TORT LAW

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INTRODUCTION

This *Survey of New York Law* on torts includes a host of New York Court of Appeals decisions that, for the most part, have continued or expanded trends defined by that Court during the past four years. Many of the decisions during this *Survey* year's review were unanimous decisions, with very few of the decisions being four-to-three, indicating an agreement and decisive statement of law rather than the divided decisions that the Court published in the preceding year.

The doctrine of primary assumption of the risk was further

weakened in its application as the Court of Appeals, like last year, again refused to apply the doctrine outside of events where there is voluntary participation in an organized sport or sponsored event. In addition, a number of appellate courts across the state now limit the application of the doctrine, and they decline to apply primary assumption of the risk in cases where there is compulsory participation in sporting events or physical education classes.

The Court of Appeals also took a major step in the application of Labor Law section 240(1) when it, for the first time in several years, denied application of the statute where a worker was involved in cleaning in the context of a manufacturing process. In doing so, the Court eliminated some of the confusion surrounding section 240 application in cleaning cases.

The restrictive trend continued in the case of governmental liability, as the Court of Appeals again applied the severe limitations announced in *McLean* and *Dinardo* during this *Survey* year in a case that, for all practical purposes, ends the possibility of actionable cases against police officers, police departments, and other governmental entities for discretionary governmental acts, even in cases where there has been an express promise of action made by the defendant. To the extent that there was any doubt of the Court's intention in the *McLean* case, it now becomes clear that the limitations espoused by *McLean* will act as a significant drawback to any type of personal reliance upon statements made promising protection by police officers or police departments.

Possibly the most aggressive action of the Court of Appeals during the *Survey* year was a finding by the high Court determining that federal preemption does not prohibit a claim against bus companies for failure to supply seat belts and/or shoulder harnesses in passenger buses. In making that holding, the Court has taken the stance that the Federal Motor Vehicle Safety Standards, which leave the decision of seatbelts in buses to the manufacturers, does not mean that it was intended that such regulations occupy the complete field with regard to the design of safety devices in large transportation vehicles. It remains to be seen whether the Supreme Court of the United States will weigh in on what has become a very controversial decision.

If there is any definitive trend seen throughout the cases during the *Survey* year, it is that the courts appear to be very willing to protect municipalities and governmental agencies in these very difficult economic times. Whether that trend will continue into the future, at this point is unclear. The other clear trend that comes through the cases over the past several years, including this *Survey* year, is that there is

broad belief in the doctrine of comparative negligence, and the fairness that emanates from that doctrine upon litigants in personal injury cases.

I. ASSUMPTION OF THE RISK

A. Primary Assumption of the Risk—Application Based on the Type and Nature of Liability and the Public Policy Behind the Doctrine

In 1975, the New York State Legislature sought to abolish contributory negligence and assumption of the risk as absolute defenses in favor of a system of comparative fault.[1] In enacting section 1411 of the New York Civil Practice Law and Rules ("CPLR"), the Legislature specifically provided that "contributory negligence or assumption of the risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in proportion which the culpable conduct attributable to the claimant . . . ."[2]

Despite the clear and unequivocal terms of section 1411, New York's comparative fault statute, the doctrine of primary assumption of the risk has survived, and it continues to provide a complete defense to tort recovery cases involving athletic or recreational activities.[3] As the doctrine of primary assumption of the risk has developed, the Court of Appeals has, with regularity, examined the scope and nature of the application in light of comparative fault and section 1411 of the CPLR.[4]

Primary assumption of the risk applies generally when a participant in a qualified sporting event or activity is aware of the risks generally involved in that activity and voluntarily assumes the risks.[5] It is only when the risks that cause injury result from reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced beyond those generally accepted in participation of the sport.[6]

The Court of Appeals this *Survey* year again took up the issue of the scope and application of primary assumption of the risk in the case

1. *See* N.Y. C.P.L.R. 1411 (McKinney 1997).

2. *Id.*

3. *See, e.g.*, Turcotte v. Fell, 68 N.Y.2d 432, 438, 502 N.E.2d 964, 968, 510 N.Y.S.2d 49, 53 (1986); Maddox v. City of N.Y., 66 N.Y.2d 270, 277, 487 N.E.2d 553, 556, 496 N.Y.S.2d 726, 729 (1985).

4. N.Y. C.P.L.R. 1411; *Turcotte*, 68 N.Y.2d at 438, 502 N.E.2d at 967, 510 N.Y.S.2d at 52; *Maddox*, 66 N.Y.2d at 276, 487 N.E.2d at 555, 496 N.Y.S.2d at 728; Morgan v. State, 90 N.Y.2d 471, 485, 685 N.E.2d 202, 208, 662 N.Y.S.2d 421, 427 (1997); Benitez v. N.Y. City Bd. of Educ., 73 N.Y.2d 650, 656-57, 541 N.E.2d 29, 32, 543 N.Y.S.2d 29, 32 (1989).

5. *Benitez*, 73 N.Y.2d at 657, 541 N.E.2d at 32, 543 N.Y.S.2d at 32.

6. *Morgan*, 90 N.Y.2d at 485, 685 N.E.2d at 208, 662 N.Y.S.2d at 427 (citing *Turcotte*, 68 N.Y.2d at 439, 502 N.E.2d at 968, 510 N.Y.S.2d at 53; *Benitez*, 73 N.Y.2d at 658, 541 N.E.2d at 33, 543 N.Y.S.2d at 33).

of *Custodi v. Town of Amherst*.[7] In *Custodi*, the plaintiff was roller-blading along Countryside Lane in the Town of Amherst, when she allegedly tripped over a small height differential at the end of a driveway and a culvert that separated the driveway from the public roadway.[8] The accident happened as the plaintiff sought to avoid a truck that was stopped in the roadway on Countryside Lane, and the plaintiff roller-bladed onto the sidewalk and then tried to reenter the roadway using defendant Muffoletto's driveway.[9] As she hit the two-inch height differential, her foot struck or caught upon something near the differential, and she tripped and fell at the edge of the defendant's driveway.[10] As a result of her fall, the plaintiff allegedly sustained a fractured hip, and subsequently brought action against both the Town of Amherst and the defendant, homeowner Muffoletto.[11]

After discovery, the defendants moved for summary judgment, arguing that the plaintiff's claim was barred by the doctrine of primary assumption of the risk.[12] The supreme court granted the defendants' motion and dismissed the complaint against the defendants.[13] The plaintiff then appealed to the Appellate Division, Fourth Department, which rendered a decision in February 2011, reversing the decision of supreme court.[14] In a three-to-two decision, the Fourth Department determined that the doctrine of primary assumption of the risk did not apply to the activity in which the plaintiff was engaged in at the time of her injury.[15] The court noted that the public policy underlying the doctrine of primary assumption of the risk is to promote and facilitate "free and vigorous participation in athletic activities."[16] The majority found that the alleged two-inch height differential between the driveway apron and the curb "created a dangerous condition that was over and above the usual dangers that are inherent in the sport of roller-blading."[17] The court also found there was a question of fact whether

7. 17 N.Y.3d 846, 846, 954 N.E.2d, 1116, 1166, 930 N.Y.S.2d 541, 541 (2011).

8. Custodi v. Town of Amherst, 81 A.D.3d 1344, 1345, 916 N.Y.S.2d 685, 686 (4th Dep't 2011).

9. *Id.* at 1346, 916 N.Y.S.2d at 687.

10. *Id.*

11. Custodi v. Town of Amherst, 20 N.Y.3d 83, 86-87, 980 N.E.2d 933, 934-35, 957 N.Y.S.2d 268, 269-70 (2012).

12. *Custodi*, 81 A.D.3d at 1345, 916 N.Y.S.2d at 686.

13. *Id.*

14. *Id.* at 1347, 916 N.Y.S.2d at 688.

15. *Id.* at 1346, 916 N.Y.S.2d at 687.

16. *Id.* at 1345, 916 N.Y.S.2d at 686 (quoting Benitez v. N.Y. City Bd. of Educ., 73 N.Y.2d 650, 657, 541 N.E.2d 29, 33, 543 N.Y.S.2d 33, 33 (1989)).

17. *Custodi*, 81 A.D.3d at 1346, 916 N.Y.S.2d at 687 (quoting Morgan v. State, 90

the two-inch height differential was open and obvious.[18] The court held that, given the nature of the risks involved and the nature of the activity, primary assumption of the risk should not be applied under the circumstances of the case.[19]

Justices Martoche and Smith joined in a dissent that agreed with supreme court Justice Ferolito that the doctrine of primary assumption of the risk should preclude any recovery on behalf of the plaintiff in this case.[20] As a result of the three-to-two decision, the plaintiff, as a matter of right, appealed to the Court of Appeals. In a decision released on October 30, 2012, the Court of Appeals unanimously affirmed the decision of the appellate division.[21] In the opinion written by Judge Graffeo, the Court traced the history of the doctrine of primary assumption of the risk, recognizing that rather than applying the doctrine as a complete defense since the enactment of CPLR section 1411, courts in the State of New York have reviewed the cases in terms of the scope of duty owed to a participant where a plaintiff freely accepts a known risk.[22] The Court held that as a result of participation in athletic or sporting events, the participants may be held to have consented to the injury-prone risks that are "known, apparent, or reasonably foreseeable."[23] The Court then delineated the black letter law that participants are not deemed to have assumed risks resulting from neither the reckless nor intentional conduct of others nor risks that are concealed or unreasonably enhanced by the defendant.[24]

The Court recognized the enormous social value of athletic and recreational activities, and it urged that the application of the doctrine of primary assumption of the risk facilitates vigorous participation in such athletic activities by shielding co-participants, activity sponsors, and

N.Y.2d 471, 485, 685 N.E.2d 202, 208, 662 N.Y.S.2d 421, 427 (1997) (internal quotation marks omitted).

18. *Custodi*, 81 A.D.3d at 1346-47, 916 N.Y.S.2d at 687.

19. *See id.* at 1346, 916 N.Y.S.2d at 687.

