



# GOLDBERG SEGALLA<sup>LLP</sup>

## Government Liability and Civil Rights Newsletter

Government Liability and Civil Rights Newsletter

Fall 2010

Editors: [Jonathan M. Bernstein](#), [Julie P. Apter](#) and [Thomas F. Segalla](#)

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. 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](mailto:jbernstein@goldbergsegalla.com). The next issue of this newsletter will be released on March 4, 2011.

### Federal Court Decisions

#### ***Prince A. Z. K. v. Federal Bureau of Prisons, 2010 U.S. App. LEXIS 8878 (2d Cir. 2010)*** **FTCA And PLRA Bar Plaintiff's Complaint**

The plaintiff appealed from an award of summary judgment in favor of the defendants in a civil action pursuant to the Federal Tort Claims Act (FTCA) for damages sustained to personal property as a result of flooding in a prison storeroom. The FTCA effects a limited waiver of the federal government's sovereign immunity against civil actions for damages based on loss of property caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment. The waiver does not apply, however, to any claim arising in respect of the detention of any goods, merchandise, or other property by an officer of customs or any other law enforcement officer, except when property is seized for the purpose of forfeiture. The court held that sovereign immunity barred the plaintiff's claim under the FTCA because the plaintiff sought to recover based on damage to property during its detention by law enforcement officers and because the plaintiff's property was not seized for the purpose of forfeiture. The court also dismissed the claim because the plaintiff failed to exhaust his administrative remedies as required by the PLRA. The plaintiff never filed an administrative grievance regarding his alleged damaged property.

**Byrne v. Rutledge, 2010 U.S. App. LEXIS 20825 (2d Cir. 2010)**  
**Vermont License Plate Law Violates First Amendment**

Vermont allows the owners of motor vehicles to request a vanity plate that contains a short message selected by the registrant from the Department of Motor Vehicles. Vermont law does not permit any combination of letters or numbers that refer to a religion or deity. The plaintiff applied for a license plate that referred to a biblical verse. The state denied his application on the ground that the requested plate referred to religious text in violation of Vermont law. Vermont permits use of state vanity plates for all subjects that have a secular perspective. The state rejected the plaintiff's message only because it addressed an expression from a religious perspective. The court held that the state cannot do this because it violates the First Amendment. The court held that Vermont opened its forum to a wide variety of permissible subjects, so it cannot target for exclusion those that wish to comment on subjects that are from a religious viewpoint. The court held that this was facially impermissible viewpoint discrimination.

**Amore v Novarro, 2010 U.S. App. LEXIS 21694 (2<sup>nd</sup> Cir. 2010)**  
**Police Officer Granted Qualified Immunity**

In a decision demonstrating that the ultimate determination of the availability of the qualified immunity defense rests upon a careful examination of the specific facts of each case, the Second Circuit holds, in a case argued by Goldberg Segalla's own Jonathan Bernstein, that an officer arresting an individual for violation of a Penal Law Statute held unconstitutional eighteen years earlier is entitled to dismissal on immunity grounds!

In 1983, the New York Court of Appeals held that Penal Law Section 240.35(3) prohibiting loitering in a public place for the purpose of engaging or soliciting deviate sexual behavior unconstitutional on its face. Nearly 18 years later, undercover Ithaca police officer Novarro was sitting in his unmarked police car in a public park when plaintiff Amore unwittingly approached Novarro and offered to perform a sexual act upon him. Novarro pulled his department issued Penal Law, found Section 240.35(3) and charged Amore with loitering in a public place for the purpose of engaging or soliciting deviate sexual behavior. After the charges were dismissed against Amore, he commenced an action in United States District Court seeking damages under 42 USC sec. 1983 for violation of his constitutional rights. Novarro moved for Summary Judgment seeking dismissal upon the grounds of qualified immunity. Summary Judgment was denied at the District Court level.

