



GOLDBERG SEGALLA^{LLP}

Government Liability and Civil Rights Newsletter

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Editors: [Jonathan M. Bernstein](#) and [Julie P. Apter](#)

Advisor: [Thomas F. Segalla](#)

Goldberg Segalla'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. Please feel free to share this publication with your colleagues. If others in your organization are interested in receiving the publication, or if you do not wish to receive future issues, please contact [Jonathan Bernstein](#) at jbernstein@goldbergsegalla.com. The next issue of this newsletter will be released on May 14, 2010.

SPOTLIGHT DECISION

New York: Reckless Disregard Standard of Care for Vehicles Engaged in Highway Work

Section 1103(b) of the New York Vehicle and Traffic Law states that drivers of vehicles engaged in work on a highway are subject to liability while operating such vehicles only if they act in reckless disregard for the safety of others. This is a high burden for the plaintiff to meet often resulting in dismissal of the case. The Court of Appeals in New York has interpreted this statute to mean that "all vehicles actually engaged in work on a highway are exempt from the rules of the road." *Riley v. County of Broome*, 95 N.Y.2d 455 (2000).

Key to the applicability of the statute is that the vehicle must have been engaged in "highway work" when the accident occurred. Plowing, sanding and cleaning storm drains have been held to constitute "highway work" within the meaning of the statute. *Riley v. County of Broome*, 95 N.Y.2d 455 (2000); *Rockland Coaches v. Town of Clarkstown*, 49 A.D.3d 705 (2nd Dept. 2008); *Sklonick v. Town of Hempstead*, 278 A.D.2d 481 (2nd Dept. 2000).

The vehicle does not have to actually be plowing the road or dropping sand at the exact moment of the impact. Courts have held that is sufficient if the vehicle is engaged in the overall process

of doing such work when the accident occurs. However, the statute does not apply if the accident occurs while the vehicle is on its way to a work site or on the way back after the work is completed.

New York courts define reckless disregard “as intentionally [doing] an act of an unreasonable character in disregard of a known or obvious risks that was so great as to make it highly probably that harm would follow.” *Saarienen v. Kerr*, 84 N.Y.2d 494 (1994). Reckless disregard requires more than a “momentary lapse in judgment.” *Rockland Coaches v. Town of Clarkstown*, 49 A.D.3d 705 (2nd Dept. 2008). The issue of whether a defendant’s conduct rises to a level of reckless disregard can be decided as a matter of law. *See, e.g., Levine v. GBE Contracting Corp.*, 2 A.D.3d 596, (2nd Dept. 2003); *Yousef v. Verizon, Inc.*, 33 A.D.3d 315 (1st Dept. 2006); *Ferreri v. Town of Penfield*, 34 A.D.3d 1243(4th Dept. 2006).

Recently, Goldberg Segalla LLP, defended the Town of Brookhaven and invoked this statutory provision to get the plaintiff’s complaint dismissed as a matter of law. In *Lobello v. Town of Brookhaven*, 66 A.D.3d 646 (2d Dept. 2009), the Town truck was spreading sand on an icy patch of road in front of a school. The Town truck was in the process of making a turn when the plaintiff’s vehicle struck it. At the moment the Town truck was making the turn, it was not actually dispensing sand. However, both the trial court and the Appellate Division held that the reckless standard applies. These courts concluded that the Town vehicle was engaged in highway work because the only reason the vehicle was making the turn was so it could make another pass by the school to spread more sand.

This is an important statute to invoke whenever faced with an accident involving a vehicle that was doing some type of work on a highway when the accident occurred. The applicability of the statute should always be tested on a motion for summary judgment.

Contributed by: Marianne Arcieri, Esq.

