Plaintiff, but failed to react. The Plaintiff must demonstrate that the Defendant was actually aware of the immediate danger, not that the Defendant should have been aware of the immediate danger. This case is of benefit to Defendants, as the burden on the Plaintiff to demonstrate deliberate indifference is high.

IX. NEW YORK STATE LAW

Skelos v. Paterson, 2009 N.Y. LEXIS 3578 (Court of Appeals 2009)

Governor Has Authority To Appoint Lieutenant Governor

The New York Court of Appeals held that the Governor of the State of New York has the authority to fill a vacancy in the Office of Lieutenant Governor by appointment. In November 2006, Elliott Spitzer and David Paterson were elected respectively to the Offices of Governor and Lieutenant Governor. On March 17, 2008, Governor Spitzer resigned which led to Paterson becoming Governor. Fifteen months later, Republicans and Democrats split 31-31 in the Senate. Because each party recognized a different temporary President of the Senate, a deadlock in the Senate Chamber occurred. On July 8, 2009, Governor Paterson responded by appointing a Lieutenant Governor. The Court held that Governor Paterson properly relied on §43 of the Public Officers Law in making this appointment. The Court held that §43 of the Public Officers Law allowed the Governor to appoint a person to execute the duties of Lieutenant Governor until the vacancy could be filled by an election. The Court held that the New York State Constitution does not bar the Governor from appointing a Lieutenant Governor.

Oznor Corp. v. County of Monroe, 875 N.Y.S.2d 727 (4th Dept. 2009)

Grocery Store's Constitutional Rights Not Violated By Government Conduct

The plaintiff, a grocery store, commenced an Article 78 proceeding seeking to annul a determination of the County of Monroe that it violated public health law by selling tobacco to a minor. In affirming the lower court's finding of said violation, the Appellate Court held that the store's constitutional rights were not violated by virtue of the fact that a formal notice of violation was signed by an inspector from the County Department of Health who did not actually observe the violations. For the court, the right to due process in the administrative proceedings were not violated, inasmuch as the record established that the plaintiff received adequate notice of the allegations against it and had a full opportunity to be heard on the issues.

X. EXCESSIVE FORCE

Shirvanion v. State of New York, 883 N.Y.S.2d 639 (3d Dept. 2009)

Officers Did Not Use Excessive Force In Subduing Motorist

A plaintiff filed an action against the State of New York alleging that various members of the New York State Park Police and State Police used excessive force against him following a routine traffic stop. In the underlying matter, the motorist fled from the stop and was ultimately pursued and subdued. The plaintiff alleged that several of the officers, “without cause or provocation,” battered him with fists, feet, and batons. Following the trial, the Court of Claims dismissed the claim, finding that the officers involved used reasonable force under the circumstances.

In affirming the lower court’s dismissal of plaintiff’s action, the Third Department maintained that the record fully supported the dismissal of the claim on the grounds that the claimant failed to prove that any officer used excessive force in subduing him after he led them on a high speed chase and then resisted arrest. It is interesting to note that the claimant did not dispute the defendant’s testimony that he remained combative and non-compliant with the officers while they were attempting to place him under arrest after the underlying crash, requiring various defensive measures on their part, including the use of pepper spray and the striking of a baton on his arm. In essence, the plaintiff tried to argue that he was diabetic and in a state of “hypoglycemia unawareness.” Yet, based on the claimant’s persistent attempts to evade the officers and his combative behavior, the police had no choice but to subdue him, in the opinion of the Third Department Court.

XI. FIRST AMENDMENT

Parkhouse v. Stringer, 884 N.Y.S. 2d 216 (2009)

Subpoena To Testify Does Not Interfere With First Amendment Rights

The petitioner, a member of “Landmark West!”, an organization which seeks the preservation of historic buildings on the Upper West Side of Manhattan, sought to quash a subpoena for her testimony at a City hearing. The landmark preservation commission had calendared a public hearing for two buildings that Landmark West! had targeted for historic protection. A member of petitioner’s organization spoke at the public LPC hearing and discussed positions that were purportedly taken by the Borough president, Scott Stringer. However, the Borough president was unhappy when he heard of the underlying events and references made to the Borough president’s purported position regarding the historical landmark issue in question. Therefore, a follow-up hearing was conducted at which time the petitioner had received a subpoena to testify regarding her understanding of the underlying events, and her co-member’s possible misstatements.

In affirming the lower court’s denial of petitioner’s attempt to quash the subpoena, the court held that the respondent was entitled to subpoena the petitioner and to question her about the allegedly deceptive conduct of another representative of the organization. Moreover, for the court, the subpoena did not violate free speech rights of the representative, as spreading potential false information, in and of itself, carries no First Amendment protection.