On appeal, the Second Circuit's inquiry in determining the qualified immunity issue that is "forgiving" and "protects all but the plainly incompetent or those who knowingly violate the law," analyzed and evaluated whether Novarro's conduct (1) did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable for him to believe his actions did not violate clearly established rights. The court "assume(d)" the arrest to be a violation of constitutional rights as the law was clearly unconstitutional as determined by the New York Court of Appeals years before. Regardless, the court determined it was "objectively reasonable" for the officer to make the arrest as he failed to realize the statute was unconstitutional because the New York legislature did not remove the statute from the Penal Law and the officer therefore could presume it to be valid. Moreover, the officer had undergone

police training and had never been instructed or trained with respect to the validity or constitutionality of the statute he was enforcing. Applying the reasonable person standard under the circumstances, versus imputing knowledge to the officer that a lawyer or judge would have known, the court found officer Navarro's conduct objectively reasonable and dismissed.

The court went out of its way to note the "failure to train" claim against the City of Ithaca remained pending, though not part of the appeal

***Philip Morris USA Inc. v. Scott, 2010 U.S. LEXIS 5738***

**Stay Granted By Supreme Court So Due Process Issue Can Be Addressed By Supreme Court**

In this matter, Justice Scalia, in his capacity as Circuit Justice for the Fifth Circuit, granted a stay of a judgment until the Supreme Court could act on the petition for a writ of certiorari. In this matter, the plaintiffs brought a class action against several tobacco companies on behalf of all Louisiana smokers. The suit alleges that the companies defrauded the plaintiffs' class by distorting public knowledge about the addictive effects of nicotine. The Fourth Circuit Court of Appeals of Louisiana granted relief and entered a judgment requiring the applicants to pay \$241,540,488.00 plus interest to front a 10-year smoking cessation program for the benefit of the members of the plaintiffs' class.

A single Justice has the authority to enter a stay. The applicant must demonstrate a reasonable probability that certiorari will be granted. The applicant must also demonstrate a significant possibility that the judgment below will be reversed and that there is a likelihood of irreparable harm if the judgment is not stayed. The case at issue involved fraud. In Louisiana, the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misinterpretations. The Louisiana Court eliminated any need for the plaintiffs to prove, and denied any opportunity for the defendants to contest, that any particular plaintiff believed defendants' distortions and continued to smoke as a result. Simply put, because this was a class action, the Court did away with the detrimental reliance element. As a result, the defendants alleged that they were denied the due process right to present every available defense. Justice Scalia noted that the extent to which class treatment may constitutionally reduce the normal requirement of due process was an important question. He noted national concern over abuse of the class action device. Justice Scalia granted the stay finding it reasonably probable that four Justices will vote to grant certiorari. He found irreparable harm because the defendants will have to pay a significant amount of money to provide anti-smoking counseling and that money is most likely not recoverable. Justice Scalia noted that the equities favored granting the application as other smoking cessation measures are available in Louisiana while this matter is decided by the Supreme Court.

**Johnson v. County of Nassau, 2010 U.S. Dist. LEXIS 101752 (E.D.N.Y. 2010)**

**Court Allows Plaintiff's Illegal Search Claim But Not Excessive Force Claim To Continue**

On or about October 30, 2008, at around 7:10 a.m., the plaintiff was in a car with his parents on the way to school. At some point, approximately 20 police officers stopped the vehicle, drew their guns, and asked plaintiff to exit the car. Before the plaintiff could get out, one officer opened the door, grabbed the plaintiff's arm, and physically removed him from the car. The officers opened the plaintiff's backpack and searched its contents. The officers also searched the plaintiff's pockets and asked plaintiff his age and relationship to the other people in the car. Next, the officers asked the plaintiff's parents to exit the car and similarly questioned them. The officers then opened and inspected the vehicle's trunk. One hour later, the officers finally let the plaintiff and his parents leave.