SPOTLIGHT CIVIL RIGHTS

VARIOUS FEDERAL COURT DECISIONS

I. Fourth Amendment

***Burg v. Gosslin*, 2010 U.S. App. LEXIS 289 (2d Cir. 2010)** **Court Holds Issuing an Appearance Ticket Not a Seizure**

The Second Circuit held that the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restraint, does not constitute a Fourth Amendment seizure. The defendant, a K-9 Control Officer, received a complaint about the plaintiff’s dog. Six days later, on October 26, 2005, at 7:25, defendant issued a summons to the plaintiff at her home requiring the plaintiff to appear in court at a later date. The plaintiff was not handcuffed, removed from her home, restricted from using her property, or restricted from travel. Sometime after November 8, 2005, the plaintiff was arrested for failure to appear, handcuffed and taken

into physical custody. The plaintiff sued defendants on the ground that issuing the summons constituted an unreasonable seizure in violation of the Fourth Amendment. The court held that a seizure did not exist. The summons did no more than require the plaintiff to appear in court on a single occasion. Merely sending the plaintiff an appearance ticket by mail requiring her to appear in court was not a seizure. Rather, the appearance ticket operates to effectuate due process.

Lynch v. The City of New York, 2009 U.S. App. LEXIS 26980 (2d Cir. 2009)

Court Upholds NYPD Breathalyzer Test

The plaintiffs, who were union representatives of police officers employed by the NYPD, challenged the constitutionality of the NYPD policy that required a breathalyzer test to be administered to every NYPD officer who caused injury or death as a result of firing his or her gun. The court upheld the District Court's denial of the plaintiff's motion for a preliminary injunction.

The breathalyzer policy applies when an NYPD officer, on or off duty, is involved in a firearms discharge within New York City which results in injury to or death of a person. The policy requires that a portable breathalyzer test be administered in a private setting to the members of the service who discharged a firearm. The plaintiff claimed that the breathalyzer policy violated the Fourth Amendment of the United States Constitution. The court held that the plaintiffs could not demonstrate a likelihood of success on the merits because the breathalyzer policy withstood Fourth Amendment scrutiny under the "special needs" doctrine. The Fourth Amendment requires that searches and seizures be reasonable, and a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. Nevertheless, certain regimes of suspicion less searches are allowed where the program was designed to serve its special needs, beyond the normal need for law enforcement. A program where a general scheme of searches qualifies for treatment under the special needs doctrine applies only if the program's primary purpose is not a general interest in crime control. The NYPD policy ensures that an officer who fires his or her gun while intoxicated can be quickly disciplined or removed from duty. The court held that the point of the NYPD policy was not to prosecute the offending officers, but to remove them from duty or to impose on them internal, employment related sanctions. The breathalyzer program operates as a deterrent to officers who may consider carrying their firearms while under the influence of alcohol. The primary purpose of the policy is to encourage officers to follow the NYPD's internal safety policies, as opposed to prosecuting NYPD officers who violate the law.

II. Qualified Immunity

Aczel v. Labonia, 584 F.3d 52 (2d Cir. 2009)

Court Strikes Down Damages Due To Qualified Immunity

The plaintiff appealed from a judgment in favor of the defendant in regard to plaintiff's claim of excessive force. The jury answered interrogatories finding that the plaintiff had demonstrated that the defendant used excessive force and that \$12,078.61 in damages were proximately caused by the defendant's act, but that the defendant was entitled to qualified immunity. The jury found that the defendant had an objectively reasonable belief that his conduct was justified under the

circumstances. The Second Circuit held that because the jury unanimously found that defendant was entitled to qualified immunity and there was no flaw in the findings that required the court to reject it, the District Court acted within its discretion in entering judgment for defendant. The trial court credited the jury's finding of fact that the defendant violated plaintiff's rights under the Fourth Amendment to be free of excessive force. However, the jury also concluded that the defendant proved his entitlement to qualified immunity by proving his reasonable belief that the force used was reasonable under the circumstances at the time of the arrest. Therefore, because the defendant was entitled to qualified immunity, the jury should not have awarded damages to the plaintiff.