20. *Id.* at 1347, 916 N.Y.S.2d at 687-88.

21. Custodi v. Town of Amherst, 20 N.Y.3d 83, 86, 980 N.E.2d 933, 934-36, 957 N.Y.S.2d 268, 269-71 (2012). (2012).

22. *Id.* at 87-88, 2012 N.Y. LEXIS 3261, at *4-5, 2012 N.Y. Slip Op. 7225, at *3 (citing *Morgan*, 90 N.Y.2d at 485, 685 N.E.2d at 208, 662 N.Y.S.2d at 427; Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395, 927 N.E.2d 547, 548, 901 N.Y.S.2d 127, 128 (2010)).

23. *Custodi*, 20 N.Y.3d at 87, 2012 N.Y. LEXIS 3261, at *5, 2012 N.Y. Slip Op. 7225, at *3 (citing Benitez v. N.Y. City Bd. of Educ., 73 N.Y.2d 650, 657, 541 N.E.2d 29, 32, 543 N.Y.S.2d 29, 32 (1989)).

24. *Custodi*, 20 N.Y.3d at 87, 980 N.E.2d at 935, 957 N.Y.S.2d at 270 (citing *Morgan*, 90 N.Y.2d at 485, 685 N.E.2d at 208, 662 N.Y.S.2d at 427).

venue owners from "potentially crushing liability."[25] The Court distinguished between the types of events that generally apply the doctrine of primary assumption of the risk from those that do not, emphasizing those activities that involve participation in a sporting event or recreational activity that are supported by the policy underlying the nature of the doctrine—to facilitate free and vigorous participation in athletic activities.[26] In tracing the history of the doctrine, the Court noted that the doctrine has been applied in matters concerning bobsledding,[27] collegiate baseball,[28] high school football,[29] recreational basketball,[30] horse racing,[31] speed skating,[32] golf,[33] and other such competitive sports.

In 2010, the Court of Appeals declined to apply the doctrine of primary assumption of the risk in *Trupia v. Lake George Central School District*.[34] In that case, the plaintiff was a child who was injured while sliding down a banister at school.[35] The Court in *Custodi* recalled that in *Trupia*, the doctrine of primary assumption of the risk such that "[it] must be closely circumscribed if it is not seriously to undermined and displace the principles of comparative causation."[36]

Based upon the case law to date, and applying the *Trupia* rationale, the Court concluded that assumption of the risk does not apply to the fact pattern of a personal roller-blading who trips over an uneven portion of a driveway.[37] The Court found, as a general rule, that "[the] application of assumption of the risk should be limited to cases

25. Bukowski v. Clarkson Univ., 19 N.Y.3d 353, 358, 971 N.E.2d 849, 852, 948 N.Y.S.2d 568, 571 (2012) (citing Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 395, 927 N.E.2d 547, 549, 901 N.Y.S.2d 127, 129 (2010)); *see also Benitez*, 73 N.Y.2d at 657, 541 N.E.2d at 33, 543 N.Y.S.2d at 33.

26. *Benitez*, 73 N.Y.2d at 657, 541 N.E.2d at 33, 543 N.Y.S.2d at 33.

27. *See Morgan*, 90 N.Y.2.d at 486, 685 N.E.2d at 209, 662 N.Y.S.2d at 428.

28. *See Bukowski*, 19 N.Y.3d at 355, 971 N.E.2d at 850, 948 N.Y.S.2d at 569.

29. *See Benitez*, 73 N.Y.2d at 654, 541 N.E.2d at 30, 543 N.Y.S.2d at 30.

30. *See* Sykes v. Cnty. of Erie, 94 N.Y.2d 912, 913, 728 N.E.2d 973, 973, 707 N.Y.S.2d 374, 374 (2000).

31. *See* Turcotte v. Fell, 68 N.Y.2d 432, 435, 502 N.E.2d 964, 966, 510 N.Y.S.2d 49, 51 (1986).

32. *See* Ziegelmeyer v. U.S. Olympic Comm., 7 N.Y.3d 893, 894, 860 N.E.2d 60, 60, 826 N.Y.S.2d 598, 598 (2006).

33. *See* Anand v. Kapoor, 15 N.Y.3d 946, 947, 942 N.E.2d 295, 296, 917 N.Y.S.2d 86, 87 (2010).

34. 14 N.Y.3d 392, 396, 927 N.E.2d 547, 549, 901 N.Y.S.2d 127, 129 (2010).

35. *Id.* at 393, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.

36. *Custodi*, 20 N.Y.3d at 89, 980 N.E.2d at 936, 957 N.Y.S.2d at 271 (quoting *Trupia*, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129).

37. *Custodi*, 20 N.Y.3d at 90, 2012 N.Y. LEXIS 3261, at *8, 2012 N.Y. Slip Op. 7225, at *4.

appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues."[38]

Recognizing that the plaintiff was not roller-blading at a rink, at a skating park, or in some sort of competition, and further noting that the defendants did not actively sponsor or promote the activity in question, the Court determined that the doctrine of primary assumption of the risk should not be applied.[39] The Court went on to hold that the extension of the doctrine to individuals who might be injured while traveling along streets and sidewalks would create an unwarranted diminution of the general duty of landowners to maintain their premises in a safe condition.[40] Based upon this thinking, the Court of Appeals affirmed the appellate division and found a question of fact with regard to issues of common law negligence and causation.[41]

While the *Custodi v. Town of Amherst* case was working its way through the Appellate Division, Fourth Department, on its way to the Court of Appeals, the case of *Bukowski v. Clarkson University*, was running a parallel track in the Appellate Division, Third Department.[42] In *Bukowski*, the plaintiff was a freshman student athlete at Clarkson University, and began indoor training for baseball in February of his freshman year.[43] While pitching from an artificial mound in an indoor batting cage, a batter hit a hard line drive that struck the plaintiff in the face.[44] Following discovery, the defendants moved for summary judgment, based on the application of the doctrine of primary assumption of the risk. Supreme Court Justice Teresi, denied the defendants' motion for summary judgment dismissing the complaint, and the case then went to trial.[45]

The plaintiff, during his trial testimony, acknowledged his experience as a baseball pitcher, and testified that the risks of pitching included the possibility that he might be struck by a batted ball while in the act of pitching.[46] The plaintiff testified that since the age of five he had been playing baseball and had as many as 50 to 100 batted balls hit

38. *Id.*

39. *Id.*, 2012 N.Y. LEXIS 3261, at *8, 2012 N.Y. Slip Op. 7225, at *4-5.

40. *Id.*, 2012 N.Y. LEXIS 3261, at *8, 2012 N.Y. Slip Op. 7225, at *5.

41. *Id.*

42. Bukowski v. Clarkson Univ., 86 A.D.3d 736, 738-41, 928 N.Y.S.2d 369, 369-72 (3d Dep't 2011).

43. *Id.* at 737, 928 N.Y.S.2d at 370.

44. *Id.*, 928 N.Y.S.2d at 370-71.

45. *Id.*, 928 N.Y.S.2d at 371.

46. *Id.*

towards him while on the pitching mound.[47] The plaintiff further testified as to his extensive experience as a pitcher, and his familiarity with the indoor training facility where the Clarkson University team practiced during the winter.[48] The plaintiff had been informed by his coaches that the indoor pitching practice would be "live," meaning that there would be no protective L-screen,[49] a device often used by pitchers for protection against batted balls. After the close of proof at trial, Supreme Court Justice Devine granted the defendants' motion to dismiss based on the defense of primary assumption of the risk: the court found that the plaintiff had assumed the obvious risk of being hit by a line drive while playing the game.[50]

The plaintiff appealed to the Appellate Division, Third Department, and in a three-to-two decision, the court found that there was no rational process by which a trier of fact could find in favor of the plaintiff, relying upon the doctrine of primary assumption of the risk.[51] The court also held that the plaintiff was not compelled to play, or that his participation in practice was anything other than voluntary.[52] The plaintiff then appealed to the Court of Appeals as of right.[53] The Court of Appeals, in a decision written by Chief Judge Lippman, unanimously held that plaintiff assumed the risk of being hit by a line drive, and affirmed the decision of the appellate division.[54] The Court recognized that the risk that the plaintiff was exposed to was one commonly encountered and inherent in the sport of baseball, and that the plaintiff, as a voluntary participant, was legally deemed to have accepted personal responsibility.[55] The Court rationalized that the doctrine of primary assumption of the risk also includes risks involving less than optimal conditions.[56] The Court relied upon the facts that: (1) the plaintiff was experienced and knowledgeable as a baseball player; (2) it was clear he assumed the inherent risk of being hit by a line drive;

47. *Bukowski*, 86 A.D.3d at 737, 928 N.Y.S.2d at 371.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 739, 928 N.Y.S.2d at 373.

52. *Bukowski*, 86 A.D.3d at 739, 928 N.Y.S.2d at 373.

53. Bukowski v. Clarkson Univ., 19 N.Y.3d 353, 356, 971 N.E.2d 849, 850, 948 N.Y.S.2d 568, 569 (2012).

54. *Id.* at 355, 971 N.E.2d at 850, 948 N.Y.S.2d at 569.

55. *Id.* at 356, 971 N.E.2d at 851, 948 N.Y.S.2d at 570 (quoting Morgan v. State, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 207-08, 662 N.Y.S.2d 421, 426-27 (1997)).

56. *Bukowski*, 19 N.Y.3d at 356, 971 N.E.2d at 851, 948 N.Y.S.2d at 570 (citing Sykes v. Cnty. of Erie, 94 N.Y.2d 912, 913, 728 N.E.2d 973, 973, 707 N.Y.S.2d 374, 374 (2000)).