The plaintiff alleged that the defendants improperly stopped his parents' car, interrogated him for an hour, searched his backpack and pockets, and searched his parents' car. Police officers only need reasonable suspicion to stop a vehicle. To plead an improper seizure claim, the plaintiff must plead facts suggesting that the police officers lacked reasonable suspicion. The court dismissed plaintiff's improper seizure claim because the plaintiff pled only a conclusory, improper allegation, that the defendants lacked probable cause. The plaintiff applied the wrong standard by relying on probable cause as opposed to reasonable suspicion. The court allowed plaintiff's illegal search claims for the search of his book bag and pockets to survive the defendant's motion. During an investigative stop, police officers are entitled to conduct a warrantless stop and frisk if the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense and the police officer suspects that the person stopped is armed and dangerous. In this case, the plaintiff alleged that the officers did more than just search the plaintiff's bag. The officers removed books from the plaintiff's bag and leafed through the book's pages. It was alleged that the officer did so without first frisking or patting down the plaintiff, meaning that the book bag search was immediately upon plaintiff's removal from the car. The court, taking these allegations together, held that it was plausible to infer that the officers were not searching for weapons when they searched the plaintiff's bag and started leafing through the pages of plaintiff's books. The court held that this is an illegal search. The court allowed plaintiff's search claim concerning the pockets of his pants to survive. Before searching his pockets during an investigative stop, the officers must first pat down the suspect. Plaintiff alleged that the officers apparently failed to do so. The court dismissed the plaintiff's claim stemming from the trunk search because the plaintiff was only a passenger in his parents' car, so he did not have standing to sue for the trunk search.

The court dismissed the plaintiff's excessive force claim. To plead such a claim, the plaintiff must allege that the defendant's used an objectively sufficiently serious or harmful force and the use of such force proximately caused his injuries. Proximate cause requires connecting the force used with the plaintiff's injury. In addition, the plaintiff cannot obtain relief for purely psychological injuries, even if the plaintiff establishes proximate cause. In this case, the plaintiff alleged only a single act of physical force of being grabbed by the arm and being physically removed from his parents' car. The plaintiff failed to plead facts to proximately connect that force to the injuries he claimed, which were stomach aches and headaches. The court held that the plaintiff's stomach aches and headaches were psychological in nature, and thus non-compensable.

**Perry v. Schwarzenegger, 2010 U.S. Dist. LEXIS 78817 (N.D.Cal. 2010)**  
**California's Ban On Same Sex Marriage Held Unconstitutional**

The plaintiffs challenged a November 2008 voter enacted amendment to the California Constitution. Proposition 8 provided that only a marriage between a man and a woman was valid or recognized in California. The plaintiffs alleged that Proposition 8 deprived them of due process and equal protection of the laws contrary to the Fourteenth Amendment. The plaintiffs were denied marriage licenses because they were same sex couples. The Court held that Proposition 8 was unconstitutional. The Court held that Proposition 8 violated the Due Process Clause because the right to marry is a fundamental right. The Court held that the right to marry has historically and remains the right to choose a spouse and, with mutual consent, join together and form a household. The Court held that gender is not relevant, as it does not form an essential part of marriage, as marriage under the law is a union of equals. The Court held that domestic partnerships do not fulfill California's Due Process obligations to plaintiffs because domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. In addition, domestic partnerships were created specifically so that California can offer same sex couples like benefits, while simply withholding marriage from same sex couples.

The Court held that Proposition 8 violated the Equal Protection Clause of the Fourteenth Amendment because it discriminates both on the basis of sex and sexual orientation. For example, the plaintiff Perry was prohibited from marrying a woman because Perry was a woman. The Court held that if Perry was a man, Proposition 8 would not prohibit the marriage. Thus, the Court held that Proposition 8 operated to restrict Perry's choice of a marital partner because of her sex and sexual orientation. Because Perry was a woman and a lesbian, she was barred by Proposition 8 from marrying her partner, equaling discrimination based on sex and sexual orientation. Because Proposition 8 violated the Due Process and Equal Protection Clauses, the Court permanently enjoined its enforcement.