Padgett v. Wright, 2009 U.S. App. LEXIS 25888 (9th Cir. 2009)

Qualified Immunity Defense Found Moot

The plaintiff appealed from a District Court's denial of summary judgment on the ground of qualified immunity in a 42 U.S.C. §1983 action. After the defendant appealed the denial of qualified immunity, the case went to trial and a jury found the defendant liable to the plaintiff for deprivation of the plaintiff's First Amendment rights. The Ninth Circuit dismissed the appeal as moot. Although a pre-trial appeal on an order denying qualified immunity normally divests the District Court of jurisdiction to proceed with trial, the District Court may certify the appeal as frivolous and may proceed with trial, which the District Court did in this case. Because the trial already occurred and the defendant was found to have violated the plaintiff's constitutional rights, the court saw no need to address whether qualified immunity applied.

III. Title VII

Equal Employment Opportunity Commission v. United Parcel Service Inc., 587 F.3d 136 (2d Cir. 2009)

Court Upholds EEOC Subpoena

The EEOC requested information about how religious exemption to the United Parcel Service, Inc.'s (UPS) uniform and personal appearance guidelines, that apply to every UPS facility across the country, are handled nationwide. The District Court concluded that this nationwide information was not relevant to the two individual charges being investigated by the EEOC. The Second Circuit reversed.

UPS' appearance guidelines prohibit employees in public contact positions at all UPS facilities from wearing any facial hair below the lower lip. Until 1999, employees who refused to comply with the appearance guidelines for religious reasons were replaced. In 1999, UPS formalized a religious accommodation policy to allow for the granting of limited exceptions from the appearance guidelines. An employee seeking an exemption can submit a request to his/her immediate supervisor and manager, who then forwards the request to the District Human Resources Manager.

On November 23, 2005, Bilal Abdullah, a practicing Muslim who wears a beard, interviewed with the UPS' Rochester, New York, facility for the position of seasonal driver's helper and sorter. When told by the interviewer that he would have to shave his beard, he explained that maintaining a beard was part of his religion. He was not hired by UPS. Abdullah filed a charge with the EEOC alleging religious discrimination in violation of Title VII.

Muhammed Farhan, also a Muslim, began working at UPS in Dallas, Texas, as a package handler in 2001. In February 2007, Farhan started to become more religious and began to grow a beard. In April 2007, he was told to report for a full-time driver position. When he did so, he was told that UPS does not allow anyone with a beard to be a driver. Farhan spoke with his manager and union representative and asked for religious accommodation to allow him to drive a UPS truck. The manager said that Farhan could not drive for UPS if he had a beard and would have to return to his position as a package handler. Both Human Resource Officers to whom Farhan spoke said that they knew of no form to request a religious accommodation. In the Farhan matter, he alleged that he was prevented from working as a driver because of his beard and UPS refused to accommodate his religious practice.

In the course of the investigation of Abdullah's charge, the EEOC sent UPS a request for information seeking documents related to the appearance guidelines; seeking information pertaining to all job applicants denied employment because of their refusal to adhere to the appearance guidelines; seeking information for all employees who requested religious accommodation to the appearance guidelines; the outcomes of those requests; and for information for all employees who were terminated for religious reasons related to the appearance guidelines.

The court allowed the subpoena. The court held that the appearance guidelines apply to every UPS facility in the country. The subpoena was relevant because up until 1999, UPS did not allow employees who, for religious reasons, could not meet the appearance guidelines to work in public contact positions. Abdullah and Farhan were both told that they could not drive a UPS truck by wearing a beard. Both were not told they could request an exception from the policy for religious reasons. Farhan's EEOC charge alleged not only one specific case of failure to accommodate, but a pattern or practice of religious discrimination in failing to accommodate those who cannot meet the UPS appearance guidelines for religious reasons. Thus, the court held that the subpoena was relevant to the charges being investigated by the EEOC.