SPOTLIGHT MUNICIPAL LAW

NEW YORK STATE DECISIONS

I. ATHLETIC ACTIVITIES - ASSUMPTION OF RISK

Rigney v. Ichabod Crane Central School District, 874 N.Y.S.2d 280 (3d Dept. 2009)
Aerobics Class Injury Results In Question Of Fact For Trial

A participant in an aerobics class offered by the defendant School District's adult education program brought suit against the School District for personal injury allegedly sustained when several weighted bars fell onto her back and injured plaintiff during her class. After discovery was completed, both the School District and the plaintiff moved for summary judgment on the issue of liability. The defendant School District contended that the plaintiff signed a release which agreed to hold the School District harmless from all claims arising out of her participation in the class. The defendant also argued that the plaintiff assumed the risk of injury while taking part in her aerobics class. In support of the plaintiff's cross-motion for summary judgment, Ms. Rigney contended that the underlying incident occurred through no fault of her own and solely as a result of the negligent maintenance of the aerobics class by the School District.

Confirming the lower court's denial of summary judgment to either party, the court maintained that the release itself was unenforceable. For the *Rigney* court, the release failed to put the plaintiff on notice that her signature would extend to claims that might arise from the defendant's own negligence. The failure to provide such express language made the release void. Finally, the court held that material issues of fact existed with respect to possible assumption of risk for injury and comparative negligence in the manner in which the plaintiff took part in the aerobics class and may have arguably caused the underlying incident to occur.

Trupia v. Lake George Central School District, 875 N.Y.S.2d 298 (3d Dept. 2009)
Primary Assumption Of Risk Does Not Bar School District's Possible Liability For Student's Fall From Stairway Banister

A summer school student was injured during a break between classes when he fell off a stairway banister he was attempting to slide down. As a result of the injuries caused therefrom, plaintiff's parents commenced suit, alleging general negligence in the upkeep and maintenance of the banister in question. In opposition to the plaintiffs' complaint, the defendant raised, among other defenses, the doctrine of primary assumption of risk. The lower court granted defendant's motion for summary judgment and plaintiff appealed.

In reversing the lower court's ruling in favor of the School District, the Third Department held that the doctrine of primary assumption of risk maintains that a participant engaged in a sport or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and result from willing participation in that sport. However, since the plaintiff was not injured in a recreational or sporting activity, but sliding down a stairway banister, the *Trupia* court held that primary assumption of risk was not an applicable affirmative defense. Therefore, according to the Third Department, although the Second and Fourth Departments in the State of New York have expanded the application of the

doctrine beyond mere sporting and recreational activities, the Third Department refused to do so and held that the underlying injury was governed by comparative negligence.

Martin v. State of New York, 878 N.Y.S.2d 823 (3d Dept. 2009)

Skiing Accident Governed By The Doctrine Of Assumption Of Risk

A 17-year-old skier lost his balance at a State-owned property while skiing on his second attempt to slide across a rail at the ski park in question. In his action for personal injury, the plaintiff maintained that the State entity operating the ski park was negligent in constructing and maintaining the rail on which the skier was injured.

However, in *Martin*, the Third Department maintained that since the plaintiff was engaged in a sport or recreational activity, he consented to the types of injuries that were reasonably foreseeable in the participation in that activity. In affirming the lower court's grant of summary judgment, the court ruled that the condition of the rail was open and obvious and was in no way concealed or dangerously constructed. Under the evidence presented in the subject litigation, the plaintiff had prior experience in successfully sliding across the subject rail and, in fact, had done so earlier on the day of the underlying incident.

Cotty v. Town of South Hampton, 880 N.Y.S.2d 656 (2d Dept. 2009)

Bicyclist Injured On Roadway Did Not Assume The Risk Of The Condition In Question

A bicyclist was injured after a collision with a car in an area where work was being performed by the Town of South Hampton. The defendant moved for summary judgment, arguing that the bicyclist assumed all risks associated with the roadway by voluntarily bicycling in the area of the accident. In affirming the lower court's denial of summary judgment to the Town of South Hampton, the Appellate Division maintained that although, traditionally, the doctrine of primary assumption of risk bars suits by participants in athletic endeavors, such a defense successfully applies where the underlying injury is a result of known risks associated with the participation in question. However, in the underlying matter, the Second Department found that there were questions of fact as to whether the road repair work and lack thereof in a timely fashion may have unreasonably enhanced the risk of injury to bicyclists as well as motorists on the roadway in question. Thus, for the *Cotty* court, the plaintiff's mere participation in the activity of bicycling did not, as a matter of law, preclude litigation against the Town for possibly enhancing the risks of injury for the condition of the roadway in question.

Musante v. Oceanside Union Free School District, 881 N.Y.S.2d 446 (2d Dept. 2009)

Wrestler's Injury Barred By Doctrine Of Primary Assumption Of Risk

A high school wrestler was injured during wrestling practice when he slipped on the edge of a wrestling mat and collided with a nearby wall. In his personal injury action against the School District, the plaintiff and his family maintained that the mat in question was positioned improperly with respect to its location next to a wall.