**Hollander v. Copacabana Nightclub, 2010 U.S. App. LEXIS 18229 (2d Cir. 2010)**  
**Ladies Night Held Not A Form Of Discrimination**

The plaintiff in this matter challenged whether several New York City nightclubs could charge males more admission than females or give males less time than females to enter the nightclub for a reduced price or a fee during "Ladies Night". The plaintiff alleged that feminism created a customary practice of invidious discrimination of men. Plaintiff alleged that his Equal Protection Rights were violated. The Second Circuit dismissed the case. The Court held that the nightclubs' admission policies failed to constitute state action so a §1983 claim could not be asserted. State action occurs where the challenged action of a private party is fairly attributable to the State. The deprivation must be caused by the exercise of some right or privilege created by the State or by a rule or conduct imposed by the State or by a person for whom the State is responsible. The party charged with the deprivation must be a person who may be fairly said to be a state actor. The Court held that the nightclubs in this case were not state actors. Issuing a liquor license to a nightclub does not establish State action.

**Harris v. City of New York, 2010 U.S. App. LEXIS 11128 (2d Cir. 2010)**  
**Court Upholds PLRA Three Strikes Rule**

The three strikes rule of the PLRA prohibits incarcerated prisoners from filing *in forma pauperis* in federal court if they have previously brought three or more actions or appeals that were dismissed on the grounds that they were frivolous, malicious or failed to state a claim upon which relief could be granted. The Court held that the three strikes rule applies even when the prisoner has been released from prison subsequent to filing his complaint. The three strikes rule need not be raised by the defendant in the pleadings in order to serve as grounds for dismissal.

Under the PLRA, prisoners granted *in forma pauperis* status must pay the full amount of the filing fee to the extent that they can afford to, as measured by their funds in their prison accounts. Prisoners accumulating three strikes are prohibited by the PLRA from bringing further actions or appeals *in forma pauperis*. If a prisoner/plaintiff satisfies the imminent danger exception, then the suit can continue regardless of the plaintiff having three strikes. In this case, because the plaintiff was a prisoner at the time that he brought the action, the three strikes rule applied. The Court held that a district court can evoke the three strikes rule to dismiss a prison lawsuit, even if the three strikes rule has not been raised by the defendant in the pleadings. The PLRA grants courts with great power to protect their dockets from meritless lawsuits so its application is not contingent upon the defendant asserting this defense in its answer.

**Borough of Duryea v. Guarnieri, 2010 U.S. LEXIS 8075**  
**Supreme Court Will Decide Whether First Amendment Protects Government Employees From Retaliation For Petitioning On Matter Of Private Concern**

In February 2003, the Borough of Duryea, in Pennsylvania, dismissed Charles J. Guarnieri from his job as police chief. In response thereto, Guarnieri filed a union grievance which led to arbitration. Guarnieri prevailed and was reinstated to his position as Chief of Police. Upon his return to work in 2005, the Borough issued eleven directives that Guarnieri must do or could not do on the job. These directives lead to another arbitration, resulting in a decision in which the arbitrator directed the Borough to remove or modify some of the directives. In 2006, the Borough withheld \$338 in overtime from the Police Chief. Guarnieri thereafter sued on grounds that the directives and other actions were acts of unconstitutional retaliation for his filing of the 2003 grievance. At trial, Guarnieri won a jury verdict on his claim that the directives and the withholding of overtime were in violation of the First Amendment of the United States Constitution. The 3rd Circuit affirmed. The United States Supreme Court granted certiorari to review the 3rd Circuit judgment.

The Borough argues that the First Amendment does not protect government employees from retaliation for the filing of petitions unless they address matters of public concern. However, the 3rd Circuit followed an earlier decision of that court which held that "a public employee who has petitioned the government through a formal mechanism such as the filing of a lawsuit or grievance is protected under the Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern." Seeking to address a split among the other

circuit courts, the Supreme Court accepted the case on whether public employees may sue for retaliation under the First Amendment. Oral argument is to be scheduled.

## **State Court Decisions**

### **Trupia v. Lake George Central School District, 14 NY3d 392 (2010)**

#### **Courts Of Appeals Narrows Scope Of Assumption Of Risk**

On April 6, 2010, the New York Court of Appeals denied the request to amend the defendant's pleadings to assert that plaintiff's claim was barred by the assumption of risk defense. Luke Trupia, age 11, was at defendant's summer camp when he was seriously injured sliding down a banister. He and his parents sued based on negligent supervision. Since the risk of falling from a banister was obvious defendant sought to plead primary assumption of risk as a complete bar to plaintiff's action. The Court of Appeals denied the request and issued an opinion signaling an end to the expansion of the complete assumption of risk defense, to activities that are not athletic or recreational. The Court held that the purpose of the assumption of risk doctrine is to encourage municipalities and other providers of facilities and sponsors of sporting activities to do so by eliminating liability where the risk of injury was an inherent part of the game or activity.