IV. ADA

Boose v. Tri-County Metropolitan Transportation District Of Oregon, 587 F.3d 997 (9th Cir. 2009)

Court Finds Compliance With ADA

Tri-County Metropolitan Transportation District of Oregon (TriMet) is a public entity providing mass transportation services in Washington and Oregon. TriMet had developed and implemented a plan for providing paratransit service for disabled riders unable to use its fixed route system of bus and light rail. This system provided door-to-door, shared/ride service, 22 hours a day, 7 days per week in all areas in the TriMet district.

The plaintiff suffered from a balance disorder. She received special services to get to medical appointments, do her grocery shopping and generally get around. In 2006, she submitted a request to accommodate her disability by scheduling rides in only sedans or taxis, as she experienced less dizziness and nausea in those vehicles than in a bus. Plaintiff filed a complaint

in the District Court alleging that TriMet refused to accommodate her request in violation of the ADA and Rehabilitation Act. The court held that TriMet was not currently required to consider plaintiff's request modification and thus, plaintiff could not make out a *prima facie* case of discrimination under the ADA or the Rehabilitation Act. No federal regulation existed that required TriMet to meet the plaintiff's demand. The court held that DOT regulations implementing ADA do not contemplate perfect service for the disabled. Simply put, TriMet met its obligation under the ADA.

V. 42 U.S.C. §1983

Caviness v. Arising Community Learning Center, Inc., 2010 U.S. App. LEXIS 40 (9th Cir. 2010)

Court Holds Charter School Not a State Actor

The court held that a private non-profit corporation that runs a charter school in Arizona was not a state actor under 42 U.S.C. §1983 when it took certain employment-related actions with respect to a former teacher, the plaintiff. Horizon Community Learning Center (Horizon) is a private, non-profit corporation that operates a charter school in Arizona. In Arizona, charter schools are public schools established by contract with a district governing board, the State Board of Education or the State Board for Charter Schools, to provide learning that will improve pupil achievement. Charter schools are publicly funded, although they also accept private grants and gifts.

The plaintiff was employed as a high school physical education teacher, health teacher and track coach at Horizon for six years. In February of 2006, a female student filed a grievance against the plaintiff alleging that the student-teacher boundary had been crossed. In March of 2006, the Horizon Board had a hearing regarding the student's allegation, at which Horizon, but not the plaintiff, questioned the student. The Horizon Board determined that the plaintiff exercised questionable judgment regarding the extent of his personal communication with the student, and therefore, decided not to renew the plaintiff's teaching and coaching contract. The plaintiff filed a complaint alleging that Horizon, acting under color of state law, among other things, deprived the plaintiff of his liberty interest without due process and made several false statements about him in connection with his employment, which caused serious damage to the plaintiff's standing and association in the community. Plaintiff alleged that Horizon violated plaintiff's First Amendment right of freedom of association.

The court held that merely because Horizon was a private entity performing a function which serves the public did not make it a state actor. The court concluded that Horizon providing educational services was not a function that was traditionally and exclusively the prerogative of the state, and therefore, was not a basis for holding that Horizon acted under color of state law in taking the alleged actions relating to the plaintiff's employment. The court noted that the state had no involvement in the contested employment actions. The court held that ultimately, Horizon's actions and personnel decisions were made by private parties. Thus, the plaintiff's claim failed.

SPOTLIGHT MUNICIPAL LAW

NEW YORK STATE DECISIONS

I. School Districts

In the Matter of Rose T. Place, as Guardian ad Litem for CHILD DOE, and Infant v. Beekmantown Central School District et al., 2010 N.Y. App. Div. LEXIS 40 (3d Dept. 2010)

Courts Allow Mandatory Reporting Claim to Proceed

The mandatory reporting requirements set forth in Social Services Law §413 have again been the subject of a claim against a School District for alleged abuse occurring outside of the school setting. In this recent Third Department decision involving the Beekmantown Central School District, a child was the subject of years of abuse perpetrated by the child's stepfather. The child never notified anyone about what was occurring in the child's home until the child observed a "good touch/bad touch" puppet presentation at school. The presentation took place in the year 2004 and after viewing the presentation, the child told the puppeteer that the stepfather engaged in "bad touch". The presenter puppeteer advised a school counselor who in turn notified the County's Department of Social Services.