(3) he knew of the risk of pitching without the protection of an L-screen; and (4) he had the opportunity to observe the lighting in the facility as well as the color of the pitching backdrop, yet chose to participate in practice.[57] The Court explained that while the conditions may have been, as alleged, to be "sub-optimal," there were no concealed risks unknown to the plaintiff that would bar the application of the doctrine of primary assumption of the risk.[58] Reiterating the strong public policy reason for the application of primary assumption of the risk, the Court acknowledged the enormous social value of the game of baseball, and the importance of participation in that game by student athletes, in finding that the plaintiff's injuries were the result of a "luckless accident arising from . . . vigorous voluntary participation in competitive . . . athletics."[59] In conclusion, the Court found that there was insufficient evidence from which a jury might conclude that the plaintiff was confronted with an unassumed, concealed, or enhanced risk, even though it was his first time pitching in the cage.[60] As a result, the Court affirmed the order of the appellate division.[61]

The *Bukowski* and *Custodi* Court of Appeals decisions laid bare the strong public policy behind the application of primary assumption of the risk, and the need to protect schools, colleges, municipalities, and others who might be responsible for organizing athletic events, and invite participation.

B. Participation in Compulsory Versus Voluntary or Elective Athletic Events as Affecting the Applicability of the Doctrine of Assumption of Risk

While *Bukowski* and *Custodi* distinguish those sporting events where the application of primary assumption of the risk might well apply, a spattering of appellate decisions decided during the *Survey* year seem to run counter to the policy-based theory, particularly when an injured plaintiff might be involved in compulsory sporting activities. In *Talyanna S. v. Mount Vernon City School District*, the plaintiff was a fourth-grade student in elementary school and was participating in a physical education class that had been set up with "fitness stations" on the date she sustained an injury.[62] Six to seven activities were set up for

57. *Bukowski*, 19 N.Y.3d at 356-57, 971 N.E.2d at 851, 948 N.Y.S.2d at 570.

58. *Id.* at 357, 971 N.E.2d at 851, 948 N.Y.S.2d at 570.

59. *Id.* at 358, 971 N.E.2d at 852, 948 N.Y.S.2d at 571 (quoting Benitez v. N.Y. City Bd. of Educ., 73 N.Y.2d 650, 659, 541 N.E.2d 29, 34, 543 N.Y.S.2d 29, 34 (1989)).

60. *Bukowski*, 19 N.Y.3d at 358, 971 N.E.2d at 852, 941 N.Y.S.2d at 571.

61. *Id.*

62. 97 A.D.3d 561, 561, 948 N.Y.S.2d 103, 103 (2d Dep't 2012).

children throughout the school's gymnasium with activities at each station occurring simultaneously.[63] It was admitted by the defendant that two of the activities—rope climbing and balance board—required more supervision than others because of the nature of the risks involved.[64] The plaintiff injured her ankle when she fell from a balance board, and an action was then commenced against the school district alleging negligent supervision.[65] The school district then moved for summary judgment, dismissing the complaint.[66] Supreme Court Justice Adler, Westchester County, denied the motion for summary judgment, and the defendant appealed.[67] The Appellate Division, Second Department, held that the defendant failed to submit adequate evidence that they properly supervised the infant plaintiff or that the possible alleged lack of supervision was not a proximate cause of the plaintiff's injuries.[68] It was also clear through the decision that the class was a compulsory class, as part of the regular curricula at the Mount Vernon City School District Middle School.[69] Because of the compulsory participation of the young child and for all of the above reasons, the court affirmed Justice Adler's decision denying the defendant's motion for summary judgment.[70]

Similarly, in *Stoughtenger v. Hannibal Central School District*, the plaintiff sustained injuries while participating in a wrestling class in the defendant's compulsory physical education class.[71] The plaintiff brought action against the defendant, and then moved for summary judgment on liability, as well as to strike the affirmative defense of primary assumption of the risk.[72] The defendant moved for summary judgment dismissing the complaint, basing the motion on the doctrine of primary assumption of the risk.[73] Supreme Court Justice McCarthy, Oswego County, denied the parties' respective motions for summary

63. *Id.*, 948 N.Y.S.2d at 103-04.

64. *Id.* at 561-62, 948 N.Y.S.2d at 104.

65. *Id.* at 562, 948 N.Y.S.2d at 104 (noting that the plaintiff's mother also asserted a derivative claim).

66. *See id.* at 561, 948 N.Y.S.2d at 103.

67. *Talyanna S.*, 97 A.D.3d at 561, 948 N.Y.S.2d at 104) (citations omitted).

68. *Id.* at 562, 948 N.Y.S.2d at 104.

69. *Id.*

70. *Id.* (citing Hernandez v. Middle Country Cent. Sch. Dist., 83 A.D.3d 781, 781, 920 N.Y.S.2d 671, 671 (2d Dep't 2011); Bloomfield v. Jericho Union Free Sch. Dist., 80 A.D.3d 637, 639, 915 N.Y.S.2d 294, 296 (2d Dep't 2011); Armellino v. Thomase, 72 A.D.3d 849, 849-50, 899 N.Y.S.2d 339, 340-41 (2d Dep't 2010)).

71. 90 A.D.3d 1696, 1697, 935 N.Y.S.2d 430, 431 (4th Dep't 2011).

72. *Id.*

73. *Id.*

judgment; appeals and cross-appeals were then filed.[74] The Appellate Division, Fourth Department, modified Justice McCarthy's order, finding that the defense of primary assumption of the risk was not applicable because the plaintiff's participation was not voluntary, but was rather compulsory.[75]

In *Navarro v. City of New York*, the plaintiff was a sixteen-year-old who was struck in the face by a baseball bat swung by another student.[76] The incident occurred after the plaintiff had handed the bat to the other student who was going to hit balls for practice drills.[77] Despite being told not to take a full swing, the co-student immediately threw the ball up in the air and took a full swing before the plaintiff had time to get out of the way.[78] The plaintiff brought a personal injury action in Supreme Court, Bronx County, and following a jury trial, the plaintiff obtained a verdict in her favor against the defendant, City of New York Department of Education. [79] Supreme Court Justice Massaro, denied defendant Department of Education's motion for judgment notwithstanding the verdict or a new trial, and defendant appealed to the Appellate Division, First Department.[80] The First Department then reversed and found that summary judgment in favor of the defendant school district was appropriate based on the application of primary assumption of the risk as well as the sudden unexpected act of the student who swung the bat.[81] The court found that because this was an elective high school softball class, the plaintiff voluntarily accepted the risks commonly associated and inherent arising out of the game of baseball from such participation.[82] The court further found that given the plaintiff's knowledge and experience of the game and the fact that she was a player who knew the risks inherent in the sport, the plaintiff must be deemed to have accepted those risks.[83] The court held that there was no evidence presented that the plaintiff's injury resulted from any "unassumed, concealed or unreasonably increased risks" that might deter the application of the doctrine of primary assumption of the risk.[84]

74. *Id.*

75. *Id.*, 935 N.Y.S.2d at 431-32.

76. 87 A.D.3d 877, 877, 929 N.Y.S.2d 236, 237 (1st Dep't 2011).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Navarro*, 87 A.D.3d at 877-78, 929 N.Y.S.2d at 237.

82. *Id.* (quoting Morgan v. State, 90 N.Y.2d 471, 485, 685 N.E.2d 202, 207, 662 N.Y.S.2d 421, 426 (1st Dep't 1997)).

83. *Navarro*, 87 A.D.3d at 878, 929 N.Y.S.2d at 237 (internal citations omitted).

84. *Id.* (citing Benitez v. N.Y. Bd. of Educ., 73 N.Y.2d 650, 658, 541 N.E.2d 29, 33,

The court also found that the plaintiff cannot sustain the verdict on a theory of negligent supervision because of the unexpected act of the fellow student that was done with such haste that supervision could not have prevented it, and any lack of supervision could not be the proximate cause of injury.[85] In conclusion, the court held that schools "are not 'insurers of safety' and cannot be held liable 'for every thoughtless or careless act by which one pupil may injury another.'"[86]

Indeed, sudden and unanticipated acts will routinely defeat a plaintiff's claim of negligent supervision.[87]

C. Risks or Events that are Not Assumed, Concealed, or Unreasonably Increased Because of Conduct or Actions of the Defendant

Thus, from the cases decided at the appellate division level this year, it appears clear that if a plaintiff voluntarily participates in an organized sport or activity, an injury caused by a risk or event which is known, apparent or reasonably foreseeable as a consequence of participation, then the doctrine of primary assumption of the risk will apply. However, if the risk is one that is compulsory or not voluntarily assumed, or otherwise concealed, unassumed, or is a risk that is unreasonably increased because of conduct or actions of the defendant, then the doctrine of primary assumption of the risk will not apply.[88]

Even if the risk of harm is considered a risk generally assumed in the sport, there may be liability of a defendant who unreasonably increases the risk of harm to a plaintiff. In the case of *Charles v. Uniondale School District Board of Education*, the defendant school district failed to provide the plaintiff with head and face protection during pre-season high school lacrosse practice, and the plaintiff was struck with a passed ball.[89] The plaintiff was spared from the

543 N.Y.S.2d 29, 33 (1989)) (internal quotation marks omitted).

85. *Navarro*, 87 A.D.3d at 878, 929 N.Y.S.2d at 237-38 (citing Esponda v. City of N.Y., 62 A.D.3d 458, 460, 878 N.Y.S.2d 330, 332 (1st Dep't 2009)).

86. *Navarro*, 87 A.D.3d at 878, 929 N.Y.S.2d at 238 (quoting Lizardo v. Bd. of Educ. of N.Y., 77 A.D.3d 437, 438, 908 N.Y.S.2d 395, 396 (1st Dep't 2010)).

87. Kamara v. City of N.Y., 93 A.D.3d 449, 450, 940 N.Y.S.2d 53, 54 (1st Dep't 2012) (decided during the *Survey* year in accord with Paca v. City of N.Y., 51 A.D.3d 991, 993, 858 N.Y.S.2d 772, 774-75 (2d Dep't 2008) and *Lizardo*, 77 A.D.3d at 438, 908 N.Y.S.2d at 396).