While primary assumption of risk is still a viable complete defense in cases involving athletics and sponsored recreational activity, the Court held that it should not be applied outside that type of endeavor, or it would erode the comparative negligence rule adopted by the legislature in 1975. The Court held that minors and adults can assume the risk of injury by participating in a risky beneficial pursuit that defendant has in some way enabled.

Here, the School District had an obligation to supervise minors, and the Court held that if the School District failed to do so, it was improper to apply assumption of risk so as to bar the claim entirely. The Court held that any negligence of the plaintiff would reduce his recovery under comparative negligence principles.

### **Kochanski v. City of New York, 2010 N.Y. App. Div. LEXIS 6862 (2<sup>nd</sup> Dept. 2010)**

#### **Appellate Division Dismisses Action Against New York City Arising Out Of Criminal Act Of Foster Children**

The Appellate Division, Second Department, reviewed an appeal by the City of New York from denial of summary judgment. Pursuant to contract between the City and St. Vincent's Services, St. Vincent's operated a group home for foster children in Staten Island. Three teenage foster children broke into plaintiff's nearby home and beat and stabbed the homeowner to death. Plaintiff sued and alleged the City was liable for negligently placing the youths in the group home despite knowledge of violent propensities. The Court held that the City of New York foster care services is a governmental function, not a proprietary one and as such the City is immune from liability. Negligent performance of a governmental function is not actionable absent a special duty, which did not exist.

**Shipley v. City of New York, 2010 N.Y. App. Div. LEXIS 6880 (2<sup>nd</sup> Dept. 2010)**

**Appellate Division Sustains Cause Of Action Against New York City Medical Examiner For Violation Of The Right Of Sepulcher**

The Court sustained a cause of action by the parents of Jesse Shipley based on the medical examiner's negligent handling of the remains of Jesse Shipley, who was killed in an auto accident. The family granted permission for an autopsy and after it was conducted, a wake, funeral and burial were held. The Medical Examiner's office had retained Jesse's brain for further analysis without disclosing that to the family.

In a bizarre coincidence, Jesse's former classmates, who were in a forensic science class, went on a field trip to the Medical Examiner's office. One of them saw a cabinet with various human organs in specimen jars and one of them held a human brain with the label Jesse Shipley. This evoked a strong emotional reaction among his former classmates who told the family, which led to their lawsuit for emotional distress due to the mishandling of Jesse's remains. Subsequently, Jesse's remaining body parts were returned. The family argued that Jesse's brain was improperly on display without consent, and that withholding the brain required a second funeral.

The Appellate Division held that although the Medical Examiner's office had the right to conduct the autopsy and perform further testing of Jesse's brain, any claim by plaintiffs to the contrary was barred because defendants were immune due to discretionary governmental action. The Court also held that New York recognizes a common law right of sepulcher giving the next of kin the right to return of all the remains of a family member. Any unlawful interference with that right is actionable. Here, the Court concluded that the City faced potential liability for not notifying the family of the retention of Jesse's brain, which necessitated a second funeral after the return of his remains.

**Tipaldo v. Lynn, 76 A.D.3d 477 (1<sup>st</sup> Dept. 2010)**

**Appellate Court Rules Pre-judgment Interest Available On Whistleblower Claims Under Civil Service Law Section 75-b.**

John Tipaldo, a long time manager with the New York City Department of Transportation, was demoted after reporting that a superior had violated bidding rules. Tipaldo sued, asserting a whistleblower claim under New York Civil Service Law Section 75-b. Tipaldo prevailed after a nonjury trial, and was awarded \$175,000 in back pay without interest by the lower court. On the issue of damages, the appellate court reversed the calculation of damages and the denial of predetermination interest. The appellate court also reversed the lower court's denial of Tipaldo's request for reinstatement. With respect to interest, the court stated "we hold that predetermination interest is generally available to whistleblowers who claim under Civil Service Law Section 75-b." The court noted that pre-judgment interest is generally available to employees who prevail on employment discrimination claims under New York's Human Rights Law, and concluded "[i]t makes no sense that the Legislature would have intended victims of employment discrimination to be made 'whole' through an award of pre-judgment interest, but not whistleblowers like plaintiff."

