ADMINISTRATIVE LAW

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CONTENTS

INTRODUCTION 551
I. JUDICIAL BRANCH 551
A. Delegation of Authority 551
B. Agency Interpretation of Rules and Regulations 556
C. Search and Seizure 560
D. Government Liability 564
II. LEGISLATIVE BRANCH 571

INTRODUCTION

This Article reviews developments in administrative law and practice during 2013 in the judicial and legislative branches of the New York State government. The discussion highlights certain decisions announced by the New York Court of Appeals and the legislation involving the NY SAFE Act as it relates to FOIL. The Cuomo Administration issued a year-end report for 2013 on a number of its initiatives, so it seems appropriate to the let the administration speak for itself.[1]

I. JUDICIAL BRANCH

The decisions of the Court of Appeals covered a variety of interesting topics in 2013 including unconstitutional delegation of authority, agency interpretation of its regulations, workplace searches, and government liability.

A. Delegation of Authority

The Legislature frequently delegates authority to agencies to carry out their responsibilities,[2] and the delegation of authority is usually sufficiently broad to allow an agency discretion to carry out the mandate

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1. Governor Andrew M. Cuomo, *New York Rising: Year End Report* (2013), *available at* http://www.governor.ny.gov/assets/documents/eoy-report-2013.pdf.

2. PATRICK J. BORCHERS ET AL., NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 5.3 (2d ed. 1998).

of the statute.[3] It is well recognized, however, that the Legislation may not constitutionally pass on its fundamental policymaking responsibility to a regulatory agency.[4] From time to time, a constitutional challenge to legislation is asserted on the grounds that the legislature has ceded its power to an agency.[5] One such challenge was raised against the broad authority of the Public Health Council to "deal with any matters affecting the . . . public health"[6] and regulations issued by the Council which banned indoor smoking.[7] While the Court did strike down the regulations as an ultra vires act of the Council in that case,[8] it stopped short of declaring the statutory authority of the Public Health Council unconstitutional.[9] As in the case of *Brightonian Nursing Home v. Daines,*[10] the New York Court of Appeals has been receptive to broad delegations and challenges of unlawful delegations are likely to be unsuccessful.[11]

Petitioner nursing homes in *Brightonian Nursing Home*[12] brought a hybrid declaratory judgment—article 78 proceeding challenging on its face the constitutionality of a provision of the Public Health Law that prohibited nursing homes from withdrawing equity or transferring assets that exceeded three percent of their total annual revenue for patient care services without prior written approval of Commissioner of Health.[13] The statute gave the Commissioner sixty days to determine whether to approve such a request and authorized the Commissioner to "consider the facility's overall financial condition, any indications of financial distress, whether the facility is delinquent in any payment owed to the [D]epartment [of Health], whether the facility has been cited for immediate jeopardy or substandard quality of care, and such other factors as the [C]ommissioner deems appropriate."[14]

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3. *See generally id.*

4. *See, e.g.*, Boreali v. Axelrod, 71 N.Y.2d 1, 16, 517 N.E.2d 1350, 1357, 523 N.Y.S.2d 464, 472 (1987).

5. *See generally* BORCHERS, *supra* note 2, § 5.3.

6. *Boreali*, 71 N.Y.2d at 9, 517 N.E.2d at 1353, 523 N.Y.S.2d at 467-68.

7. *Id.* at 14, 517 N.E.2d at 1357, 523 N.Y.S.2d at 471.

8. *Id.* at 6, 517 N.E.2d at 1351, 523 N.Y.S.2d at 466.

9. *Id.* at 9, 517 N.E.2d at 1353, 523 N.Y.S.2d at 468.

10. 21 N.Y.3d 570, 999 N.E.2d 510, 977 N.Y.S.2d 147 (2013).

11. *See* BORCHERS, *supra* note 2, § 5.3.

12. *Brightonian Nursing Home*, 21 N.Y.3d at 573, 510 N.E.2d at 511, 977 N.Y.S.2d at 148.

13. *Id.* (citing N.Y. PUB. HEALTH LAW § 2808(5)(c) (McKinney 2013)).

14. N.Y. PUB. HEALTH LAW § 2808(5)(c) (the statute further provides that "[i]n addition to any other remedy or penalty available under this chapter, and after opportunity for a hearing, the [C]ommissioner may require replacement of the withdrawn equity or

Petitioners asserted two claims. They alleged that the statutory language appearing at the end of the subdivision—"such other factors"—was unconstitutionally vague because it left the decision to the "Commissioner's unfettered discretion."[15] They also alleged that the provision violated substantive due process because petitioners' interest in the equity of their property was impaired by the statutory restrictions which were not rationally related to government's interest in maintaining the financial viability of nursing homes.[16]

The Supreme Court denied defendant's motion to dismiss the action and declared the statute unconstitutional.[17]

The Appellate Division, Fourth Department, affirmed,[18] noting that the action was properly one for declaratory judgment because plaintiffs challenged the constitutionality of statute and not agency action.[19]

The Fourth Department, unpersuaded by the defendant's argument that the ejusdem generis rule of statutory construction saved the statute, agreed with the Supreme Court that the absence of standards to guide the Commissioner made the statutory provision an unconstitutional delegation of power.[20] While the court acknowledged that the ejusdem generis rule "requires the court to limit general language of a statute by specific phrases which have preceded the general language,"[21] it interpreted the rule's applicability to require that the specific words used to constrain the more general language be "of the same nature."[22] The court concluded that the statutory terms preceding the general language of 2808(5)(c), namely the facility's overall financial condition, indications of financial distress, delinquency in payments owed to the Department of Health, and citations for immediate jeopardy or substandard quality of care were themselves general in nature rather than all of the same kind or type, thus rendering the rule of ejusdem generis inapplicable to restrict the Commissioner's discretion.[23]

The Fourth Department also agreed that the same lack of standards

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assets and may impose a penalty for violation of the provisions of this subdivision in an amount not to exceed ten percent of any amount withdrawn without prior approval.").

15. Brightonian Nursing Home v. Daines, 93 A.D.3d 1355, 1357, 941 N.Y.S.2d 396, 400 (4th Dep't 2012).

16. *Brightonian Nursing Home*, 93 A.D.3d at 1359, 941 N.Y.S.2d at 401.

17. *Id.* at 1356, 941 N.Y.S.2d at 397.

18. *Id.*

19. *Id.* at 1356, 941 N.Y.S.2d at 399.

20. *Id.* at 1357, 941 N.Y.S.2d at 400.

21. *Brightonian Nursing Home*, 93 A.D.3d at 1358, 941 N.Y.S.2d at 400.