88. *See* Charles v. Uniondale Sch. Dist. Bd. of Educ., 91 A.D.3d 805, 805, 937 N.Y.S.2d 275, 276 (2d Dept. 2012); *Benitez*, 73 N.Y.2d at 658, 541 N.E.2d at 33, 543 N.Y.S.2d at 33; Turcotte v. Fell, 68 N.Y.2d 432, 439, 502 N.E.2d 964. 968, 510 N.Y.S.2d 49, 53 (1986); *see also* Weller v. Colls. of the Senecas, 217 A.D.2d 280, 283, 635 N.Y.S.2d 990, 992-93 (4th Dep't 1995).

89. *Charles*, 91 A.D.3d at 806, 937 N.Y.S.2d at 277.

application of the doctrine of primary assumption of the risk because the court found the defendant school district unreasonably increased the risk of harm to the plaintiff by not providing the accepted helmet and face mask safety devices that are standard issue in high school lacrosse.[90]

The Appellate Division, Second Department, again affirmed this legal imperative in the case of *Viola v. Carmel Central School District*.[91] In *Viola*, the plaintiff was a female tenth-grade varsity softball player who slid into second base and sustained personal injuries as a result of a stationary base which was anchored into the ground.[92] The base had been installed by employees of the defendant school district.[93] The plaintiff then commenced action as against the defendants alleging negligence in the installation of second base in that it was improperly positioned such that one of the points of the base faced first base.[94] The plaintiff was allegedly injured when her foot hit the point of the base and abruptly stopped.[95] The defendants moved for summary judgment, and Supreme Court, Putnam County, Justice Lubell denied the defendants' motions.[96] The Appellate Division, Second Department, affirmed again relying on the *Benitez* rationale that the doctrine of a primary assumption of the risk is not applicable if the risk is un-assumed, concealed, or unreasonably increased.[97] The court acknowledged that the assumption of the risk doctrine encompasses risks associated with the construction of the playing surface and any open and obvious condition found upon it.[98] The court in *Viola* went on to hold that the defendants failed to establish or otherwise demonstrate that the base was properly positioned and that the plaintiff was aware of the alleged improper positioning or that it was an open and obvious condition.[99] The court found further that the defendants failed to show that, given the (allegedly incorrect) positioning of the base, they did not

90. *Id.*

91. 95 A.D.3d 1206, 1207, 945 N.Y.S.2d 155, 157 (2d Dep't 2012).

92. *Id.* at 1207, 945 N.Y.S.2d at 156.

93. *Id.*

94. *Id.* at 1206-07, 945 N.Y.S.2d at 156.

95. *Id.* at 1207, 945 N.Y.S.2d at 156.

96. *Viola*, 95 A.D.3d at 1207, 945 N.Y.S.2d at 157.

97. *Id.* (citing *Benitez*, 73 N.Y.2d at 654, 541 N.E.2d at 30, 543 N.Y.S.2d at 30).

98. *Viola*, 95 A.D.3d at 1207, 945 N.Y.S.2d at 157 (citing Morlock v. Town of N. Hempstead, 12 A.D.3d 652, 652, 785 N.Y.S.2d 123, 124 (2d Dep't 2004); Casey v. Garden City Park-New Hyde Park Sch. Dist., 40 A.D.3d 901, 902, 837 N.Y.S.2d 186, 187 (2d Dep't 2007); Welch v. Bd. of Educ. of N.Y., 272 A.D.2d 469, 470, 707 N.Y.S.2d 506, 507 (2d Dep't 2000)).

99. *Viola*, 95 A.D.3d at 1207, 945 N.Y.S.32d at 157.

unreasonably increase the risk of injury.[100] The appellate panel further concluded that Supreme Court Justice Lubell properly denied defendants' motion for summary judgment.[101]

D. Application of the Doctrine of Assumption of the Risk for Injuries Occurring Because of On-the-Field Defects

In yet another case considered by the Appellate Division, Second Department, during the *Survey* year dealing with primary assumption of the risk, a plaintiff was denied recovery because of a defect on the playing field that comprised an open and obvious condition.[102] In *Castro v. City of New York*, the plaintiff allegedly tripped over a raised sewer grate that was present on a cement ball field owned by the City of New York while playing softball.[103] The plaintiff was aware of the presence and the condition of the raised sewer grate, and had played at least forty softball games on the cement ball field before the date of his injury.[104] Supreme Court, Kings County, granted a motion for summary judgment of the defendant.[105] After the Court of Appeals issued its ruling in *Trupia v. Lake George Central School District*,[106] the plaintiff moved for leave to renew the opposition to the defendant's motion.[107] Supreme Court, Kings County granted leave to renew, but upon renewal, confirmed the City's entitlement, finding that the doctrine of "primary assumption of the risk extends to risks associated with the construction of a playing field in any open and obvious condition thereon."[108] The Second Department affirmed, confirming the findings of the lower court.[109]

100. *Id.*

101. *Id.* at 1208, 945 N.Y.S.32d at 157.

102. *See* Castro v. City of N.Y., 94 A.D.3d 1032, 1032, 944 N.Y.S.2d 155, 156 (2d Dep't 2012).

103. *Id.*

104. *Id.*

105. *Id.*

106. 14 N.Y.3d 392, 927 N.E.2d 547, 901 N.Y.S.2d 127 (2010).

107. *Castro*, 94 A.D.3d at 1032, 944 N.Y.S.2d at 156-57.

108. *Id.* (citing Sykes v. Cnty. of Erie, 94 N.Y.2d 912, 913, 728 N.E.2d 973, 973, 707 N.Y.S.2d 374, 374 (2000); Palladino v. Lindenhurst Union Free Sch. Dist., 84 A.D.3d 1194, 1195, 924 N.Y.S.2d 474, 475 (2d Dep't 2011); Brown v. City of N.Y., 69 A.D.3d 893, 893, 895 N.Y.S.2d 442, 443 (2d Dep't 2010); Manoly v. City of N.Y., 29 A.D.3d 649, 649-50, 816 N.Y.S.2d 499,500 (2d Dep't 2006)).

109. *See Castro*, 94 A.D.3d at 1033, 944 N.Y.S.2d at 157.

II. MUNICIPAL LIABILITY

A. Governmental Action and the Need for Proof of a Special Relationship

In 1987, the Court of Appeals decided the case of *Cuffy v. City of New York*, and in doing so, allowed a narrow class of cases to provide for recovery against municipalities where there was a "special relationship" between the agents of the municipality and an injured person.[110] For such a special relationship to exist, *Cuffy* provided that four elements must be met by the plaintiff in order to allow recovery.[111] The four *Cuffy* requirements are:

> (1) an assumption by the municipality, through promises or actions of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking.[112]

In the post-*Cuffy* era, cases that dealt with municipal liability in New York State distinguished between "discretionary" and "ministerial" acts when governmental officials were acting in a governmental capacity.[113] As the New York State Court of Appeals cases developed in the decade after *Cuffy* was decided, tort claims were allowed in cases where the plaintiffs had established a special relationship with the municipality, some times for discretionary acts,[114] and others allowing recovery only for ministerial acts.[115]

On March 31, 2009, the Court of Appeals, recognizing the dichotomy and inconsistency in the prior decisions of that Court, issued a decision in the case of *McLean v. City of New York*, which presumably clarified the direction and thinking of that Court.[116] In *McLean*, the Court held that governmental action, if discretionary, can never be the subject of a viable claim against the municipality, and that action, if

110. 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

111. *Id.*

112. *Id.*

113. *See* Lauer v. City of N.Y., 95 N.Y.2d 95, 98, 733 N.E.2d 184, 187, 711 N.Y.S.2d 112, 115 (2000); Pelaez v. Seide, 2 N.Y.3d 186, 199, 810 N.E.2d 393, 399, 778 N.Y.S.2d 111, 117 (2004).

114. Kovit v. Estate of Hallums, 4 N.Y.3d 499, 507, 508, 829 N.E.2d 1188, 1192, 797 N.Y.S.2d 20, 24 (2005); *Pelaez*, 2 N.Y.3d at 193, 810 N.E.2d at 395, 778 N.Y.S.2d at 113.

115. *See generally Lauer*, 95 N.Y.2d 95, 733 N.E.2d 184, 711 N.Y.S.2d 112; Tango v. Tulevech, 61 N.Y.2d 34, 459 N.E.2d 182, 471 N.Y.S.2d 73 (1983).

116. 12 N.Y.3d 194, 197, 203, 905 N.E.2d 1167, 1169, 1174, 878 N.Y.S.2d 238, 240, 245 (2009).

ministerial, cannot be a subject of tort action, absent a showing of a special duty between the injured person and the municipality to be charged.[117]

In *Dinardo v. City of New York*, the Court of Appeals interpreted *McLean* for the legal declaration that "discretionary government action . . . cannot be a basis for liability."[118] In *Dinardo*, Chief Judge Lippman authored a concurring opinion, agreeing with the majority decision only because he was constrained to do so because of the Court's decision in *McLean*.[119] Criticizing the majority view, Chief Judge Lippman wrote as follows:

> Whether the municipality's act [was] characterized as ministerial or discretionary should not be, and never has been, determinative in special duty cases . . . . Unfortunately, under the rule announced in *McLean*, a plaintiff will never be able to recover for the failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she justifiably relied on that promise to his or her detriment. This is particularly disturbing given our recognition that the 'police cases . . . all but occupy the special relationship field.'[120]

Last year's *Survey of New York Law* reported the application of the *McLean/Dinardo* rules in the First Department case of *Valdez v. City of New York*.[121] In that case, the plaintiff was shot and seriously wounded outside her apartment while taking the garbage out approximately twenty-four hours after she had telephoned the police, and an officer told her that the police would arrest her threatening ex-boyfriend immediately, advising her to go to her apartment instead of going to some alternate or safer location.[122] The First Department found that the plaintiff failed to establish the element of justifiable reliance, which is one of the *Cuffy* requirements that must be proven under the special duty exception.[123] The appellate division issued the three-to-two

117. *See id.* at 203, 905 N.E.2d at 1173-74, 878 N.Y.S.2d at 244-45.