**Matter of Charter School v. Smith, 2010 N.Y. LEXIS 2950**

**Court Of Appeals Rules That New York Department Of Labor Erred In Adopting A Blanket Rule Imposing Prevailing Wage Requirements On All Charter School Projects.**

In an opinion letter issued by the New York State Department of Labor on August 31, 2007, the Department declared that the prevailing wage mandate of New York Labor Law Section 220 applied to all charter school projects. In response, various petitioners related to charter schools commenced proceedings in opposition to the opinion letter, seeking a declaratory judgment invalidating the Commissioner's position and an order enjoining imposition of prevailing wage laws on charter school projects. The trial court dismissed the petition, in essence agreeing that Labor Law Section 220 does apply to charter school projects. The appellate court below reversed, declaring that petitioners in the case were not subject to prevailing wage laws under the Labor Law. The Court of Appeals agreed and affirmed.

The Court of Appeals held that the Department of Labor's blanket rule imposing prevailing wage requirements on all charter school projects was in error. Reviewing the pertinent sections of Section 220, the Court disagreed that all charter schools are public entities within the meaning of the prevailing wage law. Citing the statutory provisions creating charter schools, the Court observed the essential differences between charter schools and other public schools.

Notably, the Court did not rule that all charter school projects are outside of Labor Law Section 220. The court observed that, "[o]ur holding today should not be read to mean that every facilities contract in which a charter school is a party is exempt from the prevailing wage laws." The court explained, "[t]here may be contracts where a charter school is acting in place of, on behalf of and for the benefit of a public entity, where the prevailing wage law may apply." Thus, depending on the facts of the matter, Labor Law Section 220 may be applicable. The Court refused to "address the application of section 220" to all other situations, since, in the case before the court, "the facilities contracts contemplated in this litigation involve projects in which the ... charter school owns the building and all construction, renovation, repair and maintenance of the building are the responsibility of the charter school," thus resulting in the determination that the prevailing wage law was not implicated in that specific case.

**Weissman v. City of New York, 2010 N.Y. Misc. LEXIS 3879 (J. Kerrigan, Sup. Ct. Queens, County)**

**Notice Of Defect Dated Five Years Prior To Accident Is Not Too Remote To Constitute Written Notice.**

The plaintiff sued New York City for a sidewalk defect. The City made a motion for summary judgment based on lack of written notice. The plaintiff cited to the City's Big Apple map, which showed there was a defect in the sidewalk, to satisfy the written notice requirement. The City argued that the map cited to is five-years-old and was too remote in time to serve as notice of the actual condition alleged to have caused plaintiff's injuries. The City further argued, without proof, that there must have been changes to the sidewalk since the 2003 Big Apple map.

The trial court noted the facts of this case were unique and there was no prior case law directly on point. The trial court held the 2003 map can serve as written notice of the alleged defect. The court's decision was based on the fact that the City proved no evidence that the sidewalk was

repaired since that time and there was no subsequent Big Apple map showing the specific area. The trial court also cited to a Court of Appeals case in which it was held that prior written notice must be traced back to the most current Big Apple map on file. In this case the map that was five-years-old was the most current map.

**Petty v. Duomont, 2010 N.Y. App. Div. LEXIS 7447 (2nd Dept. 2010)**  
**Municipal Defendants Liable For Installation Of Security Concrete Barriers In Roadway Because No Warnings Were Provided.**

The plaintiff was a passenger in a cab that collided with concrete barriers placed in roadway around the Con Edison facility in Manhattan. The concrete barriers were placed in the middle of the left-most lane of West 66<sup>th</sup> Street's traffic lanes. The barriers were installed as an antiterrorist measure after September 11 to expand the safety perimeter around the Con Ed facility. The municipal defendants did not install any warning signs or change the traffic lanes to divert traffic around the barriers. One of the municipal defendants' witnesses admitted the barriers, as configured, constituted a hazard.