22. *Id.*

23. *Id.* at 1357-58, 941 N.Y.S.2d at 399-400.

rendered the provision unconstitutionally vague because its general language forced a reasonable person to guess at its meaning and provided no guidance for judicial review of the Commissioner's decision.[24]

The court concluded that severing that portion of the statute would not save it because the statute in its entirety violated substantive due process; its requirement had no reasonable relation to the government's purpose in protecting nursing home residents from financially challenged operators.[25] Other provisions of the statute already addressed this concern.[26] The court viewed the other constraints on the operator as sufficient to carry out the government's purpose, namely, subdivision (5)(a) which requires the Commissioner's approval before an operator withdraws equity or assets from a for-profit hospital when the withdrawal will create or increase negative net worth, and subdivision (5)(b) which requires prior notification to, as opposed to prior approval of, the Commissioner before a non-public residential health care facility "may withdraw equity or transfer assets which in the aggregate exceed 3% of such facility's total reported annual revenue for patient care services."[27]

The State appealed as of right.[28] The Court of Appeals reversed, holding that none of the arguments advanced by plaintiffs had merit.[29]

First, the Court noted that the Commissioner's regulatory agenda as reflected in the challenged section of the Public Health Law was neither new or controversial.[30] The Court viewed the overall purpose of the statute as one designed to protect the vulnerable individuals who populate nursing homes from "precipitous withdrawals of substantial facility equity or assets for non-facility purposes [that] may impair facility operations and thus occasion detriment to the welfare of an utterly reliant resident population."[31]

The Court pointed specifically to sections 2808(5)(a) and 2808(5)(b), provisions enacted prior to section 2808(5)(c) and claimed

24. *Id.* at 1358, 941 N.Y.S.2d at 400.

25. *Brightonian Nursing Home*, 93 A.D.3d at 1360, 941 N.Y.S.2d at 401.

26. *Id.* at 1360, 941 N.Y.S.2d at 402.

27. *Id.* at 1360, 941 N.Y.S.2d at 402.

28. Brightonian Nursing Home v. Daines, 21 N.Y.3d 570, 573, 999 N.E.2d 510, 511, 977 N.Y.S.2d 147, 148 (2013).

29. *Brightonian Nursing Home*, 21 N.Y.3d at 579, 999 N.E.2d at 515, 977 N.Y.S.2d at 152.

30. *Id.* at 574, 999 N.E.2d at 511-12, 977 N.Y.S.2d at 148-49.

31. *Id.*, 999 N.E.2d at 511-12, 977 N.Y.S.2d at 148-49.

by petitioners to be sufficient protection, as reflecting that agenda.[32]

Second, the Court dismissed as error the substantive due process holdings of the Supreme Court and the Appellate Division, noting that judicial balancing of private property interests over government interests are "vanishingly rare."[33] It pointed out that petitioners did not challenge the government's interest in "ensuring the financial viability of nursing homes and protecting the welfare of their vulnerable residents"[34]generally; rather, they argued that by targeting financially sound operators, the challenged provision did not advance that interest particularly because annual revenue streams are not necessarily a reliable measure of the fiscal health of the organizations.[35]

The Court was persuaded by the Commissioner's argument that the financially stable organizations could be rendered unstable by a precipitous withdrawal, and measuring financial stability by the operator's annual revenue stream is a rational indicator of its ability to carry out its operations.[36]

Moreover, the Court pointed out that the three percent baseline is already employed in subdivision 2808(5)(b) as an acceptable legislative mechanism to both "identify contemplated withdrawals sufficiently substantial to be of legitimate regulatory concern, and afford owners of facilities with positive net worth a measure of unregulated access to facility assets and equity."[37] On that basis, the Court concluded that the statutory provision was not an "outrageously baseless regulatory exercise."[38]

Finally, the Court similarly disposed of the lower courts' rulings that the statute was unconstitutionally vague. Defendants had conceded that the Commissioner's determination would be based on the facility's fiscal condition and the quality of care provided; thus, the Court concluded that "language of the subject subdivision does not absolutely require the conclusion that the legislature's delegation to the Commissioner was constitutionally excessive"[39] and that petitioners'

32. *Id.* at 575, 999 N.E.2d at 512, 977 N.Y.S.2d at 149.

33. *Id.* at 575-76, 999 N.E.2d at 513, 977 N.Y.S.2d at 150 (citing Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n, 71 N.Y.2d 313, 320, 520 N.E.2d 528, 531, 525 N.Y.S.2d 809, 812 (1988)).

34. *Id.* at 575, 999 N.E.2d at 512, 977 N.Y.S.2d at 149 (citing *Brightonian Nursing Home*, 93 A.D.3d at 1360, 941 N.Y.S.2d 396).

35. 21 N.Y.3d at 576, 999 N.E.2d at 513, 977 N.Y.S.2d at 150.

36. *Id.* at 576-77, 999 N.E.2d at 513-14, 977 N.Y.S.2d at 150 (citing Montgomery v. Daniel, 38 N.Y.2d 41, 64, 340 N.E.2d 444, 459, 378 N.Y.S.2d 1, 20 (1975)).

37. *Id.* at 577, 999 N.E.2d at 514, 977 N.Y.S.2d at 151.

38. *Id.*, 999 N.E.2d at 513-14, 977 N.Y.S.2d at 150-51.

39. *Id.* at 579, 999 N.E.2d at 515, 977 N.Y.S.2d at 152.

argument is "not legally available."[40]

B. Agency Interpretation of Rules and Regulations

An agency interpretation of its rules is generally afforded considerable deference.[41] Courts do, however, "scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case."[42] In *Murphy v. N.Y. State Division of Housing and Community Renewal,* the Court of Appeals held in a four-to-three decision that the New York State Division of Housing and Community Renewal ("DHCR")'s interpretation of its own regulation, which denied a family member succession rights to a rent regulated Mitchell-Lama apartment,[43] was arbitrary and capricious.[44] The case illustrates why deference may be due to an agency interpretation when reasonable minds might differ on the meaning of the regulations.

The DHCR, which is part of New York State Homes and Community Renewal agency,[45] oversees the administration and regulation of Mitchell Lama co-operative apartments and provides, among other things, guidelines for succession rights to a Mitchell-Lama apartment.[46] Pursuant to these regulations, when a Mitchell-Lama tenant vacates an apartment, any remaining co-occupants do not automatically

40. *Brightonian Nursing Home*, 21 N.Y.3d at 579, 999 N.E.2d at 515, 977 N.Y.S.2d at 152.

41. *See generally* BORCHERS, *supra* note 2, § 8.3; Gaines v. N.Y. State Div. of Hous. & Cmty. Renewal, 90 N.Y.2d 545, 548-49, 686 N.E.2d 1343, 1345, 664 N.Y.S.2d 249, 250 (1997).

42. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 21 N.Y.3d 649, 654, 999 N.E.2d 524, 528, 977 N.Y.S.2d 161, 165 (2013)

43. Mitchell-Lama housing is the commonly known name for co-operative housing built in New York City in the late 1950s pursuant to the Limited Profit Housing Companies Act which offered incentives to private builders to build homes for individuals with low and moderate income. Schorr v. N.Y.C. Dep't.of Hous. Pres. & Dev., 10 N.Y.3d 776, 777 n.1, 886 N.E.2d 762, 763 n.1., 857 N.Y.S.2d 1, 2 n.1 (2008). *See also Mitchell-Lama Housing Program*, N.Y. STATE HOMES & CMTY RENEWAL, http://www.nyshcr.org/Programs/mitchell-lama/ (last updated Jan. 15, 2013). The Act is part of the Private Housing Finance Law, Article II. N.Y. PRIV. HOUS. FIN. LAW § 10. The apartments are "sold at below-market rates, and limitations are placed on the maintenance fees that can be charged to the cooperators who purchase the shares allocable to the apartments where they reside." Kaywein Realty Co. LLC v. City of New York Envtl. Control Bd., No. 109580/10, 2010 NY Slip Op. 51810(U) (Sup. Ct. N.Y. Cnty., 2010).

44. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 21 N.Y.3d 649, 652, 999 N.E.2d 524, 526, 977 N.Y.S.2d 161, 163 (2013).

45. *Division of Housing & Community Renewal (DHCR)*, N.Y. STATE HOMES & CMTY RENEWAL http://www.nyshcr.org/Agencies/DHCR/ (last updated May 17, 2013).

46. *See* N.Y. COMP. CODES R. & REGS. tit. 9, §§ 1727-8.1-1727.8.5 (1991).

retain the right to continue to live in the apartment. In order to succeed to the tenancy, they must be a family member[47] who meets certain requirements of residency in the apartment.[48] The majority viewed these regulations as intended to "facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure of a tenant for their 'traditional' and 'non-

47. 9 NYCRR 1700.2(a)(7) (1991). A family member is defined as

> a spouse, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, or sister, grandfather, grandmother, grandson, granddaughter, daughter-in-law, son-in-law, mother-in-law or father-in-law of the tenant. *Family member* may also mean any other person residing with the tenant or cooperator . . . . Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed shall be the income affidavit filed by the tenant for the dwelling unit and other evidence which may include, without limitation, the following factors: (i) longevity of the relationship; (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life; (iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.; (iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.; (v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.; (vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their works or actions; (vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services; and (viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship. In no event would evidence of a sexual relationship between such persons be required or considered.

Id.

48. 9 NYCRR 1727-8.2(a). The regulations provide for certain exceptions to the period of occupancy. *See* 9 NYCRR 1727-8.2(b). These exceptions include

> any period during which the family member, who is listed on the tenant's income affidavit, temporarily relocates because he or she: (1) is engaged in active military duty; (2) is enrolled as a full-time student; (3) is not in residence pursuant to a court order not involving any term or provision of the lease, and not involving any grounds specified in the Real Property Actions and Proceedings Law; (4) is engaged in employment requiring temporary relocation; (5) is hospitalized for medical treatment; or (6) has such other reasonable grounds that shall be determined by the division upon application by such person.

Id.

traditional' family members."[49] The dissent viewed them as "a narrow exception to [the] general admission process to permit, under limited circumstances, a family member of a departing tenant of record to succeed to the tenancy and thus displace the next qualified individual or family on the waiting list."[50]

Succession rights will be recognized for administratively defined family members who have occupied the apartment for a minimum two year period and are able to offer evidence that the apartment was their primary residence during that time.[51] According to the regulations, that proof of residency

> *must* include: (i) the listing of such person on all annual income affidavits, certifications or recertifications required to be executed and filed during the applicable period; and (ii) such other evidence as establishes that such person actually occupies the dwelling unit for his or her own dwelling purposes and has an ongoing, substantial, physical nexus to the unit . . . .[52]

At issue in this case was the sufficiency of the documentation to support Mr. Murphy's succession claim as required by the regulations.[53]

In 1981, one-month-old infant Paul Murphy moved into a Mitchell-Lama apartment with his parents.[54] His infancy prevented him from actually holding title with his parents but he was listed as a shareholder on some documents relating to the family's occupancy of the apartment.[55] He lived in this apartment for his entire life, and shared it with his mother until she vacated the apartment in 2000.[56] In 2004,

49. *Murphy,* 21 N.Y.3d at 653, 999 N.E.2d at 524 (citing Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 210, 543 N.E.2d 49, 53, 544 N.Y.S.2d 784, 788, 977 N.Y.S.2d 161, 163 (1989)).

50. *Id.* at 657, 999 N.E.2d at 529-30, 977 N.Y.S.2d at 166-67 (Read, J., dissenting with which Pigott, J., and Abdus-Salaam, J., concurred).

51. 9 NYCRR 1727-8.2.

52. 9 NYCRR 1727-8.2(ii) (emphasis added). The additional evidence "may include, without limitation, certified copies of tax returns, voting records, motor vehicle registration, driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts." *Id.*

53. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 21 N.Y.3d 649, 999 N.E.2d 524, 977 N.Y.S.2d 161.

54. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, No. 101005/10, 2010 NY Slip Op. 51816(U), at 1 (Sup. Ct. N.Y. Cnty. Oct. 8, 2010).

55. *Id.*

56. *Id.* at 2. His father apparently did not live in the apartment continuously but that fact is not relevant to petitioner's claim to succeed to the apartment. *Id.* at 1 n.1.

Mr. Murphy sought succession rights to the apartment.[57] He offered as proof for his application annual income affidavits for the calendar years 1990 through 1997, and 2000 through 2003.[58] He also submitted a statement from his mother confirming his lifelong occupancy of the apartment and explaining the absence of income affidavits for 1998 and 1999 based on her privacy and security concerns regarding an employee of DHCR who lived in the building and collected the income affidavits.[59] The record indicated that the property owner imposed a surcharge on Mrs. Murphy for her failure to file the affidavits, which she paid, but took no other steps to penalize her or terminate her tenancy.[60]

In 2007, the property owner denied Mr. Murphy's succession claim based on the absence of the 1998 and 1999 income affidavits, which the property owner claimed were necessary to establish Mr. Murphy's occupancy with his mother.[61] Mr. Murphy appealed this determination to DHCR[62] which upheld the owner's decision.[63] DHCR concluded that Mr. Murphy had demonstrated that he was the son of the previous tenant and had lived in the apartment with her throughout his childhood.[64] However, it also concluded that the applicable two-year period for determining succession rights ran from January 1998 through January 2000 and that only one affidavit, the 1997 income affidavit dated May 21, 1998, was filed during that period.[65]

Mr. Murphy thereafter commenced an article 78 proceeding challenging DHCR's decision.[66] The Supreme Court wasted no time in determining that the DHCR's decision was arbitrary and capricious based on a strained interpretation of its own regulations.[67] It concluded that "[i]n denying petitioner's succession claim, DHCR has arbitrarily

57. *Murphy*, No. 101005/10, 2010 NY Slip Op. 51816(U), at 1. Mr. Murphy sought the succession rights on behalf of his uncle as well, however, his uncle did not pursue the claim further. *Id.* at 1-2.

58. *Id.* at 2.