118. Dinardo v. City of N.Y., 13 N.Y.3d 872, 874, 921 N.E.2d 585, 586, 893 N.Y.S.2d 818, 819 (2009) (citing McLean v. City of N.Y., 12 N.Y.3d 194, 202-03, 905 N.E.2d 1167, 1173-74, 878 N.Y.S.2d 238, 244-45 (2009); *Tango*, 61 N.Y.2d at 40-41, 459 N.E.2d at 185-86, 471 N.Y.S.2d at 76-77).

119. *See Dinardo*, 13 N.Y.3d at 876, 921 N.E.2d at 588, 893 N.Y.S.2d at 821.

120. *See id.* at 877, 921 N.E.2d at 589, 893 N.Y.S.2d at 822 (citing Pelaez v. Seide, 2 N.Y.3d 186, 205, 810 N.E.2d 393, 403, 778 N.Y.S.2d 111, 121 (2004)).

121. *See* Hon. John C. Cherundolo, *Tort Law*, *2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 935, 949-53 (2011) (for an extensive review); *see generally* Valdez v. City of N.Y., 74 A.D.3d 76, 901 N.Y.S.2d 166,176 (1st Dep't 2010).

122. *Valdez*, 74 A.D.3d at 77, 901 N.Y.S.2d at 167.

123. *Id.* at 78, 89, 901 N.Y.S.2d at 168; *see* Cuffy v. City of N.Y., 69 N.Y.2d 255,

decision on April 29, 2010, and as a result, a $9.93 million dollar verdict was reversed and set aside.[124] The jury in *Valdez* apportioned fault 50% to the City and 50% to the plaintiff's ex-boyfriend, and also found that the City had acted in reckless disregard of the plaintiff's safety.[125] In a decision by the appellate division, Justice Catterson, joined by Justices Sax and Abdus-Salaam, the majority determined that the proof was inadequate to support a finding that the plaintiff's reliance on the police officer's promise to arrest her ex-boyfriend was justifiable.[126] The two dissenting Justices Mazzarelli and DeGrasse, felt that there was sufficient evidence of justifiable reliance proven and that the Panel should have sustained the liability verdict.[127]

Ironically, both *McLean* and *Dinardo* were decided while *Valdez* was pending appeal at the appellate division level.[128] Because of the two justice dissent, the plaintiff appealed to the Court of Appeals as of right, and the Court of Appeals issued its decision on October 18, 2011.[129]

In a five-to-two decision, the Court of Appeals affirmed the appellate division decision.[130] In doing so, the Court announced that "*McLean* did not announce a new rule—it merely distilled the analysis applied in prior cases."[131] The black letter law confirmed by *Valdez* stated, "the rule that emerges is that governmental action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general."[132]

In *Valdez*, the majority of the Court declined to view the special duty rule as an exception to the governmental function immunity defense, as Chief Judge Lippman espoused, and also declined to accept the assertion that Judge Jones voiced in dissent that the governmental

260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

124. *Valdez*, 74 A.D.3d at 78, 901 N.Y.S.2d at 168.

125. Valdez v. City of N.Y., 18 N.Y.3d 69, 74, 960 N.E.2d 356, 360, 936 N.Y.S.2d 587, 590 (2011).

126. *Valdez*, 74 A.D.3d 76 at 84, 901 N.Y.S.2d at 172.

127. *See id.* at 81, 901 N.Y.S.2d at 169.

128. *See* McLean v. City of N.Y., 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009); Dinardo v. City of N.Y., 13 N.Y.3d 872, 921 N.E.2d 585, 893 N.Y.S.2d 818 (2009); *see Valdez*, 18 N.Y.3d at 75, 960 N.E.2d at 360, 936 N.Y.S.2d at 591.

129. *See Valdez*, 18 N.Y.3d at 69, 960 N.E.2d at 356, 936 N.Y.S.2d at 587.

130. *Id.*

131. *Id.* at 77, 960 N.E.2d at 362, 936 N.Y.S.2d at 593 (citing Lauer v. City of N.Y., 95 N.Y.2d 95, 733 N.E.2d 184, 711 N.Y.S.2d 112 (2000); Garrett v. Holiday Inns, 58 N.Y.2d 253, 477 N.E.2d 717, 460 N.Y.S.2d 774 (1983)).

132. *See Valdez*, 18 N.Y.3d at 76-77, 960 N.E.2d at 362, 936 N.Y.S.2d at 592.

function immunity defense should be inapplicable to police protection cases.[133] The dissent expressed its fear that given the current state of the law under the *McLean/Dinardo* rules—as adopted by the *Valdez* Court—plaintiffs will never be able to recover in negligence actions in police protection cases.[134] The majority countered with the previously well-established rule that if the alleged functions and duties were essentially clerical or routine (i.e. ministerial), no immunity would attach.[135]

Based on the law then before it, the Court of Appeals made the determination that it would not have been reasonable for the plaintiff to rely on the police officer's promise to arrest her ex-boyfriend immediately, since his location had to be discovered before any arrest could occur, and that under the circumstances, the promise of the police officer can only be reasonably viewed as a promise to look for the ex-boyfriend and arrest him if he was located. The Court concluded that it was not reasonable for the plaintiff to relax her vigilance based on this type of representation concerning the location of the ex-boyfriend.[136] The Court concluded that, based on the *Cuffy* analysis, "a promise by police that certain action will be forthcoming within a specified time period generally will not justify reliance long after a reasonable time period has passed without any indication that the action has occurred."[137]

In dissent, Chief Judge Lippman criticized the majority for adding a requirement to the *Cuffy* analysis that there be some confirmatory visible police conduct or action that would justify reliance upon the officer's assurances.[138] Chief Judge Lippman clearly made the point that "we have . . . never made such confirmation a legally requisite condition of a special duty finding."[139] Chief Judge Lippman went on to describe the preexisting relationship that the plaintiff had with the police officer assigned to the case, that the plaintiff had every reason to expect that the officer and the force would act responsibly to see that the order of protection was enforced, and that the ex-boyfriend would be arrested.[140] This argument was supported by the fact that the plaintiff

133. *See id.* at 78, 960 N.E.2d at 363, 936 N.Y.S.2d at 596.

134. *Id.*, 960 N.E.2d at 364, 936 N.Y.S.2d at 595.

135. *Id.* at 79, 960 N.E.2d at 364, 936 N.Y.S.2d at 595 (citing Mon v. City of N.Y., 78 N.Y.2d 309, 313, 579 N.E.2d 689, 692, 574 N.Y.S.2d 529, 532 (1991)).

136. *Valdez*, 18 N.Y.3d at 81-82, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.

137. *Id.* at 82, 960 N.E.2d at 366, 936 N.Y.S.2d at 597-98.

138. *Id.* at 86, 960 N.E.2d at 369, 936 N.Y.S.2d at 600.

139. *Id.*

140. *Id.* at 86, 960 N.E.2d at 369, 936 N.Y.S.2d at 600.

had a valid order of protection, upon which the police were required to take action and arrest the ex-boyfriend upon her report of a violation of the order.[141] Chief Judge Lippman then reminded the panel of the warning he made in *Dinardo* about the application of the *McLean* doctrine, arguing that "[t]he special duty doctrine was conceived precisely to avoid such an inequitable . . . and regressive outcome" such as the majority would give.[142] Chief Judge Lippman opined that"[t]oday's decision . . . effectively tolls the death knell for these actions."[143]Chief Judge Lippman concluded his dissent by saying: "I doubt that anyone will discern in it a plausible explanation as to why a doctrine that had for so long been considered to state grounds for overcoming the governmental immunity for discretionary acts, should have been summarily reduced to a vestige."[144]

Judge Jones, also in his dissent, asserted the following: "I would have concluded that a claim for the negligent failure to provide police protection is excepted from the governmental immunity defense and any discretionary or ministerial distinctions and proceeded to whether plaintiffs established prima facie evidence to support this claim."[145]

The Second Department considered two additional cases in which they applied the *McLean/Dinardo/Valdez* rules concerning governmental immunity. The first, *Bawa v. City of New York*, was an action where the decedent's son killed the decedent, who then killed her companion and the companion's health aide before killing himself.[146] The decedent's administrator then brought action against the New York City Police Department, alleging that they negligently failed to arrest the son on prior occasions when they responded to 911 calls, that they failed to follow up with decedent after she had complained of threats, and failed to respond to decedent's final 911 call on April 18, 2007.[147] The defendant moved to dismiss the complaint on the issue of governmental immunity, and the Supreme Court, Queens County, denied the defendant's motion.[148]

On appeal, the Appellate Division, Second Department, reversed, relying upon *McLean* and *Valdez*, making the determination that police protection was a classic governmental function and that there was no

141. *Valdez*, 18 N.Y.3d at 86, 960 N.E.2d at 369, 936 N.Y.S.2d at 600.
142. *Id.* at 91, 960 N.E.2d at 373, 936 N.Y.S.2d 587 at 604.
143. *Id.* at 92, 960 N.E.2d at 373, 936 N.Y.S.2d at 604.
144. *Id.* at 93, 960 N.E.2d at 374, 936 N.Y.S.2d at 605.
145. *Id.* at 94, 960 N.E.2d at 375, 936 N.Y.S.2d at 606.
146. 94 A.D.3d 926, 926, 942 N.Y.S.2d 191, 192 (2d Dep't 2012).
147. *Bawa*, 94 A.D.3d at 926, 942 N.Y.S.2d at 192.
148. *Id.*

special duty owed to the injured party beyond that that was owed to the public at large.[149] In making the finding, the court reviewed the 911 operator's statement on April 18, 2007, where the operator was credited as saying "they are on their way, Ma'am," and determined that even if that statement qualified as an assumption of an affirmative duty, that there was no proof that the decedent relied to her detriment on that assurance.[150] Interestingly, in support of its position, the court issued the following statement:

> Although, in a colloquial sense, we should be able to depend on the police to do what they say they are going to do—and no doubt the police have an obligation to attempt to fulfill that trust—it does not follow that a plaintiff injured by a third party is always entitled to pursue a claim against a municipality in every situation where the police fall short of that aspiration. The element of justifiable reliance must be assessed through the prism of reasonableness and liability will not always extend to a municipality for injuries caused by the violent acts of a third party.[151]

In conclusion, the court found that the complaint must be dismissed, not only because there was no special relationship existing, but also because the claim involved an exercise of discretion and reasonable judgment by the defendant, for which plaintiffs cannot recover.[152]

It should be noted that the First and Second Departments issued four other decisions collectively dealing with the need for special relationship. In each of those cases, the issue of special relationship was reviewed in accord with the four requirements set out in *Cuffy v. City of New York*.[153] In each of the four cases, a review of those criteria are set forth and the *McLean/DiNardo/Valdez* rules were consistently applied. The cases include *Robiou v. City of New York*,[154] *Miserendino v. City of Mount Vernon*,[155] *Matican v. City of New York*[156] and *Kramer v. Lagnese*.[157]

149. *See id.* at 927, 942 N.Y.S.2d at 193.