However, in holding that the lower court erred in denying the School District's motion for summary judgment, the Appellate Court ruled that by engaging in the sport of wrestling, the high school wrestler assumed all risks inherent in and arising out of the nature of the sport. In so ruling, the court held that the risk of leaving a matted area was obvious and that the condition of

the wall in its proximity was also open and obvious, as was any height differential between the floor and the wrestling mat.

Brookstone v. State of New York, 883 N.Y.S.2d 347 (3d Dept. 2009)

Basketball Player Injured On Outdoor Asphalt Court Assumed Risk Of Injury

A basketball player was injured while playing a pickup game of basketball on an outdoor asphalt court at Gilbert Lake State Park. The plaintiff was injured after jumping for a ball. As he headed out of bounds, he landed on the uneven edge of the court. In his personal injury action, the plaintiff maintained that the defendant was negligence in the construction and maintenance of the basketball court.

In affirming the Court of Claims' dismissal of the subject claim, the Appellate Court held that the plaintiff was a voluntary participant in the subject sporting activity and, as such, he assumed all risks arising out of such activity. In so ruling, the court held that these risks included the construction of the playing surface and any open and obvious condition on the playing field. Citing the State's highest court determination in prior decisions that there is an inherent risk in outdoor basketball, the Appellate Division maintained that the uneven outdoor surface at the court in question was, in fact, open and obvious and not an unreasonably dangerous condition.

II. SCHOOL DISTRICTS - THE DUTY OF SUPERVISION AND CONTROL.

Calcagno v. John F. Kennedy Intermediate School, 877 N.Y.S.2d 455 (2d Dept. 2009)

School District Not Liable For Student's Fall From Gymnastic Bars

The infant plaintiff, a fourth grade student, fell while playing in her school's playground on a set of horizontal gymnastic bars during her recess period. The infant plaintiff was on the subject bars between five and ten seconds, during which time she attempted to spin forward around the lowest of three bars when she intentionally let go of the bar in order to stop. In the injured plaintiff's personal injury suit against the School District, the infant plaintiff's parents alleged that the School was negligent in the supervision and control of plaintiff and her fellow classmates during the recess period.

In affirming the lower court's grant of summary judgment to the defendant, the Appellate Division maintained that there were three teachers in the recess area supervising ten classes of students and that one supervisor was standing just outside the playground area in the location where the fall occurred. The record further revealed that the infant plaintiff was engaged in normal play and not in dangerous conduct in the moments preceding her fall. Thus, for the court, the accident did not involve any level of negligent supervision as the proximate cause of the infant plaintiff's injuries.

Esponda v. City of New York, 878 N.Y.S.2d 330 (1st Dept. 2009)

Injury To Student During Fire Drill Not The Fault Of School District

A third grade student injured her wrist during a fire drill when two other students bumped into her from behind, causing her to fall. The parents of the infant plaintiff contended in their complaint that the school was negligent in the supervision and control of the third grade class in leading a line of students exiting the building. According to the plaintiffs, the teacher should

have been in the middle or at the end of the line in a better position to observe the students during the fire drill.

In reversing the lower court's denial of summary judgment to the School District, the Appellate Division maintained that a school teacher's responsibility is to act as an ordinary and prudent parent under comparable circumstances. To the court, the students bumping into the infant plaintiff was not due to any fault of the teacher and closer supervision would not have prevented the underlying accident from occurring.

Brandy B. v. Eden Central School District, 880 N.Y.S.2d 431 (4th Dept. 2009)

Alleged Sexual Misconduct On School Bus Not The Fault Of The School District

The infant plaintiff, by her family, alleged unwanted sexual touching and contact by a third-party student while the infant plaintiff was on a school bus. In maintaining that the school did not exercise adequate control or supervision on the bus, the plaintiffs contended that the event would not have occurred with closer supervision by the defendant.

In affirming the lower court's grant of summary judgment to the Eden Central School District, the Appellate Division agreed with the defense contention that the school had no notice or specific knowledge of the conduct in question. In so ruling, the court maintained that the record was devoid of any proof that the assailant had been engaged in or been disciplined for any conduct of any kind during the year in which the underlying incident had occurred.

Teodoro v. Longwood Central School District, 881 N.Y.S.2d 468 (2d Dept. 2009)

School Not Liable For Gymnasium Injury

A student was learning to play golf in gym class when he was injured when he stepped forward while another student was swinging his golf club. Infant plaintiff was struck in the face, and his parents brought suit against the School District for negligent control and supervision. In reversing the lower court's denial of summary judgment to the School District, the Second Department held that the gym instructor in question set a very specific protocol for his physical education students' participation in the golf session in question. For the court, the infant plaintiff was solely responsible for the underlying incident for failing to follow the established protocol for allowing the student with the golf club to have the proper distance from other students.