59. *Id.* at 2-3. Apparently, Mrs. Murphy was concerned about the activities of the employee who was subsequently convicted of corruption for acts occurring from 2000–2005 and "Mrs. Murphy's decision not to file the 1998 and 1999 affidavits (due in 1999 and 2000) was based on information which led to the indictments." *Id.* at 3.

60. *Murphy*, No. 101005/10, 2010 NY Slip Op. 51816(U), at 2.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 3.

65. *Murphy*, No. 101005/10, 2010 NY Slip Op. 51816(U), at 4.

66. *Id.* at 2.

67. *Id.*

applied the applicable regulations to give the annual affidavit the significance of a trump card, invalidating all other evidence in the case. Such a result is not supported by the wording of the regulations or the policy behind it."[68]

The Appellate Division affirmed the Supreme Court's holding.[69] It agreed that the absent income affidavit should not be fatal to an application particularly where a host of other documentary evidence supported his claim of residency during the relevant period of 1998-1999.[70]

The Court of Appeals granted DHCR leave to appeal[71] and, in a four-to-three decision, affirmed the Appellate Division's holding.[72] The dissent argued that the filing of the income affidavit is a bright line requirement that prevents would-be tenants from circumventing the regulations which the dissent viewed as providing a narrow exception rather than a broad protection for family members.[73] The dissent also faulted the majority's view that other evidence of Mr. Murphy's residency could be substituted for the income affidavit, noting that the majority's view of the regulations was in fact rejected by DHCR when it revised its regulations.[74] As a result, the dissent concluded that the majority impermissibly substituted its interpretation of the regulations for that of DHCR.[75]

C. *Search and Seizure*

Cunningham v. New York State Department of Labor,[76] addressed a workplace search of a state employee which led to findings that the employee had taken unauthorized absences from work and filed fraudulent time records.[77] At the disciplinary hearing, petitioner moved to suppress the evidence which had been obtained using a GPS device

68. *Id.* at 4.

69. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 91 A.D.3d 481, 481, 937 N.Y.S.2d 16, 17 (1st Dep't 2012).

70. *Id.* at 481-82, 937 N.Y.S.2d at 17.

71. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 19 N.Y.3d 812, 812, 976 N.E.2d 251, 251, 951 N.Y.S.2d 722, 722 (2012).

72. Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal, 21 N.Y.3d 649, 655, 999 N.E.2d 524, 528, 977 N.Y.S.2d 161, 165 (2013).

73. *Murphy,* 21 N.Y.3d at 655, 999 N.E.2d at 528, 977 N.Y.S.2d at 165 (Read, J., dissenting).

74. *Id.* at 657, 999 N.E.2d at 529, 977 N.Y.S.2d at 166.

75. *Id.* at 655, 999 N.E.2d at 528, 977 N.Y.S.2d at 165.

76. Cunningham v. N.Y. State Dep't of Labor, 21 N.Y.3d 515, 518, 997 N.E.2d 468, 470, 974 N.Y.S.2d 896, 898 (2013).

77. *Id.*

attached to the petitioner's personal automobile but the motion was denied.[78] Four of the eleven charges sustained against the state employee were based on evidence obtained through the use of the GPS, and four other charges were based on a combination of the evidence from the GPS and other information.[79] Three of the charges did not rely on the GPS information.[80]

The Commissioner of Labor adopted the administrative findings and terminated the employee.[81] Petitioner then commenced an article 78 proceeding which was transferred from the Supreme Court to the Appellate Division.[82] The appellate court upheld the search as reasonable over two dissents.[83] Petitioner appealed as of right.[84] The Court of Appeals reversed, holding that a warrantless search using a GPS device attached to a public employee's personal car which recorded the car's location during the employee's work hours was permissible in the workplace but that this particular search was unreasonable.[85]

The Court began by acknowledging that the attachment of a GPS device to an individual's vehicle to track the individual's movements is a search under both the United States and New York Constitutions.[86] It also acknowledged that the question of whether such a search can ever occur without a warrant had not been addressed in cases thus far.[87] The Court concluded that the use of a GPS fell within the workplace exception for warrantless searches.[88] It relied on the Supreme Court's

78. Cunningham v. N.Y. State Dep't of Labor, 89 A.D.3d 1347, 1348, 933 N.Y.S.2d 432, 434 (3d Dep't 2011).

79. *Cunningham*, 21 N.Y.3d at 519, 997 N.E.2d at 470-71, 974 N.Y.S.2d at 898-99.

80. *Id.* at 519, 997 N.E.2d at 471, 974 N.Y.S.2d at 899.

81. *Id.*

82. *Id.*

83. *Cunningham*, 89 A.D.3d at 1352, 933 N.Y.S.2d at 437 (3d Dep't 2011). The dissents argued that the search was "so broad and intrusive as to defy a finding of reasonableness" because the GPS was operational twenty-four hours a day, seven days a week "including during a week-long family vacation." 89 A.D.3d at 1352, 933 N.Y.S.2d at 437 (Spain, J., dissenting).

84. *Cunningham,* 21 N.Y.3d at 519, 997 N.E.2d at 471, 974 N.Y.S.2d at 899.

85. *Id.* at 523, 997 N.E.2d at 473, 974 N.Y.S.2d at 901.

86. *Id.* at 520, 997 N.E.2d at 471, 974 N.Y.S.2d at 899 (citing United States v. Jones, 132 S. Ct. 945, 949 (2012); People v. Weaver, 12 N.Y.3d 433, 437, 909 N.E.2d 1195, 1203, 882 N.Y.S.2d 357, 365 (2009)).

87. *Id*. (citing People v. Weaver, 12 N.Y.3d 433, 444-45, 909 N.E.2d 1195, 1201, 882 N.Y.S.2d 357, 364 (2009)); United States v. Jones, 132 S. Ct. 945, 954 (2012).

88. *Id.* at 520, 997 N.E.2d at 471, 974 N.Y.S.2d at 899 (citing O'Connor v. Ortega, 480 U.S. 709 (1987); Caruso v. Ward, 72 N.Y.2d 432, 434, 530 N.E.2d 850, 850, 534 N.Y.S.2d 142, 142 (1988)).

analysis of workplace searches in *O'Connor v. Ortega*,[89] as well as the Court of Appeals precedent in *Caruso v. Ward*.[90] Using the language of *O'Connor*, the Court observed:

> [R]equiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.[91]

Petitioner did not challenge the workplace aspect of the search but argued that a workplace search should not apply to his personal car. [92] The Court disagreed, given that the issue regarding the petitioner's conduct was his location during work hours and his alleged use of the car for work during those hours.[93] Nevertheless, the Court found the search to be unreasonable, based on the standard of reasonableness articulated in *O'Connor*:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place . . . . The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct.[94]

The Court in *Cunningham* concluded that the workplace search was justified at its inception because there was a sufficient basis to believe that petitioner was submitting false time records.[95] The scope of the search, however, was "excessively intrusive."[96] The Court recognized that tracking the activities of an employee who was attempting to conceal unauthorized behavior was challenging; nevertheless, it concluded that the search could have been stopped short

89. 480 U.S. 709 (1987).