Fast forward to the year 2006 and a school social worker received indications of abuse but never notified any authorities. The proper authorities were notified the next year when a friend of the child told school personnel about the stepfather's abuse. Due to the notification in the year 2007, the stepfather was eventually arrested and subsequently convicted of a host of sex related crimes perpetrated upon the child. The child thereafter was assigned to a Guardian who decided to file a claim against the school for failure to comply with the Social Services Law as a result of the 2006 notification.

The Guardian filed a motion seeking leave to serve a late notice of claim and the School District opposed the motion for two reasons, i.e. failure to timely file within the one year and ninety days, and failure to set forth a meritorious claim. Regarding the late notice, the court recognized that an infant was the subject of the proceedings and further the school had notice of the claim from the year 2004 on. Therefore, the failure to timely file would not prohibit the action to proceed.

With respect to the meritorious claim defense, the Court focused on the Social Services Law requirement of a school counselor being a mandatory reporter. That failure to report the abuse, despite the fact that the abuse did not occur in the school setting, is sufficient in and of itself to proceed against the School District. The Court allowed the claim to proceed in this respect.

This case again demonstrates the importance of mandatory reporting. School personnel should be trained in what constitutes a report of abuse, whether occurring in the school setting or outside the school setting, for proper compliance with Social Services Law §413.

Adi Segal v. St. John's University, et al., 2010 N.Y. App. Div. LEXIS 2360 (2d Dept. 2010)
Swimmers Claim of Negligence May Proceed

A college student's participation on a school sports team is the subject of this Second Department decision. The plaintiff was a swimmer on the St. John's University swim team. She injured her back while participating during her swim events and decided to sue her swim coach and University for negligence and negligent hiring. Her allegations stem from her belief that the injuries were caused by the training methods engaged in by her coach. After completion of discovery, the defendants moved for summary judgment. The motion was denied by the lower court and after hearing oral arguments on the appeal, the Second Department modified the decision, allowing the negligence claim to stand but dismissing the negligent hiring claim. The Second Department pointed out that when an employer, such as the University, is sued for the actions of its employees, the employer is liable under the doctrine of respondeat superior, not under the theory of negligent hiring or supervision. This is due to the fact that the evidence generally establishes that the activities that are alleged to constitute negligence are activities within the scope of employment, i.e. training swimmers. Thus, with activities being part of the duties an employee is hired for, the negligent hiring is a moot point. Thus, in this matter, since the plaintiff never sued under the respondeat superior theory, the cause of action for negligent hiring should be dismissed as improper.

Regarding the negligence theory, however, the appellate court followed the line of cases regarding allowing negligence cases to be decided by a jury. In this matter, whether the teaching principles employed by the instructor were within the normal and expected parameters for swimmers is an issue to be submitted to a jury since there may be numerous opinions in this respect. Of course, the defendants are allowed to dispute this claim by demonstrating that the alleged injury could be inherent in the risks of swimming; however, the Appellate Division felt that this should be determined by a trier of fact and is not an issue of law to be resolved at this time.