Grandeau v. South Colonie Central School District, 881 N.Y.S.2d 549 (3d Dept. 2009)

School Not Liable For Eight-Year-Old's Fall From School Monkey Bars

An eight-year-old, third grade student fell during recess from the monkey bars at a school playground. In the student's personal injury action against the School District, it was alleged that the property was not properly maintained. However, in affirming the lower court's grant of summary judgment, the court held that based on the record produced during discovery, the fall zone beneath the monkey bars had the requisite amount of surfacing material to cushion falls and that the school maintained the monkey bars in a way as to not create a public nuisance.

Troiani v. White Plains City School District, 882 N.Y.S.2d 519 (2d Dept. 2009)

School District Not Responsible For Recess Injury Involving Monkey Bars

A five-year-old kindergarten student was injured when she fell from monkey bars in the school's playground during recess. At the time of the accident there were approximately 100 students in

the schoolyard with six teacher's aids to supervise them. One aid was specifically assigned to supervise the monkey bars and was present at the time of the plaintiff's fall.

In reversing the lower court's denial of summary judgment to the School District, the Second District Court held that the school had provided adequate supervision during recess and that any alleged lack of supervision was not the proximate cause of the student's injury. From the record it was determined that the monkey bars were not defective in nature. In so ruling, the Second Department maintained that, based on the rules and regulations regarding the design and installation of monkey bars, the subject playground equipment was safe and suitable for a five-year-old kindergarten student.

Gray v. South Colonie Central School District, 883 N.Y.S.2d 647 (3d Dept. 2009)
School District Not Responsible For Student's Fall From Monkey Bars

A six-year-old student broke his elbow when he fell from monkey bars during recess at his elementary school. In affirming the lower court's grant of summary judgment to the School District, the Appellate Court held that, from a review of the record of discovery, the School District adequately demonstrated that the construction of the monkey bars and the fall surface of wood chips beneath the monkey bars adhered to playground safety guidelines promulgated by the Consumer Products Safety Commission.

III. INFECTIOUS DISEASE TRANSMITTAL

Farrell v. Bellmore-Merrick Central High School District, 884 N.Y.S.2d 261 (2d Dept. 2009)
High School Wrestler's Contracting Of Herpes Not Responsibility Of School District

A high school wrestler allegedly contracted Herpes Simplex I while participating in a wrestling match against another wrestler from an opposing school district. In reversing the lower court's denial of summary judgment to the School District, the Second Department held that the student contracting herpes while participating in a wrestling match could not be the basis for liability on the part of the School District where the District informed all of its wrestlers of the specific risks of contracting herpes, not just risks of contracting skin diseases in general through wrestling. The record revealed that the defendant's wrestling coach distributed to all team wrestlers and their parents a packet of information, including an article stating that herpes was among the skin diseases most commonly seen in wrestling. Thus, based on the doctrine of primary assumption of risk, the court maintained that contracting skin diseases was a commonly appreciated risk inherent in and arising out of the nature of the sport of wrestling.

IV. LATE NOTICE OF CLAIM

Kobernik v. City of New York, 877 N.Y.S.2d 46 (1st Dept. 2009)
Bus Passenger's Failure To Serve Notice Of Claim Was Excused

Plaintiff commenced an action against the defendant, City of New York, for personal injury sustained when a tree on the side of the road located in the Town of Carmel in Putnam County uprooted and fell on the van in which plaintiff was a passenger. Plaintiff had served notice of claim on the Town of Carmel and Putnam County based on his reasonable belief that one or the

other owned the roadway within the territorial jurisdictions of both. The plaintiff's subsequent delay in serving the true owner, the City of New York, was excused by the Appellate Court in affirming the lower court's denial of the defendant, City of New York's, motion to dismiss based on the fact that plaintiff promptly moved to serve a late notice of claim against the City once he was advised by Putnam County that the site was owned by the City of New York.

Nicaj v. Town of Carmel, 877 N.Y.S.2d 145 (2d Dept. 2009)

Pedestrian Plaintiff Entitled To Leave To Serve Late Notice Of Claim

Plaintiff was struck and injured by a vehicle owned and operated by a member of the defendant fire department which was in the process of responding to a fire. After being served with a late notice of claim, the defendant municipality moved for summary judgment. In affirming the lower court's grant of leave to serve a late notice of claim, the Appellate Division held that, in determining whether to grant leave to serve a late notice of claim, a court must consider, among other factors, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days after it arose or within a reasonable time thereafter. Moreover, for the court, a further fact was whether the delay would substantially prejudice the public corporation in maintaining its defense on the merits and whether the plaintiff demonstrated a reasonable cause for the delay. Applying these factors, the lower court, in the opinion of the Appellate Division, properly granted plaintiff's leave to serve a late notice of claim.