90. 72 N.Y.2d 432, 434, 530 N.E.2d 850, 858, 534 N.Y.S.2d 142, 142.

91. *Cunningham*, 21 N.Y.3d at 520, 997 N.E.2d at 471, 974 N.Y.S.2d at 899 (quoting O'Connor v. Ortega. 480 U.S. 709, 722 (1987)).

92. *Id.* at 521, 997 N.E.2d at 472, 974 N.Y.S.2d at 900.

93. *Id.*

94. *Id*. at 522, 997 N.E.2d at 473, 974 N.Y.S.2d at 901 (quoting *O'Connor*, 480 U.S. at 726).

95. *Id.*

96. *Cunningham*, 21 N.Y.3d at 522, 997 N.E.2d at 473, 974 N.Y.S.2d at 901.

of round-the-clock, every day including weekends and vacation time.[97] It was persuaded of this view by the fact that the state had demonstrated that it could and did remove the GPS at its convenience on three occasions without the removal being detected.[98]

Noting the ordinary rule that items found during the permissible portion of a search which exceeds its scope need not be suppressed, the Court held it was inapplicable to GPS searches because the GPS can track constantly and relentlessly and thus the search as a whole must be considered unreasonable when the employer does not make a reasonable effort to constrain it.[99] The Court pointed out that its conclusion did not undo the disciplining of petitioner because "only four of the 11 counts on which petitioner was found guilty depended on GPS evidence, and only those four charges need be dismissed. As to the others, the GPS evidence was either substantially duplicated by E–ZPass records or was wholly irrelevant."[100]

The concurring opinion found that the warrantless workplace search using a GPS device was unconstitutional under both the federal and state constitutions.[101] It began by noting that the Court had previously held that the use of a GPS by government law enforcement is a search subject to the protections of the search and seizure provisions of the federal and state constitutions.[102] Given the breadth of information a GPS device can secure, namely "a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits,"[103] the concurrence expressed the view that such a broad invasion of privacy demanded a warrant with concomitant judicial oversight.[104] The concurrence acknowledged the policy reasons for allowing a warrantless search in the workplace,[105] but noted that the majority had extended the boundaries of the workplace search beyond the physicality

97. *Id.* at 522-23, 997 N.E.2d at 473, 974 N.Y.S.2d at 901.

98. *Id.*

99. *Id.* at 523, 997 N.E.2d at 473, 974 N.Y.S.2d at 901.

100. *Cunningham*, 21 N.Y.3d. at 523, 997 N.E.2d at 474, 974 N.Y.S.2d at 902.

101. *Id.* at 524, 997 N.E.2d at 474, 974 N.Y.S.2d at 902 (Abdus-Salaam, J., concurring with which Lippman, J., and Rivera, J., concurred).

102. *Id.* (citing People v. Weaver, 12 N.Y.3d 433, 909 N.E.2d 1195, 882 N.Y.S.2d 357 (2009)).

103. *Id.* at 525, 997 N.E.2d at 474-75, 974 N.Y.S.2d at 902-03 (quoting *Weaver*, 12 N.Y.3d at 442, 909 N.E.2d at 1199-1200, 882 N.Y.S.2d at 362).

104. *Id.* at 525, 997 N.E.2d at 475, 974 N.Y.S.2d at 903.

105. *Cunningham*, 21 N.Y.3d at 525-26, 997 N.E.2d at 475, 974 N.Y.S.2d at 903 (Abdus-Salaam, J., concurring with which Lippman, J., and Rivera, J., concurred).

of the space by permitting a warrantless search of the petitioner's personal car that he and his family used on a daily basis.[106] According to the concurrence, "[n]o New York court has ever permitted government employers to search employees' personal cars without a warrant, and the majority creates a dangerous precedent by allowing them to do so now."[107]

D. Government Liability

The Court has taken up a number of government liability cases in recent years.[108] In 2013, the Court of Appeals was once again called upon to address the issue in *Applewhite v. Accuhealth, Inc.*[109] *Applewhite* involved the issue of whether New York City was liable for the alleged negligence of its emergency medical technicians ("EMTs") who responded to a 911 call for a child who had suffered anaphylactic shock.[110] The Court held that although the City was engaging in a governmental function which would generally absolve it from liability, plaintiffs had raised issues of fact as to whether the EMTs' conduct gave rise to a special relationship between plaintiffs and the City so as to preclude summary judgment in the City's favor.[111]

A negligence claim against a municipality[112] involves a well formulated analysis of several issues that is often difficult to apply.[113]

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106. *Id.* at 525-28, 997 N.E.2d at 475-77, 974 N.Y.S.2d at 903-05.

107. *Id.* at 528, 997 N.E.2d at 477, 974 N.Y.S.2d at 905.

108. *See, e.g.*, Valdez v. City of New York, 18 N.Y.3d 69, 81-84, 960 N.E.2d 356, 366-68, 936 N.Y.S.2d 587, 597-99 (2011) (plaintiff failed to show that City owed decedent a duty of care that exceeded the duty to provide police protection to the public at large because plaintiff did not demonstrate her justifiable reliance on the police's undertaking to investigate her claim that her estranged husband had threatened to kill her); World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 432, 957 N.E.2d 733, 735, 933 N.Y.S.2d 164, 166 (2011) (Port Authority's management of the World Trade Center was a governmental function and thus it was not liable in negligence as a result of the detonation of a car bomb along the road of the underground parking garage of the World Trade Center in 1993).

109. 21 N.Y.3d 420, 423, 995 N.E.2d 131, 133, 972 N.Y.S.2d 169, 171 (2013).

110. *Id.* at 423-24, 995 N.E.2d at 133, 972 N.Y.S.2d at 171.

111. *Id.* at 427, 432, 995 N.E.2d at 136, 139, 972 N.Y.S.2d at 174, 177.

112. The waiver of the state's sovereign immunity as reflected in section 8 of the Court of Claims Act extends to municipalities in New York. *See, e.g.*, Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945).

113. *Applewhite*, 21 N.Y.3d at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172 (citing *World Trade Ctr. Bombing Litig.*, 17 N.Y.3d at 446-47, 957 N.E.2d at 745, 933 N.Y.S.2d at 176). The court noted that the dichotomy between whether a government is performing a proprietary function for which it may be liable for negligence or a governmental function which is more likely to shield it from liability "is easier to state than to apply in some factual scenarios, the determination categorizing the conduct of a municipality may present a close question for the courts to decide." *Applewhite*, 21 N.Y.3d at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

The first question is whether the municipality was engaged in a proprietary or governmental function.[114]

> A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.[115]

If it is determined that the municipality acted in a proprietary function, the municipality is subject to the traditional rules of negligence applicable to private parties.[116] If it is determined that the municipality is carrying out a governmental function, the question of its liability is still not easily resolved. It turns on a narrow exception to the general rule of non-liability, namely whether the municipality formed a special relationship with the injured party—an issue that involves consideration of several factors.[117]

Applewhite's focus was whether the City of New York was performing a proprietary or governmental function when its EMTs responded to the child's emergency—the answer, as seen in the concurring opinions, was one about which members of the Court disagreed.[118]

Tiffany Applewhite suffered from "uveitis," an eye inflammation for which her ophthalmologist prescribed intravenous infusion of a

114. *Id.* at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

115. Miller v. State of New York, 62 N.Y.2d 506, 511-12, 467 N.E.2d 493, 496, 478 N.Y.S.2d 829, 832 (1984).

116. *Applewhite*, 21 N.Y.3d at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

117. *Id*. at 426, 995 N.E.2d at 135, 972 N.Y.S.2d at 173; *see* Laratro v. City of New York, 8 N.Y.3d 79, 82-83, 861 N.E.2d 95, 96-97, 828 N.Y.S.2d 280, 281-82 (2006).