Jo Ann Agress v. Clarkstown Central School District, 2010 N.Y. App. Div. LEXIS 439 (2d Dept. 2010)

Promissory Estoppel Issue of Health Benefits for Jury to Decide

The procedures followed by a school district regarding employment and subsequent termination of employment whether by firing or resignation should always be committed to writing, in order to protect the District from possible claims following the separation of employment. This rule of thumb is illustrated in the decision issued by the Second Department in *Agress v. Clarkstown Central School District*. In this case, the plaintiff was a school psychologist, working for the District for 12 years. When she decided to resign, she was told by an employee in the School benefits office that her health benefits would continue to age 55. After age 55, she was informed that the School would pay 50% of her health insurance benefit premiums. The plaintiff turned 55 six years after her resignation. Approximately one month prior to her 55th birthday, the plaintiff advised the school that she would be turning 55 and that she expected the school to pay one-half of the premiums. The School, in turn, advised her that an error had occurred, she was not entitled to continue her health benefits upon her retirement and that the benefits would terminate about three months after her turning 55 years of age.

The plaintiff, obviously upset about the representations made to her, sued the School District for negligent misrepresentation, breach of implied contract and promissory estoppel. The School moved for summary judgment and the lower court granted summary judgment dismissing the negligent misrepresentation claim and breach of implied contract claim. The evidence established that the plaintiff did not rely on any representations relative to her decision to resign. However, the court felt that once she decided to resign, she made various employment decisions regarding her health benefits based upon the representations earlier made. Issues of fact have thus arisen regarding what representations were in fact made and what she relied on. These issues form the basis for the cause of action brought under promissory estoppel. The elements of such a cause of action are the clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance thereof. The defendant School District did argue that as a general rule, an estoppel may not be invoked against a “*governmental body; however, an exception to the rule exists where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his/her position to his/her detriment or prejudice*”. Following this exception, the Second Department affirmed the lower court’s denial of summary judgment involving the promissory estoppel claim, and held that it is up to a jury to determine whether the plaintiff relied on with respect to her future health benefits.

Ramos v City of New York, 67 AD3d 982 (2d Dept. 2009)

City Not Liable For Alleged Defect In Classroom Door

The plaintiff, a teacher was injured when a student pushed a classroom door in striking her. The court dismissed the case against the City because the cause of the injury was the act of a student rather than a defect in the door.

II. Premises Liability

Bizzoco v County of Westchester, 890 NYS2d 353 (2d Dept. 2009)

Premises Case With Missing Handrail Dismissed

The Appellate Division Second Department affirmed a jury verdict in favor of the City of Rye in a case where plaintiff sued the City for failing to install a handrail on a staircase in a City Park. The jury found that the City was negligent for failing to install the rail, but the negligence was not a proximate cause of plaintiff’s accident. The court upheld the jury verdict in favor of the City of Rye.

Kagan v Town of Hempstead, 888 NYS2d 905 (2d Dept. 2009)

Municipality Not Liable For Fall On Ice

Plaintiff fell on ice in a parking lot owned by the Town of North Hempstead. The night before the fall, there was heavy rain and a mixture of snow and rain. Defendant argued that there was no liability in the absence of written notice of the icy condition as required by Town Code.

The Court rejected plaintiff’s claim that defendant’s logbook entry stating “salt all walks black ice”, constituted written notice of the defect. The court also rejected plaintiff’s claim that defendants created the condition by plowing snow a week before the accident.

Farrell v City of New York, 67 AD3d 859 (2d Dept. 2009)

Claim Against Adjoining Property Owner For Fall In Public Street Dismissed

Plaintiff fell in a hole in the street 10 – 15 feet from a garbage transfer facility owned and operated by the defendants. They argued that they did not have a duty to maintain the public street, and they did not create the defect. The Appellate Division granted the motion for summary judgment rejecting the affidavit of plaintiff's expert as speculative.