Purifoy v. County of Suffolk, 877 N.Y.S.2d 419 (2d Dept. 2009)

Petitioner Not Entitled To Leave To Serve Late Notice Of Claim

In reversing a lower court's grant of plaintiff's motion for leave to serve a late notice of claim, the Appellate Division maintained in the instant matter that the petitioner did not offer a reasonable excuse for his failure to serve a timely notice of claim upon the County of Suffolk. Moreover, the plaintiff failed to establish that the County possessed any records or information which provided the County with actual notice of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter. For the court, the eleven-month delay after the expiration of the 90-day statutory period of notice would create substantial prejudice to the Town in maintaining a defense on the merits of the claim.

Lauray v. City of New York, 878 N.Y.S.2d 65 (1st Dept. 2009)

Pedestrian Not Entitled To Leave To File Late Notice Of Claim

A pedestrian who was allegedly injured when she tripped and fell on a sidewalk filed motion for leave to file late notice of claim against the City of New York. In reversing the lower court's grant of leave, the First Department held that the pedestrian failed to meet her burden of demonstrating a reasonable excuse for her delay in filing a notice of claim against the City. Moreover, for the court, petitioner also failed in any way to provide proof that the City received actual notice of the alleged defect and that it was not substantially prejudiced in its defense by petitioner failing to serve a timely notice of claim.

Kemp v. County of Suffolk, 878 N.Y.S.2d 135 (2d Dept. 2009)

Plaintiff's Failure To Comply With Notice Of Claim Statute Required Dismissal Of Suit

Plaintiff commenced an action against the County of Suffolk for assault and false arrest. The defendant had served upon the plaintiff a notice of a 50-h examination prior to the commencement of the plaintiff's action. However, the plaintiff failed to offer any sufficient

reason for failing to appear for his General Municipal Law examination before the commencement of this suit.

In affirming the lower court's grant of a dismissal of the suit, the Appellate Division maintained that in the first instance the plaintiff could, while being prosecuted for the underlying charges in a criminal court, invoke the Fifth Amendment against self-incrimination at the time of the initially scheduled 50-h examination. However, according to the court, it was the plaintiff's obligation, not the County defendant's, to reschedule a continuation of the 50-h hearing after the criminal proceeding terminated two years later. In the instant matter, the plaintiff failed to reschedule the 50-h examination and moved forward with the service of the summons and complaint, which, according to the Second Department, was a violation of the plaintiff's 50-h obligation, thus requiring the termination of the underlying suit.

Korman v. Bellmore Public Schools, 879 N.Y.S.2d 194 (2d Dept. 2009)

Plaintiff's Failure To Serve Timely Notice Of Claim Fatal To Suit

An attendee of a school play commenced a proceeding for leave to serve late notice of claim against the defendant seeking to recover damages for injuries he sustained when he fell from steps in the school auditorium. In affirming the lower court's grant of summary judgment to dismiss the complaint, the court held that the petitioner's failure to demonstrate a reasonable excuse for the ten and a half month delay in commencing the proceeding was dispositive. For the court, the plaintiff's injury could not extend the statutory requirement to serve timely notice of claim. Despite the plaintiff's contention that the injury was known to the people at the School District, since he fell on the bleachers in question, the court held that the petitioner failed to demonstrate that the respondent in any way received requisite notice of the facts that underlined the legal theory on which liability is predicated through a notice of claim. Thus, for the court, a general awareness of an injury by a municipality does not create notice of a legal theory upon which the plaintiff would pursue recovery, thus necessitating a denial of the plaintiff's motion for leave to serve late notice of claim.

Smith v. Baldwin Union Free School District, 881 N.Y.S.2d 488 (2d Dept. 2009)

Petitioner Not Entitled To Leave To Serve Late Notice Of Claim

In reversing a lower court's grant of leave to an injured petitioner, the Second Department maintained that timely service of a notice of claim is a condition precedent to an action against the School District. Under the record of the underlying matter, the delay in serving a notice of claim was the result of a law office failure, which is not a sufficient excuse for leave. Moreover, the petitioner failed to demonstrate that the School District acquired actual knowledge of the essential facts constituting the claim within 90 days of the incident. For the court, a janitor who was present at the time of the plaintiff's fall does not create sufficient notice to the School District of the essential facts constituting the claim. Thus, the plaintiff's two and a half month delay after the expiration of the 90-day period was fatal to the plaintiff's potential action.