118. *See Applewhite*, 21 N.Y.3d at 432, 434, 995 N.E.2d at 139, 141, 972 N.Y.S.2d at 177, 179 (Smith, J., concurring); *id.* at 434, 995 N.E.2d at 141, 972 N.Y.S.2d at 179 (Abdus-Salaam, J., concurring).

medication called Solu–Medrol.[119] This treatment was provided by a nurse employed by AccuHealth, a company specializing in performing intravenous treatment.[120] The treatment was to be administered for three consecutive days each month over a period of time.[121] The treatment for the first month occurred without incident.[122]

When the infusion began on the first day of the second month's treatment, the child almost immediately began to experience difficulty breathing.[123] The nurse instructed the child's mother to call 911 while the nurse stopped the intravenous drip.[124] The child's condition deteriorated rapidly to a seizure and then cardiac arrest.[125] The nurse attempted cardiopulmonary resuscitation ("CPR").[126]

Two EMTs arrived in response to the 911 call; their ambulance was a Basic Life Support ("BLS") ambulance which was not equipped with a stretcher, a valve mask, or a defibrillator.[127] While one of the EMTs assisted the nurse with CPR, the other left the apartment to request an Advanced Life Support ("ALS") ambulance.[128] The record indicated that an ALS ambulance had not been available at the time the mother placed her call.[129] During this period, the mother made a second call to 911.[130] She also apparently urged the EMTs to take her daughter

119. Applewhite v. Accuhealth, Inc. (*Applewhite I*), 81 A.D.3d 94, 96, 915 N.Y.S.2d 223, 224 (1st Dep't 2010). The condition threatened the child's vision. *Id.* at 96, 915 N.Y.S.2d at 224.

120. *Id.* at 95-96, 915 N.Y.S.2d at 224.

121. *Id.* at 96, 915 N.Y.S.2d at 224.

122. *Id.*

123. *Applewhite I*, 81 A.D.3d at 96, 915 N.Y.S.2d at 223.

124. *Id.* at 96, 915 N.Y.S.2d at 224.

125. *Id.*

126. *Id.* at 96, 915 N.Y.S.2d at 225.

127. Applewhite v. Accuhealth, Inc. (*Applewhite II*), 90 A.D.3d 501, 502, 934 N.Y.S.2d 164, 166 (1st Dep't 2011). *See Paramedic and EMT Frequently Asked Questions*, NEW YORK CITY FIRE DEPARTMENT, http://www.nyc.gov/html/fdny/html/community/ems_faq_042607.shtml#mission (last visited Feb. 3, 2014) ("EMTs are trained to provide basic life support (BLS) services in a pre-hospital setting, ranging from CPR to spinal immobilization. Paramedics can provide advanced life support (ALS) services to patients during medical emergencies. The advanced training enables them to perform some invasive procedures and dispense medications under the supervision of a physician). Basic EMTs function in a "pre-hospital setting" and their activities are generally restricted to "CPR, oxygen administration, bleeding control, foreign body airway obstruction removal, and spinal immobilization."

128. *Applewhite II*, 90 A.D.3d at 502, 934 N.Y.S.2d at 166; *see generally* N.Y. COMP. CODES R. & REGS. tit. 10, § 800.5 (2011) (advanced life support systems).

129. *Applewhite II*, 90 A.D.3d at 502, 934 N.Y.S.2d at 166.

130. *Id.*, 934 N.Y.S.2d at 166.

to a nearby hospital.[131] Sometime thereafter, paramedics arrived in an ALS ambulance.[132] These paramedics administered epinephrine and oxygen to the child and then took her to the hospital. She ultimately sustained significant brain damage, which left her unable to function normally.[133]

The child and her mother commenced a lawsuit against the nurse, the nurse's employer, the EMTs, and the City.[134] Plaintiffs alleged that the nurse committed professional malpractice for "failing to properly and immediately perform CPR on plaintiff, failing to personally advise the 911 operator of the nature of the emergency, and failing to have ensured that epinephrine was available to counteract the allergic reaction which caused plaintiff's anaphylaxis."[135] The nurse's motion for summary judgment was denied and the denial was upheld on appeal.[136] The case against her was ultimately settled.[137]

Her employer, Accuhealth, was dissolved in bankruptcy and thus was no longer a party to the action.[138]

Plaintiffs alleged that the municipal defendants were negligent for "failing to bring oxygen to the apartment, for advising the mother that she should wait for the ALS ambulance and, for waiting for the ALS ambulance that arrived 20 minutes later instead of taking the infant plaintiff to the hospital that was four minutes away." [139] The City's motion for summary judgment was granted.[140] The First Department unanimously reversed the trial court decision.[141] The appellate division held that the City's action in undertaking to transport an individual to a hospital as quickly as possible is a "quintessential purpose of the municipal ambulance system," making it more like a government function than the proprietary function of caring for a patient.[142] The

131. Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 424, 995 N.E.2d 131, 133, 972 N.Y.S.2d 169, 171 (2013).

132. *Applewhite II*, 90 A.D.3d at 502, 934 N.Y.S.2d at 166.

133. *Id.*

134. Applewhite v. Accuhealth, Inc. (*Applewhite I*), 81 A.D.3d 94, 97, 915 N.Y.S.2d 233, 225 (1st Dep't 2010). The ophthalmologist was not named in the lawsuit. *Id.* at 97 n.1, 915 N.Y.S.2d at 225 n.1.

135. *Id.*

136. *Id.* at 104, 915 N.Y.S.2d at 230.

137. Applewhite v. Accuhealth, Inc., 21 N.Y.3d 21 N.Y.3d 420, 424, 995 N.E.2d 131, 133, 972 N.Y.S.2d 169, 171 (2013).

138. *Id.*

139. *Applewhite II*, 90 A.D.3d 501, 503, 934 N.Y.S.2d 164, 167 (1st Dep't 2011).

140. *Id.* at 501, 934 N.Y.S.2d at 166.