The plaintiff made a motion for summary judgment against all the defendants. The trial court denied the motion as to the municipal defendants holding there was an issue of fact as to whether the municipal defendants were liable. The municipal defendants argued that it was the driver's negligence that caused the accident and that it was a superseding cause of the accident severing the nexus of the municipal defendants' negligence for the installation of the hazardous barriers.

The Appellate Division, Second Department, reversed the trial court's order denying plaintiff's motion for summary judgment. The Appellate Division held a municipality's negligence in failing to provide adequate warning of a known roadway hazard has been held to be a concurrent cause not superseded by the negligence of a careless driver. The Appellate Division further held that it "is readily foreseeable that a careless driver might crash into an unmarked concrete barrier placed in the middle of the street." Under these circumstances, the Appellate Court noted, the municipal defendants' negligence increased the likelihood of an accident and as such was a concurrent cause of the accident, not superseded by the driver's negligence.

## Recent Victories



Brian W. McElhenny ([bmcelhenny@goldbergsegalla.com](mailto:bmcelhenny@goldbergsegalla.com)) of Goldberg Segalla LLP represented public safety officer Matthew Gershuny and the Town of Huntington in a civil suit in Suffolk County Supreme Court before Judge Patrick Sweeney. The plaintiff, a 33 year old emergency medical technician and volunteer firefighter, was on her way back to the firehouse at 12:30 a.m. on 11/2/05 at Route 110 and Arlington Street in Melville, New York, when the collision occurred. The intersection was controlled by a stop sign. Plaintiff testified she stopped and claimed that the defendant's vehicle was speeding and did not have its headlights on. Defendant argued that plaintiff failed to yield the right of way before entering the intersection. Defendant testified he never saw plaintiff's vehicle before she darted out in front of him causing the collision. Defendant's vehicle was traveling at 45 miles per hour at the time of impact. Plaintiff was not wearing her seat belt and she was ejected from her vehicle. She sustained the following injuries: a concussion, torn ligaments in her right ankle, a herniated lumbar disc, bilateral dislocation of her TMJ joints and facial lacerations. The jury rendered a defense verdict after 15 minutes of deliberation.



Latha Raghavan ([lraghavan@goldbergsegalla.com](mailto:lraghavan@goldbergsegalla.com)) of Goldberg Segalla LLP successfully defended a road design claim in *Hill v Montgomery County*. The Plaintiff, a back seat passenger in a car driven by his friend, was severely injured becoming a paraplegic, as a result of a single car accident when the driver lost control at a blind hill and hit a utility pole. Plaintiff claimed that his car had to swerve around another vehicle coming in the opposite direction as they met at the crest of the hill. Plaintiff retained road design experts and experts to drill at the hill and claimed that the hill should and could have been removed when work was done on the roadway several years earlier. Deposition testimonies showed that either the driver of plaintiff's car or the driver of the car approaching in the opposite direction failed to keep to the right of the roadway as they approached the blind hill but plaintiff argued that had the hill been removed years earlier then the drivers would have had sufficient sight distance to avoid sudden swerves at the crest. For the defense, Ms. Raghavan argued that the since one or the other driver failed to obey the rules and stay to the right on this unmarked rural road with which both drivers were familiar, the County cannot be liable even if it's road was not properly designed. Further defense experts showed that this was a rural road and the Cornell Rural Road guidelines applied and were met. Plaintiff made an insufficient showing of a history of prior accidents at the hill. The Appellate Division in Albany, New York, affirmed the trial court's finding dismissing the case against the County and ruled that the accident was caused by one of the drivers and that it therefore need not decide whether the road design was defective. Shortly before the decision, the Plaintiff reduced his demand from \$12 Million to \$3 Million. No offer was made.

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