V. MUNICIPAL PROPERTY - NOTICE OF DEFECT

Ravner v. Autun, 876 N.Y.2d 453 (2d Dept. 2009)

School District Lacked Specific Knowledge Or Notice Of Danger

The mother of a high school student who was killed when he was run over by a vehicle driven by a fellow pupil sued the School District for wrongful death. One of the claims the plaintiff alleged was negligent supervision of the student parking lot where the accident occurred. In affirming the lower court grant of summary judgment to the School District, the court held that the District established its *prima facie* entitlement to judgment, demonstrating that it did not have sufficient, specific knowledge or notice of the particular danger at the time in question so as to have reasonably anticipated the accident. Although regrettable, the Appellate Court maintained that the defendant School District was unaware of the specific operation of the vehicle of the other student, and thus lacked a duty to prevent such negligent operation.

Friedland v. County of Warren, 876 N.Y.S.2d 757 (3d Dept. 2009)

Defendants Did Not Receive Requisite Prior Written Notice Of Dangerous Condition

A motorist brought suit against both the County of Warren and the Town of Chester seeking damages when plaintiff's car slid off the road due to allegedly hazardous conditions from the accumulation of snow and ice. Both municipal defendants had notice statutes requiring prior written notice of dangerous conditions. In affirming the lower court grant of summary judgment, the Appellate Court maintained that at no time did the defendants receive written notice of the alleged ice and snow conditions. In support of said motion the defendant presented affidavits from their employees responsible for maintaining such information demonstrating that no prior written notice had been received regarding the snow and ice in question. Thus, for the court, such evidence entitled the defendant to summary judgment.

Tomao v. City of New York, 876 N.Y.S.2d 489 (2d Dept. 2009)

City Lacks Actual Or Constructive Notice Of Alleged Dangerous Condition

The plaintiff commenced action against the City of New York, as well as other defendants, for injuries arising from a slip and fall. Affirming the lower court's grant of summary judgment to the City of New York, the Appellate Court maintained that the defendant made a *prima facie* showing of its entitlement to summary judgment by submitting evidence demonstrating that it neither created the conditions at issue nor had actual or constructive notice of the allegedly dangerous condition created by water that had just been tracked into a school by the infant plaintiff.

Moxey v. County of Westchester, 883 N.Y.S.2d 80 (2d Dept. 2009)

County Lacks Constructive Notice Of Downed Tree Limb

Plaintiff commenced a personal injury action for injuries resulting after she drove her car over a large tree limb which had fallen on the northbound roadway of the Bronx River Parkway. On the day in question, heavy rainfall had occurred in the area of the accident. In reversing the trial court's denial of the defendant's motion for summary judgment, the Second Department ruled that the lack of prior written notice or constructive notice of the roadway obstruction required such a dismissal. For the court, liability against the County of Westchester could be maintained in the absence of prior written notice. However, such defects or dangerous conditions must exist for a long enough period for the condition to have been discovered and remedied. However, in

the instant matter the deposition testimony of the roadway foreman revealed that in his duties he would drive past the subject location three or four times a day over a seven hour period and that he did not see any downed tree limbs on any such occasion on the day in question. Thus, for the Second Department, the evidence established a *prima facie* showing that the defendant did not have constructive notice of the downed tree limb at the accident site. In opposition, the plaintiff failed to demonstrate with any degree of certainty how long the condition in question existed.

VI. TRIVIAL DEFECTS

Rosello v. City of New York, 883 N.Y.S.2d 531 (2d Dept. 2009)

Trip Over Gas Valve Cap Deemed Trivial In Nature

In a personal injury action brought after a pedestrian allegedly tripped and fell over a gas cap on a sidewalk, the defendant, City of New York, moved for summary judgment. In reversing the lower court's denial of summary judgment to the City, the Appellate Division held that the defect in the sidewalk was trivial and non-actionable and did not possess the characteristics of a trap or nuisance. For the court, the photographs of the sidewalk submitted by plaintiff indicated that the elevation differential between the condition and the surrounding sidewalk was slight. In addition, in granting summary judgment to the City, the court held that the depth of the defect and its width, as well as the time, place, and circumstances of the injury did not create a dangerous condition to people walking on the sidewalk in question.

VII. DUTY OF CARE

Sciortino v. Leo, 876 N.Y.S.2d 308 (4th Dept. 2009)

Call To Emergency Services Does Not Create Notice/Duty Of Care

Plaintiff brought suit against the County of Oneida and its Department of Emergency Services and the Sheriff's Department for negligence in failing to protect the decedent from the assault of the co-defendant in response to decedent's telephone call to the Sheriff's Department. In reversing the lower court's denial of summary judgment to the municipal defendants' motions, the Appellate Division, Fourth Department maintained that a municipality may not be held liable for failing to provide police protection absent a special relationship between the municipality and the injured party giving rise to a special duty. For the Appellate Court, the defendant established that there had been no special relationship. According to the court, the evidence submitted by the County defendant established that the decedent did not mention any immediate danger in his telephone call and that plaintiff failed to submit any evidence from which it may be inferred that the telephone operator at the Sheriff's Department should have known that such a danger existed.