141. *Id.*

142. *Id*. at 504, 934 N.Y.S.2d at 167-68.

court also held that plaintiffs had established the element of a special relationship because the mother "justifiably relied on the EMS technicians, who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance."[143] The court concluded that the motion papers raised issues of fact as to the cause of the injuries and their severity.[144]

The Court of Appeals affirmed the First Department's decision.[145] Recognizing that the issue of whether a municipality is performing a proprietary or governmental function is often a close call,[146] it held that "a municipal emergency response system—including the ambulance assistance rendered by first responders such as the FDNY EMTs in this case—should be viewed as 'a classic governmental, rather than proprietary, function.'"[147]

The Court's analysis in reaching this conclusion relied heavily on its prior unanimous holding in *Laratro v. City of New York*,[148] decisions in other jurisdictions, and public policy reasons favoring the treatment of emergency services dispatched through 911 calls as a governmental function. In *Laratro*, the Court observed that the provision of emergency medical services by a municipality was part of its obligation to protect the public's health and safety,[149] and moved quickly to determine that plaintiffs in that case had not established the necessary special relationship to create liability as a result of the delayed arrival of the ambulance.[150] The focus of *Laratro* was the fact that plaintiff did not have direct contact with the 911 operator—a work colleague called 911 when she found the plaintiff unresponsive at his desk.[151] This lack of contact, one of the factors showing a special relationship, defeated

143. *Id.* at 505, 934 N.Y.S.2d at 168. There is a disagreement in the Court of Appeals as to whether the appellate division found there was a special relationship or a factual issue as to the creation of the special relationship. *Compare* 21 N.Y.3d at 435, 995 N.E.2d at 141, 972 N.Y.S.2d at 177 (Abdus-Salaam, J., concurring), *with* 21 N.Y.3d at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (Smith, J., concurring).

144. *Applewhite II*, 90 A.D.3d at 505, 934 N.Y.S.2d at 168.

145. Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 995 N.E.2d 131, 972 N.Y.S.2d 169 (2013).

146. *Id.* at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172.

147. *Id.* at 430, 995 N.E.2d at 138, 972 N.Y.S.2d at 176 (quoting Valdez v. City of New York, 18 N.Y.3d 69, 75, 960 N.E.2d 356, 361, 936 N.Y.S.2d 587, 592 (2011)).

148. 8 N.Y.3d 79, 861 N.E.2d 95, 828 N.Y.S.2d 280 (2006).

149. *Id.* at 82-83, 861 N.E.2d at 96, 828 N.Y.S.2d at 281. The opinion in *Laratro* was authored by Judge Smith, who was one of the concurring judges in *Applewhite.*

150. 8 N.Y.3d at 830, 861 N.E.2d at 96-97, 828 N.Y.S.2d at 281-82 (quoting Cuffy v. New York, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987)).

151. 8 N.Y.3d at 83, 828 N.Y.S.2d at 282, 861 N.E.2d at 97.

his claim against the municipality.[152]

The Court in *Applewhite* also pointed out that a municipal emergency response system has been widely held in other jurisdictions to be "one of government's critical duties."[153] Finally, the Court found that a public policy analysis of the burden on the public fisc supported its analysis.[154] The government function doctrine protects taxpayers from having to assume the cost of a municipality's negligence liability, and reduces fears that municipalities would provide fewer services if faced with potential liability which would in turn cause greater danger to the public.[155]

The Court distinguished the city ambulance service from private ambulance companies, a comparison on which the concurring opinions relied.[156] In the Court's view, this distinction is emphasized by the fact that the EMTs are publicly employed and use City resources to come to the aid of the public.[157] To its mind, the private services supplement the City's function.[158] It also declined to bifurcate the role of the emergency services, as urged by the concurrences, namely, splitting them into two functions: first, the transportation of the individual, which would be treated as a governmental function, and second, emergency medical stabilization of the victim, which would be treated as a proprietary function.[159] The Court suggested that such a division would have the potential to undermine an important aspect of the emergency medical response system.[160]

The Court did note that the City was not necessarily immunized from liability if the plaintiffs could establish that the EMTs' conduct created a special duty to plaintiffs by their voluntarily assuming special

152. *Id.*

153. 21 N.Y.3d at 428, 995 N.E.2d at 136, 972 N.Y.S.2d at 174 (citing Edwards v. City of Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989); Ross v. Consumers Power Co., 420 Mich. 567, 654, 363 N.W.2d 641, 677 (1984); King v. Williams, 5 Ohio St. 3d 137, 140, 449 N.E.2d 452, 455 (1983); Thornton v. Shore, 233 Kan. 737, 742, 666 P.2d 655, 659 (1983); McIver v. Smith, 134 N.C. App. 583, 587, 518 S.E.2d 522, 525 (1999); Wanzer v. District of Columbia, 580 A.2d 127, 131 (D.C. Ct. App. 1990); Ayala v. City of Corpus Christi, 507 S.W.2d 324, 328 (Tx. Civ. App. 1974); Smith v. City of Lexington, 307 S.W.2d 568, 569-70 (Ky. Ct. App. 1957)).

154. 21 N.Y.3d. at 430, 995 N.E.2d at 137, 972 N.Y.S.2d at 175.

155. *Id.* at 430, 995 N.E.2d at 138, 972 N.Y.S.2d at 176.

156. *Id.* at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (Smith, J., concurring); 21 N.Y.3d at 435, 995 N.E.2d at 142, 972 N.Y.S.2d at 180 (Abdus-Salaam, J., concurring).

157. *Laratro,* 21 N.Y.3d at 428, 995 N.E.2d at 136, 972 N.Y.S.2d at 174 (majority opinion).

158. *Id.* at 428, 995 N.E.2d at 136, 972 N.Y.S.2d at 174.

159. *Id.* at 430, 995 N.E.2d at 138, 972 N.Y.S.2d at 176.

160. *Id.*

relationship with them beyond what is owed to the general public.[161] The Court then recited the well-known factors that can establish a special duty:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[162]

At issue in *Applewhite* were the first and fourth factors, which the Court of Appeals concluded raised issues of fact: the City's assumption of an affirmative duty, and the plaintiffs' justifiable reliance on these affirmative acts.[163] The Court observed that a jury could conclude that the EMTs affirmatively assumed responsibility for the treatment by continuing to provide treatment in lieu of transporting the child to the hospital, and that plaintiffs justifiably relied on their actions because they were lulled into thinking that no other recourse was available to them.[164] One of the concurring opinions noted, however, that the record was devoid of "evidence either of a promise (implicit or explicit) by the EMTs to do anything other than what they in fact did, or of any justifiable reliance by either plaintiff on such a promise."[165] The majority opinion underscores this notion by pointing out that EMTs are limited by law in what they can do.[166] However, even if a special relationship is established, there is still the question, noted by the Appellate Division,[167] of whether their actions were the proximate cause of the nature of the child's injuries and their severity.[168]

Both concurrences opined that the delivery of emergency medical treatment is more like a proprietary function so that the governmental

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161. *Id.*

162. *Id.* at 430-31, 995 N.E.2d at 138, 972 N.Y.S.2d at 176 (quoting People v. Laratro, 8 N.Y.3d 79, 83, 861 N.E.2d 95, 96-97, 828 N.Y.S.2d 280, 281-82).