150. *Id.* at 928, 942 N.Y.S.2d at 194 (internal quotation marks omitted).

151. *Id.*, 942 N.Y.S.2d at 194 (quoting Valdez v. City of N.Y., 18 N.Y.3d 69, 83-84, 960 N.E.2d 356, 368, 936 N.Y.S.2d 567, 599 (2011)).

152. *Bawa*, 94 A.D.3d at 928, 942 N.Y.S.2d at 194.

153. *See generally* 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

154. *See generally* 89 A.D.3d 587, 933 N.Y.S.2d 27 (1st Dep't 2011).

155. *See generally* 96 A.D.3d 810, 946 N.Y.S.2d 605 (2d Dep't 2012).

156. *See generally* 94 A.D.3d 826, 941 N.Y.S.2d 698 (2d Dep't 2012).

157. *See generally* 144 A.D.2d 648, 535 N.Y.S.2d 13 (2d Dep't 1988); Mooney v. Niagara Frontier Travel Sys., Inc., 125 A.D.2d 997, 510 N.Y.S.2d 393 (2d Dep't 1986).

B. Governmental Immunity—Discretionary Versus Ministerial Actions

Soon after the Court of Appeals released their decision in *Valdez*, the First Department had the opportunity to consider a case where the defendant claimed the defense of governmental immunity in *Applewhite v. Accuhealth, Inc*.[158] In *Applewhite*, an infant went into anaphylactic shock, and after the plaintiff's mother called 911, an ambulance arrived equipped only with basic life support, as the advanced life support ("ALS") ambulance was not available.[159] One of the emergency medical technicians ("EMT") that responded assisted with CPR of the infant, while the other EMT requested an ALS ambulance, as they needed a stretcher, valve mask, and a defibrillator.[160] The infant's mother made a second call to 911, and approximately twenty minutes later, the ALS equipped ambulance arrived, and began to treat the infant appropriately with ALS and brought her to the hospital.[161] The plaintiff's mother requested that the first ambulance take the child to the hospital, but they declined, advising the mother that it would be better to wait for the ALS equipped ambulance.[162] The plaintiff then brought suit against the defendant claiming that the defendant should have transported the child to the hospital as quickly as possible, and that because of the poor advice and failure to transport earlier, the child sustained severe permanent brain damage.[163]

The defendant municipality moved for summary judgment before Supreme Court, Bronx County, Justice McKeon, who granted the defendant's motion.[164] On appeal to the appellate division, the court unanimously found that the case should be reversed and the complaint reinstated.[165] In coming to that conclusion, the First Department panel first determined that the City employees were acting as part of a governmental function inasmuch as the poor advise given and the failure to transport was much closer to the performance of a governmental function than to a proprietary act of a medical provider caring for the patient.[166] The court then determined that the claims made against the municipality were ministerial in nature, inasmuch as there was no specific medical malpractice claim made, but rather the

158. *See generally* 90 A.D.3d 501, 934 N.Y.S.2d 164 (1st Dep't 2011).
159. *Id.* at 502, 934 N.Y.S.2d at 166.
160. *Id.*
161. *Id.*
162. *Id.* at 504, 934 N.Y.S.2d at 168.
163. *Applewhite*, 90 A.D.3d at 504, 934 N.Y.S.2d at 167.
164. *Id.* at 501, 934 N.Y.S.2d at 166.
165. *Id.* at 504, 934 N.Y.S.2d at 168.
166. *Id.*

ministerial acts of waiting twenty minutes for the ALS ambulance to arrive, despite the mother's request to take the child to the hospital immediately.[167] The court then looked to see whether there was a special relationship developed that promoted a justifiable reliance by the plaintiff and her mother.[168] The defendant contended that the mother could not have relied on anything that the employees said or did.[169] The court found, however, that the mother justifiably relied upon the EMT technicians because they had taken control of the emergency situation, provided treatment to her daughter and made the determination to await the arrival of an ALS ambulance without communicating to the mother that it would take another twenty minutes to arrive.[170] As a result, the court found that the *Cuffy* requirements were met, held that a special relationship existed, and reinstated the complaint as against the defendants so they could proceed accordingly.[171]

The Appellate Division, Second Department, also had the opportunity to apply the governmental immunity tests emanating out of the rules defined by the *McLean/Dinardo/Valdez* Court of Appeals decisions. In *Salone v. Town of Hempstead*, the plaintiffs brought an action as against the Town of Hempstead alleging that the infant plaintiff was attacked by three unidentified youths during a basketball game in a park that was owned and maintained by the defendant town.[172] The plaintiffs' allegations against the town was that the town was negligent in failing to provide adequate security at the park.[173] The town moved for summary judgment before Supreme Court, Nassau County, Justice Marber, who denied the defendant's motion for summary judgment.[174] The town contended, among other things, that the case should be dismissed because of governmental immunity.[175] The Appellate Division, Second Department, reversed the decision of the lower court and determined that the town's motion should have been granted.[176] The court, in evaluating the defense of governmental immunity, looked not to the general duties of the town with regard to providing the park when it evaluated whether the town was acting in

167. *Id.*
168. *Applewhite*, 90 A.D.3d at 504, 924 N.Y.S.2d at 168.
169. *Id.*
170. *Id.* at 504-05, 934 N.Y.S.2d at 168.
171. *Id.* at 505, 934 N.Y.S.2d at 169.
172. 91 A.D.3d 746, 746, 937 N.Y.S.2d 103, 104 (2d Dep't 2012).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 747, 937 N.Y.S.2d at 105.

either a governmental or proprietary way, but looked to the specific allegations contained in the complaint.[177] Here, the allegations were that the town failed to provide adequate security or police protection.[178] The court found that this claim was one distinctly arising out of the performance of the town's governmental function,[179] relying upon the case of *In re World Trade Center Bombing Litigation Steering Committee*.[180] Once the appellate division determined that the town was acting in a governmental capacity, the next question that they reviewed was whether the actions alleged were discretionary or ministerial in nature.[181] The court found that the alleged deficiencies in security measures "includ[ed] the allotment of personnel to patrol the park, [and] arose from the allocation of the defendant's security resources. Such deficiencies involving policymaking as to the nature of the risks presented at the park implicated the defendant's governmental function."[182]

The court held that the town also demonstrated that it owed no special duty to the infant plaintiff, and thereby established its entitlement to judgment as a matter of law.[183] As a result, the court determined that the defendant's motion for summary judgment should have been granted and reversed the decision of the lower court.[184]

The application of the *McLean/Dinardo/Valdez* rules concerning governmental immunity was also found during the *Survey* year in the Appellate Division, Third Department, decision in *Murchinson v. State*.[185] In that case, a Department of Environmental Conservation ("DEC") ranger was engaged in traffic control outside the plaintiff's house during a time when they were looking for the plaintiff's father, who was apparently lost in the woods behind their home.[186] Shortly afterwards, the plaintiff upon finding the father, intending to take him to the hospital, backed out of his driveway and sought help from one of the

177. *Salone*, 91 A.D.3d at 747, 937 N.Y.S.2d at 105.

178. *Id.*

179. *Id.* at 746-47, 937 N.Y.S.2d at 104-05.

180. 17 N.Y.3d 428, 447, 957 N.E.2d 733, 745, 933 N.Y.S.2d 164, 176 (2011).

181. *Salone*, 91 A.D.3d at 747, 937 N.Y.S.2d at 105.

182. *Id.*

183. *Id.* (citing Pelaez v. Seide, 2 N.Y.3d 186, 202, 810 N.E.2d 393, 401, 778 N.Y.S.2d 111, 119 (2004); Cuffy v. City of N.Y., 69 N.Y.2d 255, 260-62, 505 N.E.2d 937, 939-40, 573 N.Y.S.2d 372, 375-76 (1987); Dickerson v. City of N.Y., 258 A.D.2d 433, 684 N.Y.S.2d 584 (2d Dep't 1999)).

184. *Salone*, 91 A.D.3d at 747, 937 N.Y.S.2d at 105.

185. *See generally* Murchinson v. State, 97 A.D.3d 1014, 949 N.Y.S.2d 789 (3d Dep't 2012).

186. *Id.*, 949 N.Y.S.2d at 791.

DEC forest rangers who was directing traffic.[187] As the plaintiff backed out of the driveway, his vehicle was struck by another vehicle driven by a drunk driver.[188] The drunk driver was ultimately convicted of vehicular assault in the second degree and was serving a sentence of one to three years in prison.[189] The plaintiff brought action against the State, alleging that the DEC employee was negligent in guiding his vehicle onto the highway and into the path of oncoming traffic. Court of Claims Justice Hard determined that the DEC forest ranger did assist claimant with backing out of the driveway and further determined that the DEC forest ranger was negligent in the manner in which he did so.[190] The court nonetheless dismissed the claim because it found that the DEC forest ranger, at the time, was performing a governmental function, and that he did so within the exercise of his discretion, thus triggering the defense of governmental immunity.[191] The appellate division, in recognizing that the DEC forest ranger exercised discretion in the performance of what it found to be a governmental function held that such discretionary action could not be the basis for liability.[192] As a result, the court found that the Court of Claims correctly concluded that the defendant was immune from liability.