Stinson v. Roosevelt Union Free School District, 877 N.Y.S.2d 400 (2d Dept. 2009)

Security Guard Cannot Maintain Suit Against School

A security guard employed by a private security company was assigned to provide security at Roosevelt Junior/Senior High School. The plaintiff was allegedly injured when he intervened in an altercation between students at the school. Plaintiff commenced suit, alleging that his injuries were proximately caused by the defendant School District's negligent supervision of its students.

In affirming the lower court grant of summary judgment to the School District, the Appellate Division maintained that the plaintiff failed to establish that there was a special duty in existence between the School District and the injured security guard. For the court, although the defendant owed a duty to its students to adequately supervise them to prevent foreseeable injury to fellow students, that duty derived from the school acting in its *loco parentis* capacity for the students. However, liability for the security guard's injuries occurring during his job duties for his employer could only be created against the School District if somehow the District had a special duty to or relationship with the security guard. However, for the court, no such special duty existed.

Ostrowski v. Town of West Seneca, 877 N.Y.S.2d 546 (4th Dept. 2009)

Town Had No Duty Of Care For Roadway Or Hill Where Sledding Fatality Occurred

Plaintiffs commenced suit to recover for the wrongful death of their son who was killed while snow tubing down a hill. The accident itself occurred when the decedent failed to stop at the bottom of a hill and was struck by a truck on Indian Church Road. In affirming the lower court grant of summary judgment to the Town of West Seneca, the Appellate Division held that defendant met its initial burden by establishing that it had no duty with respect to either the road, which it did not own, control, or maintain, or the hill in question because it did not own said property. Although the Town had no legal obligation to perform the erection of barriers at the bottom of the hill following the accident, that activity did not create a duty of care with regard to the roadway or hill prior to the accident.

VIII. GOVERNMENTAL IMMUNITY

Heckel v. City of New York, 875 N.Y.S.2d 217 (2d Dept. 2009)

Governmental Immunity Applies To Sanitation Department Accident

An employee of the City of New York Sanitation Department was injured when his left hand became caught under a sanitation truck's hopper. The plaintiff commenced suit against the City for his resulting personal injuries. In reversing the lower court's denial of summary judgment to the City of New York, the Appellate Division maintained that governmental immunity applied to protect the City from tort liability for decisions to require sanitation workers to place cardboard and paper recyclables into smaller compartments of sanitation trucks. In so ruling, the *Heckel* court cited the record which demonstrated that the decision regarding recyclables was made by a Sanitation Department district superintendent who made the decision based on his reasonable judgment. For the court, the superintendent's decision was not merely ministerial in nature, thus allowing the doctrine of governmental immunity to apply.

Bresciani v. County of Dutchess, 878 N.Y.S.2d 410 (2d Dept. 2009)

Question Of Fact As To Governmental Immunity

The underlying accident involved a one-car collision where the decedent's car went off the road and crashed into a tree. The police report indicated that the roadway surface was "wet" and noted "slippery pavement". The plaintiffs commenced suit, alleging that the County of Dutchess failed to appropriately investigate and remedy a known condition on the County road and performed negligent repair and maintenance on it.

In affirming the lower court's denial of summary judgment to the municipal defendant, the court did acknowledge that, traditionally, in the area of traffic design engineering, a municipality will generally be afforded qualified immunity from liability arising out of its highway planning decisions. However, in the instant case, the court held that a municipality may be held liable if, after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures may be necessary to alleviate the condition or, having determined what reasonable measures were necessary, unjustifiably delays in taking them. For the Second Department, the record revealed that the County failed to establish that, as a matter of law, once it was made aware that the subject roadway became slippery with accumulated water, it took any steps to determine what remedial measures were necessary.

Johnson v. City of New York, 884 N.Y.S.2d 44 (1st Dept. 2009)

City Of New York Immune From Liability For Bystander Shootings

The plaintiffs consisted of several bystanders who were shot during a daylight exchange of gunfire between City of New York police officers and a robbery suspect. The lower court denied summary judgment in favor of the defendant on the theory of governmental immunity and the defendant appealed.

In reversing the lower court denial of summary judgment to the defendant, the court held that, generally, a municipal defendant is immune from negligence for conduct involving the exercise of discretion and reason in judgment. Based on the subject record, the court maintained that the officers saw no bystanders as they sought to protect themselves and their fellow officers by returning gunfire, and the officers took appropriate measures to protect themselves and the public, which was clearly endangered by the actions of the fleeing felons.

IX. EMERGENCY RESPONSE

Rusho v. State of New York, 878 N.Y.S.2d 855 (Ct. Cl. 2009)

Officer Entitled To Heightened Recklessness Standard

A driver and her passenger sued a parole officer for injuries sustained in a motor vehicle collision with the officer's unmarked vehicle. At the time of the underlying accident, the patrol officer was in pursuit of a fleeing parolee. In granting the officer's motion for summary judgment, the Court of Claims held that the officer was entitled to a heightened recklessness standard and that his actions fell within the authorized emergency vehicle standard set forth in New York State Vehicle & Traffic Law § 1104. Based on the underlying accident and the application of the emergency doctrine, the defendant could not be held liable for simple negligence alone.