163. *Applewhite*, 21 N.Y.3d at 431, 995 N.E.2d at 138, 972 N.Y.S.2d at 176.

164. *Id.*

165. *Id.* at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (Smith, J., concurring).

166. "Most EMTs (who are not specially certified as paramedics) are not authorized by law to administer medication, such as epinephrine, or perform invasive procedures, and do not have access to advanced diagnostic and medical treatment equipment or physician assistance . . . ." *Id.* at 429, 995 N.E.2d at 137, 972 N.Y.S.2d at 175.

167. 90 A.D.3d 501, 934 N.Y.S.2d 164 (1st Dep't 2011).

168. *Applewhite*, 21 N.Y.3d at 431, 995 N.E.2d at 139, 972 N.Y.S.2d at 177.

immunity does not apply.[169] Both agreed that the majority's reliance on *Laratro*[170] was misplaced, noting that *Laratro* involved the timing of the ambulance's response to the 911 call, not the medical care provided.[171] The 911 call itself is not part of the case against the City in *Applewhite,* although it did figure in the allegations against the nurse that she should have described the situation to the 911 operator.[172] There was also no discussion of what was said to the 911 operator and the nature of the 911 response except to send a basic ambulance apparently because an advanced life support ambulance was not available. That decision over management of the City's resources would seem to be a governmental function.[173]

The concurrences found no reasonable distinction between an EMT providing negligent care at the emergency scene and a physician providing negligent care at a government run hospital.[174] In any event, the question of negligence may yet get to the jury in *Applewhite.*

II. LEGISLATIVE BRANCH

Section 400.00 (5) of the Penal Law was amended in 2013 to provide that "[e]xcept as provided in paragraphs (b) through (f) of this subdivision, the name and address of any person to whom an application for any license has been granted shall be a public record."[175]

However, paragraph (b) provides that a current permit holder or a new applicant can request an exception from his or her application information becoming public record.[176] The grounds for opting out of disclosure are: (i) the applicant's life or safety may be endangered by disclosure because the applicant is an active or retired police officer, peace officer, probation officer, parole officer, or corrections officer;[177]

169. *Applewhite,* 21 N.Y.3d at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (Smith, J., concurring); 21 N.Y.3d at 435, 995 N.E.2d at 142, 972 N.Y.S.2d at 180 (Abdus-Salaam, J., concurring).

170. 8 N.Y.3d 79, 861 N.E.2d 95, 828 N.Y.S.2d 280.

171. *Applewhite*, 21 N.Y.3d at 433, 995 N.E.2d at 140, 972 N.Y.S.2d at 178 (Smith, J., concurring); 21 N.Y.3d at 436, 995 N.E.2d at 142, 972 N.Y.S.2d at 180 (Abdus-Salaam, J., concurring).

172. 81 A.D.3d at 97, 915 N.Y.S.2d at 225 (1d Dep't 2010).

173. *See, e.g.*, World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 448, 957 N.E.2d 733, 746, 933 N.Y.S.2d 164, 177 (2011); *see generally* PATRICK J. BORCHERS & DAVID L. MARKELL, N.Y STATE ADMIN. PRO. PRAC., § 8.3 (2d ed. 1999).

174. *Applewhite*, 21 N.Y.3d at 432, 995 N.E.2d at 139, 972 N.Y.S.2d at 177 (Smith, J., concurring).

175. N.Y. PENAL LAW § 400(5) (McKinney 2009).

176. *Id.*

177. *Id.* § 400(5)(b)(i)(A).

a protected person under a currently valid order of protection;[178] is or was a witness in a criminal proceeding involving a criminal charge;[179] is participating or previously participated as a juror in a criminal proceeding, or is or was a member of a grand jury;[180] or is a spouse, domestic partner or household member of an applicant who is requesting non-disclosure;[181] (ii) the applicant has reason to believe his or her life or safety may be endangered by disclosure due to reasons stated by the applicant;[182] or (iii) has reason to believe he or she may be subject to unwarranted harassment upon disclosure of such information.[183]

Thus section 400.00(5)(f) of the Penal Law requires disclosure of the names and addresses of firearm licensees after May 15, 2013, unless the licensee has been granted an exemption from disclosure or an applicant submitted an application within the first sixty days following the effective date of the SAFE Act and the application had not been processed during that time.[184]

This provision has engendered some controversy. Certain officials have publicly stated that they would not disclose the names of licensees even if they have not requested non-disclosure based on two exemptions from disclosure under the Public Officers Law, section 87(2)(b), which authorizes non-disclosure when disclosure would constitute "an unwarranted invasion of personal privacy," and section 87(2)(f) which authorizes non-disclosure when disclosure "could endanger the life or safety of any person."[185] The Committee on Open Government, however, has taken the position that non-disclosure on that basis is contrary to the law for three reasons.[186] First, none of the Freedom of Information Law ("FOIL") exceptions are applicable when records are

178. *Id.* § 400(5)(b)(i)(B).

179. *Id.* § 400(5)(b)(i)(C).

180. *Id.* § 400(5)(b)(i)(D).

181. N.Y. PENAL LAW § 400(5)(b)(i)(E).

182. *Id.* § 400(5)(b)(ii).

183. *Id.* § 400(5)(b)(iii).

184. *Id.* § 400(5)(f).

185. *Committee on Open Government Access to Firearm Licensee Names and Addresses*, DEPARTMENT OF STATE COMMITTEE ON OPEN GOVERNMENT (June 2013), http://www.dos.ny.gov/coog/june2013-safeact.html (quoting N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2009); N.Y. PUB. OFF. LAW § 87(2)(f) (McKinney 2009)) (last visited May 16, 2014).

186. *Committee on Open Government Access to Firearm Licensee Names and Addresses*, DEPARTMENT OF STATE COMMITTEE ON OPEN GOVERNMENT (June 2013), http://www.dos.ny.gov/coog/june2013-safeact.html.

available under a provision of law other than FOIL.[187] Second, section 400.00(5) of the Penal Law specifies that names and addresses of licensees are available unless the licensee has sought an exemption. Finally, in *Kwitny v. McGuire,*[188] the Court of Appeals held that such records were public and that, "[w]hether as a matter of sound policy disclosure of the contents of applications should be restricted is a matter for consideration and resolution by the Legislature." [189]

187. *Committee on Open Government Access to Firearm Licensee Names and Addresses*, DEPARTMENT OF STATE COMMITTEE ON OPEN GOVERNMENT (June 2013), http://www.dos.ny.gov/coog/june2013-safeact.html (quoting N.Y. PUB. OFF. LAW § 89(6) (McKinney 2009)) (last visited May 16, 2014).

188. 59 N.Y.2d 968, 969, 424 N.E.2d 546, 547, 441 N.Y.S.2d 659, 660 (1981).

189. 53 N.Y.2d at 969, 424 N.E.2d at 547, 441 N.Y.S.2d at 660.