**GOLDBERG SEGALLA
WINS AND ACCOMPLISHMENTS**



Julie P. Apter

Julie Apter recently obtained a dismissal of an action brought against a municipality in an employment matter. In *Strauch v. City of Tonawanda*, claimant Debby Strauch resigned her position as a Town secretary with the Highway Department. After her resignation, she filed a complaint with the New York State Division of Human Rights alleging sexual harassment and retaliation. She claims the highway workers, all male, would constantly make derogatory comments to her during the course of the work day making it uncomfortable for her to continue working. She also claims that she was interested in obtaining a "promotion" to the Police Department and claims her supervisor retaliated against her by making her job duties unbearable. After a full investigation, the New York State Division of Human Rights dismissed the petition in its entirety finding no evidence of sexual harassment. The claimant thereafter filed a petition in New York State Supreme Court seeking a remand to the State Division of Human Rights for a formal hearing. State Supreme Court Justice Frederick Marshall held that the State had all evidence before it and there are no grounds to justify a remand. The court dismissed the Petition in its entirety, upholding the finding of no evidence of sexual harassment.

In another action involving a New York State Division of Human Rights claim, another dismissal was obtained by Julie Apter involving the Town of Aurora. The claimant, Peggy O'Brien filed a complaint with both the EEOC and New York State Division of Human Rights alleging discrimination in the workplace that resulted in her termination as Town Clerk. The position Ms. O'Brien had was a temporary part time position. The position was a victim of budget cuts. Despite this, Ms. O'Brien claimed that there was so much animosity among the various Town employees that she believed she was targeted and thus discriminated against.

The EEOC dismissed the claim outright citing no basis to establish discrimination. The New York State Division of Human Rights, after an investigation, held that there also was no evidence of discrimination. The State felt that there may have been some underlying political reason for Ms. O'Brien's loss of her job; however, the State does not protect against political decisions. Therefore, Ms. O'Brien's claims were dismissed and the Town was found not liable for any damages.



Brian W. McElhenny

Brian McElhenny recently published an article in the November 2009 edition of the *Suffolk Lawyer* titled “Court of Appeals Rejects Estoppel Claim Against Municipality.”

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 **Governmental Liability Practice Group** consists of the following attorneys:

Thomas F. Segalla, Partner
Kenneth M. Alweis, Partner
Julie P. Apter, Partner
Paul S. Devine, Partner
William J. Greagan, Partner
William G. Kelly, Partner
Brian W. McElhenny, Partner
Patrick B. Naylor, Partner
Joseph A. Oliva, Partner
Latha Raghavan, Partner
Matthew J. McDermott, Special Counsel
William T. O’Connell, Special Counsel
Sandra J. Sabourin, Special Counsel
Jeffrey J. Signor, Special Counsel
Marianne Arcieri, Associate
Jonathan M. Bernstein, Associate

Newsletter Editors:

Jonathan M. Bernstein
Julie P. Apter

Contributing Authors:

Jonathan M. Bernstein
Julie P. Apter
Marianne Arcieri
Brian W. McElhenny

PHILADELPHIA

1700 Market Street / Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

NEW YORK

1200 Avenue of the Americas, 3rd Floor, New York, New York 10036
Telephone: 646.253.5400 Fax: 646.253.5500

PRINCETON

301 Carnegie Center / Suite 101, Princeton, New Jersey 08540-6227
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD

100 Pearl Street, 7th Floor, Hartford, Connecticut 06103-4506
Telephone: 860.760.3300 Fax: 860.760.3301

BUFFALO

665 Main Street / Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

ROCHESTER

2 State Street / Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE

5789 Widewaters Parkway, Syracuse, New York 13214-1855
Telephone: 315.413.5400 Fax: 315.413.5401

ALBANY

8 Southwoods Boulevard / Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS

11 Martine Avenue / Suite 750, White Plains, New York 10606-1934
Telephone: 914.798.5400 Fax: 914.798.5401

LONG ISLAND

200 Old Country Road / Suite 210, Mineola, New York 11501-9801
Telephone: 516.281.9800 Fax: 516.281.9801

EUROPE

We are affiliated with:

Studio Legale Casini, C.so di Porta Romana, 63 20121 Milano, Italy
Telephone: 011-39-02-54113609 Fax: 011-39-02-54116314
Via M. Coppino, 273, 55049 Viareggio, Italy
Telephone: 011-39-05-84388797 Fax: 011-39-05-84388798

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