Daly v. County of Westchester, 882 N.Y.S.2d 209 (2d Dept. 2009)

Officer's Conduct Does Not Rise To A Level Of Reckless Disregard

A wrongful death suit was brought against municipal entities and their Police Department after a death purportedly caused by the manner in which police officers operated their vehicle when responding to an emergency. In reversing the lower court's denial of summary judgment to the municipal defendant, the Appellate Division maintained that, in the instant matter, the record

revealed that the officers did not engage in reckless disregard for the safety of third parties while in the process of responding to the underlying emergency situation.

GOLDBERG SEGALLA WINS AND ACCOMPLISHMENTS



Kenneth M. Alweis

Ken Alweis, a partner of the firm, was recently appointed as the attorney for the Zoning Board of Appeals of the Town of Dewitt, NY.



Marianne Arcieri

Marianne Arcieri of the firm's Long Island, New York office had a recent victory in the case Lobello v. Town of Brookhaven. Appellate Division, Second Department affirmed the order of the Honorable Rebolini, which granted the Town of Brookhaven's motion for summary judgment. The issue was whether the Town's dump truck that was spreading sand on the roadway because of an ice condition acted within reckless regard when it made a u-turn on the roadway and collided with the plaintiff's vehicle. Court held there was no reckless disregard and that the Town vehicle was actually engaged in highway work so the reckless disregard standard as stated in VTL §1103(b) applied.



John J. Jablonski

John Jablonski, a partner of the firm, was recently elected as the President of the WNY Chapter of ARMA International. The leading organization for the education and training of records and information managers, ARMA recently published "Seven Steps for Legal Holds of ESI and Other Documents" which was coauthored by John. Legal holds are required by government organizations to discharge their common law duty to preserve information related to actual or threatened litigation. John is a leading authority on helping organizations develop defensible legal hold policies, record retention policies and information management policies and procedures. He is also well known for his expertise in e-discovery, including pre-litigation planning, and responding to e-discovery requests. John is the author of a blog devoted to legal holds and factual scenarios that trigger the duty to preserve information: www.legalholds.typepad.com. More information about legal holds and his book, including a 10% discount coupon, can be found on his blog or you can contact John directly at jjablonski@goldbergsegalla.com.



Jeffrey J. Signor

One of the rather “hot topics” affecting the liability industry, including municipalities, concerns the Medicare Secondary Payer Statute (MSPS”) and recent amendment to the MSPS. The amendment is known as the Medicare and Medicaid SCHIP Extension Act (“MMSEA”) and it requires all responsible reporting entities to report settlements judgments and awards. Jeff Signor, of our Buffalo office, regularly writes and speaks on this topic. In fact, Richard Saraf and Jeff Signor recently co-authored an article published in the Defense Research Institute’s monthly magazine, *For The Defense*. That article, titled “Municipalities and Medicare – There is No Free Lunch,” focuses on the applicability of the MSPS and the MMSEA to municipalities. The article will be published in mid-October and we encourage folks to pick up a copy. If there is interest in receiving a PDF copy, via electronic means, then please reach out to us and we will pass along a copy.

One of Mr. Signor’s core concepts is to begin the process of notifying Medicare and its contractors, the Coordination of Benefits Contractor (“COBC”) and the Medicare Secondary Payer Recovery Contractor (“MSPRC”), much sooner in the claims handling process. Jeff is now regularly communicating with the COBC and MSPRC, and with counsel for plaintiffs and the defense in jurisdictions across the country, on behalf of a major retail client. The fines set forth in the MMSEA are very steep --- \$1,000 per day per claim that goes unreported. The MMSEA fines and reporting issues have many in the industry scrambling to register with the Centers for Medicare and Medicaid Services (“CMS”). However, there are many contingent liabilities that can arise if conditional payments (most know these as “liens”) are not timely paid back to Medicare.

For more information on the steps recommended to keep in compliance with the MSPS, or to generally discuss any portions of this important federal regulatory Act, feel free to contact Jeff Signor at jsignor@goldbergsegalla.com.



Mary Q. Wydysz

Mary Wydysz, a partner of the firm, was recently appointed to the Zoning Board of Appeals in the Town of Tonawanda, NY.

Goldberg Segalla LLP is a Best Practices law firm with offices in New York (Buffalo, Rochester, Syracuse, Albany, New York, White Plains and Long Island), New Jersey (Princeton), Pennsylvania (Philadelphia) and Connecticut (Hartford). Our Municipal Law Litigation Team consists of the following attorneys:

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