Another case which came down from the Appellate Division, Second Department, was *Gabriel v. City of New York*.[193] That action was brought by the plaintiff against the City of New York, the Administration of Children's Services, the police department, and specific employees of the department for activities that the plaintiff claimed resulted in the murder of her minor child and the child's burial in a cemetery known as Potter's Field.[194] The court found that the defendant demonstrated that the police department's actions with regard to the claimed deficiencies were discretionary actions rather than ministerial acts, and thus could not form the basis of tort liability.[195] The court also found that the defendants demonstrated that the plaintiff did not justifiably rely on any affirmative undertaking of the police

187. *Id.*

188. *Id.* at 1015, 949 N.Y.S.2d at 792.

189. *Id.*

190. *Murchinson*, 97 A.D.3d at 1015, 949 N.Y.S.2d at 791-92.

191. *Id.*, 949 N.Y.S.2d at 792.

192. *Id.* at 1017, 949 N.Y.S.2d at 793 (quoting McLean v. City of N.Y., 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173-74, 878 N.Y.S.2d 238, 244-45 (2009)).

193. *See generally* 89 A.D.3d 982, 933 N.Y.S.2d 360 (2d Dep't 2011).

194. *Id.* at 982-83, 933 N.Y.S.2d at 361.

195. *Id.* at 983, 933 N.Y.S.2d at 362 (citing *McLean*, 12 N.Y.3d at 203, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244; Lauer v. City of N.Y., 95 N.Y.2d 95, 99, 733 N.E.2d 184, 187, 711 N.Y.S.2d 597, 599 (2004)).

department and that there was no special relationship upon which liability could be predicated.[196] As a result, the court affirmed the order of Justice Sherman of Kings County, Supreme Court, which had granted the defendants' motion for summary judgment.[197]

C. Scope of Duty of School Districts and Chosen School Bus Companies for Injuries Occurring After School

The black letter law that has existed for decades in the State of New York is that a school owes a common law duty to adequately supervise its students.[198] Because schools exercise physical custody over the students that attend, it has been long held that the duty of a school is to exercise such care as a parent would exercise given ordinary prudence in comparable circumstances.[199] In effect, school teachers and administrators effectively take the place of the students' parents and/or guardians while the students are attending school.[200] One of the exceptions to this well-established rule is that schools generally have no duty of care that extends beyond school premises or after school hours.[201] The prevailing rule dealing with school after-hour bus services is that a school district, in providing transportation services for its students, must do so in a reasonable and prudent manner.[202]

In *Smith v. Sherwood*, a local parochial school within the school district in the City of Syracuse, contracted with a public bus company, Central New York Centro, to provide bus services for the students at the school, both before and after school hours.[203] The contract provided that the bus company would use regular issued buses, and not yellow school buses that had the extra safety equipment on them such as flashing caution lights and stop signs.[204] The contract also allowed

196. *Gabriel*, 89 A.D.3d at 984, 933 N.Y.S.2d at 362 (citing Cuffy v. City of N.Y., 69 N.Y.2d 255, 258, 505 N.E.2d 937, 938, 513 N.Y.S.2d 372, 373 (1987); Carossia v. City of N.Y. 39 A.D.3d 429, 430-31, 835 N.Y.S.2d 102, 104 (1st Dep't 2007)).

197. *Gabriel*, 89 A.D.3d at 982, 933 N.Y.S.2d at 361.

198. Pratt v. Robinson, 39 N.Y.2d 554, 560, 349 N.E.2d 849, 852, 384 N.Y.S.2d 749, 752 (1976).

199. Mirand v. City of N.Y., 84 N.Y.2d 44, 49, 637 N.E.2d 263, 266, 614 N.Y.S.2d 372, 375 (1994) (quoting Hoose v. Drumm, 281 N.Y. 54, 57-58, 22 N.E.2d 233, 234 (1939)).

200. *Mirand*, 84 N.Y.2d at 49, 637 N.E.2d at 266, 614 N.Y.S.2d at 375 (citing *Pratt*, 39 N.Y.2d at 560, 349 N.E.2d at 852, 384 N.Y.S.2d at 752).

201. *Pratt*, 39 N.Y.2d at 560, 349 N.E.2d at 852, 384 N.Y.S.2d at 752.

202. Chainani v. Bd. of Educ. of N.Y., 87 N.Y.2d 370, 378-79, 663 N.E.2d 283, 285, 639 N.Y.S.2d 971, 973 (1995) (citing *Pratt*, 39 N.Y.2d at 560, 349 N.E.2d at 853, 384 N.Y.S.2d at 753; N.Y. EDUC. LAW § 3635(1)(d) (McKinney 1995)).

203. 16 N.Y.3d 130, 132, 944 N.E.2d 637, 638, 919 N.Y.S.2d 102, 103 (2011).

204. *Id.*

members of the public to use the buses, but the bus route was marked as "Special," signifying to passengers that the bus did not take a normal route.[205] The plaintiff was a twelve-year-old boy in the seventh grade.[206] At the beginning of the school year, the students were instructed never to walk in front of the bus to cross the street, but rather to wait until the bus was at least a block away before crossing the street and only after making sure the way was clear.[207] Written instructions were also distributed to the students by the school, and additional warnings were placed on the Centro buses.[208] The bus drivers were also required to alert students of that rule at least twice weekly.[209]

On October 3, 2002 the plaintiff, on his way home from school, got on a Centro bus and missed the regular stop that he would alight from the bus, either because he did not pull the stop cord or because the bus driver simply missed the stop.[210] As a result, the bus continued for some distance before turning around, traveled in the opposite direction on South Salina Street, and dropped the plaintiff off on the other side of the street, where the plaintiff would have to cross the street to get to his home.[211] The plaintiff immediately walked in front of the bus and was struck by an automobile traveling past the bus in the driving lane.[212] The plaintiff was seriously injured, and suit was then brought against Centro and the Syracuse School District.[213] Onondaga County, Supreme Court, Justice Karalunas granted the motions of the defendant school district and board of education, and Centro.[214]

The plaintiff appealed to the Appellate Division, Fourth Department, and in a three-to-two memorandum decision, the appellate panel affirmed the dismissal against the school district and the board of education.[215] The majority of the Fourth Department panel found that the school district, in contracting with Centro, contracted out its responsibility for transportation, and therefore could not be held liable for injuries to the infant plaintiff after he boarded the Centro bus.[216]

205. *Id.* at 132, 944 N.E.2d at 638-39, 919 N.Y.S.2d at 103-04.

206. *Id.*, 944 N.E.2d at 639, 919 N.Y.S.2d at 104.

207. *Id.* at 133, 944 N.E.2d at 639, 919 N.Y.S.2d at 104.

208. *Smith*, 16 N.Y.3d at 133, 944 N.E.2d at 639, 919 N.Y.S.2d at 104.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Smith*, 16 N.Y.3d at 133, 944 N.E.2d at 639, 919 N.Y.S.2d at 104; *see* Smith v. Sherwood, 68 A.D.3d 1785, 1785-86, 891 N.Y.S.2d 798, 800 (4th Dep't 2009).

214. *Smith*, 68 A.D.3d at 1785-86, 891 N.Y.S.2d at 800.

215. *Id.* at 1787, 891 N.Y.S.2d at 801.

216. *Id.* (citing Chainani v. Bd. of Educ. of N.Y., 87 N.Y.2d 370, 379, 663 N.E.2d

The court also found that any claims pursuant to Vehicle & Traffic Law section 1174(b) must be likewise dismissed, holding that Vehicle & Traffic Law section 1774(b) places the affirmative duties and obligations on bus drivers.[217] As a result, the appellate division affirmed the dismissal ordered by Justice Karalunas as against the school district and the board of education.[218]

With regard to Centro, the appellate division found that Centro had a common law duty to perform the service of transporting students in a careful and reasonably prudent way.[219] The court found that because the bus driver knew that the student had to cross the street after exiting the bus, the absence of safety equipment increased the danger of allowing the student to alight on the wrong side of the street, and the court felt that a jury could find that Centro assumed a special duty to protect the child against a danger that its driver had created.[220] The court also held that Centro failed to establish that the failure to provide supervision or assistance to the student in crossing the street was not a proximate cause of the accident.[221] Justices Hurlbutt and Fahey dissented with regard to the majority's finding against Centro, and would have held that Centro's duty to the student terminated when he exited the bus safely and stepped onto the curb.[222]

The appellate division then certified a question to the Court of Appeals, asking whether its order reinstating the plaintiff's action against Centro was proper.[223]

In a decision dated February 15, 2011 and corrected March 30, 2011, the Court of Appeals reversed the appellate decision with regard

283, 286, 639 N.Y.S.2d 971, 974 (1995); Wisoff v. Cnty. of Westchester, 296 A.D.2d 402, 402-03, 745 N.Y.S.2d 60, 61 (2d Dep't 2002)).

217. *Smith*, 68 A.D.3d at 1787, 891 N.Y.S.2d at 801 (quoting *Chainani*, 87 N.Y.2d at 379, 663 N.E.2d at 286, 639 N.Y.S.2d at 974).

218. *Smith*, 68 A.D.3d at 1787, 891 N.Y.S.2d at 801.

219. *Id.* at 1786, 891 N.Y.S.2d at 800 (citing *Pratt*, 39 N.Y.2d at 561, 349 N.E.2d at 853, 384 N.Y.S.2d at 753).

220. *Smith*, 68 A.D.3d at 1786-87, 891 N.Y.S.2d at 800 (quoting Ernest v. Red Creek Cent. Sch. Dist., 93 N.Y.2d 664, 671-72, 717 N.E.2d 690, 693, 695 N.Y.S.2d 531, 534 (1999); McDonald v. Cent. Sch. Dist. No. 3, 179 Misc. 333, 336, 39 N.Y.S.2d 103, 106 (Sup. Ct. Seneca Cnty. 1941)).

221. *Smith*, 68 A.D.3d at 1787, 891 N.Y.S.2d at 800-01 (citing Zuckerman v. City of N.Y., 49 N.Y.2d 557, 562, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 597 (1980)).

222. *Smith*, 68 A.D.3d at 1788, 891 N.Y.S.2d at 802 (quoting Kramer v. Lagnese, 144 A.D.2d 648, 649, 535 N.Y.S.2d 13, 14 (2d Dep't 1988)) (citing Wisoff v. Cnty. of Westchester, 296 A.D.2d 402, 402, 745 N.Y.S.2d 60, 61 (2d Dep't 2002); Sigmond v. Liberty Lines Transit, Inc., 261 A.D.2d 385, 387, 689 N.Y.S.2d 239, 241 (2d Dep't 1999)).

223. *Smith*, 16 N.Y.3d at 133, 944 N.E.2d at 639, 919 N.Y.S.2d at 104.

to Centro and answered the certified question in the negative.[224] The Court reiterated the long-standing rule that a bus company's duty is to stop at a place where the passenger may safely alight from the vehicle and safely leave the area.[225] Once the passenger removes himself from the bus, no further duty exists to the bus company even if the passenger is a school child who attempts to cross the street by passing in front of the bus.[226]

The plaintiff also argued that there was a question of fact as to the reason why the student was dropped on the wrong side of the street.[227] The Court of Appeals felt that it was not necessary to resolve the factual issue as the bus company's duty was terminated the minute the child got off the bus on the sidewalk.[228] The Court also found that the school bus was not subject to the rules of the Vehicle and Traffic Law requiring safety devices on school buses and accordingly dismissed the complaint against Centro and its driver.[229]

As a result, the Court of Appeals reversed the appellate division order, dismissed the case, and the certified question was answered in the negative.[230] The Court determined that the infant plaintiff exited the bus at a safe location, thus terminating the duty owed to him by the defendant, Centro.[231] As a result, the case against Centro and its driver was dismissed, and the certified question was answered in the negative.[232]

D. Scope of School District's Duty to Protect Students from Actions of Other Students

The Court of Appeals also had occasion to review yet another after-school injury during the *Survey* year in the case of *Stephenson v. City of New York*.[233] In *Stephenson*, the infant plaintiff got into a fight

224. *Id.*

225. *Id.* (quoting Miller v. Fernan, 73 N.Y.2d 844, 846, 534 N.E.2d 40, 40, 537 N.Y.S.2d 123, 124 (1988)).

226. *Smith*, 16 N.Y.3d at 133, 944 N.E.2d at 639, 919 N.Y.S.2d at 104 (citing *Wisoff*, 296 A.D.2d at 402, 745 N.Y.S.2d at 61*; Sigmond*, 261 A.D.2d at 387, 689 N.Y.S.2d at 241; Mooney v. Niagara Frontier Transit Metro Sys., Inc., 125 A.D.2d 997, 998, 510 N.Y.S.2d 393, 393 (4th Dep't 1986)).

227. *Smith*, 16 N.Y.3d at 134, 944 N.E.2d at 639, 919 N.Y.S.2d at 104.

228. *Id.*

229. *Id.*, 944 N.E.2d at 640, 919 N.Y.S.2d at 105 (citing N.Y. VEH. & TRAF. LAW § 1174(a) (McKinney 2011)).

230. *Smith*, 16 N.Y.3d at 134, 944 N.E.2d at 640, 919 N.Y.S.2d at 105.

231. *Id.*

232. *Id.*

233. *See generally* 19 N.Y.3d 1031, 954 N.Y.S.2d 782 (2012).

with another student between classes that was broken up by friends of the parties. Two days later, the infant plaintiff was assaulted by the same fellow student two blocks from the school just prior to school hours.[234] Both boys received in-school suspensions, the infant plaintiff for one day and the other child received a suspension for two weeks.[235] The boys were separated at the time of the first altercation and left school at different times so the fighting would not continue. However, the day before the assault, the infant plaintiff saw the other boy on school grounds, and was threatened by him.[236] The plaintiff brought action against the defendant school district alleging, among other things, that school officials failed to ensure the child's safety. The defendants moved for summary judgment arguing, among other things, that the defendants owed no duty to the plaintiff because the incident that caused the plaintiff's injuries occurred before regular school hours and off school property.[237] The supreme court denied the defendant's motion; the appellate division reversed and granted defendant's motion to dismiss the complaint.[238]

In the unanimous memorandum decision, the Court of Appeals determined that there could be no liability on behalf of the defendant school district as the duty of care for students does not extend beyond school premises, or, as has been said in a prior Court of Appeals case, "[w]hen [the school's] custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases."[239]

The Court, however, did recognize that there are certain situations that extend the duty to supervise children off school premises.[240] The Court viewed this case differently than the *Bell/Ernest* line of cases, as in each of those cases the injury occurred either during school hours or shortly thereafter upon the students departure from school, and, in this

234. *Id.* at 1032, 954 N.Y.S.2d at 782.

235. *Id.* at 1033, 954 N.Y.S.2d at 782.

236. *Id.*

237. *Id.*

238. Stephenson v. City of N.Y., 85 A.D.3d 523, 523, 925 N.Y.S.2d 71, 72 (1st Dep't 2011).

239. Pratt v. Robinson, 39 N.Y.2d 554, 560, 349 N.E.2d 849, 852, 384 N.Y.S.2d 749, 752-53 (1976) (citations omitted).

240. *Stephenson*, 19 N.Y.3d at 1034, 954 N.Y.S.2d at 782 (citing Bell v. Bd. of Educ. of N.Y., 90 N.Y.2d 944, 944, 687 N.E.2d 1325, 1325, 665 N.Y.S.2d 42, 42 (1997); Ernest v. Red Creek Cent. Sch. Dist., 93 N.Y.2d 664, 664, 717 N.E.2d 690, 690, 695 N.Y.S.2d 531, 531 (1999)).

case, none of those circumstances were present.[241] The Court also declined to find a duty on behalf of the school district to notify the parents of the impending danger of an altercation between their child and another student, as there was no threatened conduct that would occur while the child was at school.[242]

E. School District's Liability for Thoughtless and Careless Acts of Another Student

In another action dealing with the scope of responsibility of a school district for injuries to students, the Court of Appeals in *Summer H. v. New York City Department of Education*[243] absolved a school district from liability for injuries to a young student injured during the course of a school day. In a unanimous memorandum decision, the Court found that a classmate's thoughtless or careless act was not preventable by reasonable supervision, and as a result affirmed an Appellate Division, First Department, decision that granted summary judgment to the defendant school district.[244]

In *Summer H.*, the infant plaintiff, Summer Hunter, was sitting on a rug in her second grade class when a classmate writing on a nearby chalkboard stepped back and fell on top of her, injuring her.[245] The infant's parents then brought action against the school district and the district moved for summary judgment based on the fact that the injuries were caused by a thoughtless or careless act of another student that could not have been prevented by reasonable supervision.[246] Bronx County, Supreme Court, Justice Ruiz denied the motion, and the defendant school district appealed to the Appellate Division, First Department.[247] The First Department, in a three-to-two decision, found that the classmate's spontaneous act and the subsequent injury could not have been prevented by reasonable supervision.[248] Presiding Judge Tom and Judge Manzanet-Daniels dissented based on deposition testimony that led them to conclude that a jury might decide that the

241. *Stephenson*, 19 N.Y.3d at 1034, 954 N.Y.S.2d at 782.

242. *Id.* (citing Kimberly S. M. v. Bradford Cent. Sch. Dist., 226 A.D.2d 85, 88, 649 N.Y.S.2d 588, 590 (4th Dep't 1996)).

243. 19 N.Y.3d 1030, 1031, 954 N.Y.S.2d 1, 1 (2012).

244. *Id.*

245. Hunter v. N.Y.C. Dep't of Educ., 95 A.D.3d 719, 719, 945 N.Y.S.2d 76, 76 (1st Dep't 2012).

246. *Id.*

247. *Id.*

248. *Id.* (citing Lizardo v. Bd. of Educ. of N.Y., 77 A.D.3d 437, 437, 908 N.Y.S.2d 395, 395 (1st Dep't 2010)).

defendant's employees were negligent in permitting the child to sit and play on a rug inches away from where another student was writing on a chalk board with her back to the plaintiff.[249] As a result, the dissent believed that there were questions of fact as to whether the defendant school district created a dangerous condition, or whether it adequately supervised the students in its care.[250] The dissent also believed that the accident was foreseeable, in that, the teacher testified that she told the other two students standing by the chalkboard to watch out for the children who were playing on the rug.[251]

Upon review of the facts submitted to the Court of Appeals, the Court unanimously affirmed, determining that the classmate's thoughtless or careless act was not preventable by reasonable supervision.[252]

F. State Mental Hospital Liability and Proof of Causation

In *Williams v. State*, the plaintiff brought action against the State of New York to recover for personal injury she sustained when attacked by an individual who had, two years prior to the attack, left a mental health facility operated by the State without the consent of the State.[253] After a bench trial, Court of Claims Justice Marin dismissed the claim on the basis of lack of proof of causation.[254] The case was then considered by the Appellate Division, First Department, which issued a three-to-two decision on May 3, 2011, reversing the Court of Claims decision, reinstating the claim, finding the State liable and remanding the matter for a trial on the issue of damages.[255] The dissenters at the First Department felt that the assault was too remote in time to be proximately caused by any acts or omissions occurring at the Manhattan Psychiatric Center some two years before the assault.[256] The First Department then granted the State's motion for leave to appeal to the Court of Appeals on the certified question of law whether the order was properly made.[257] The Court of Appeals, in a unanimous memorandum decision, reversed and answered the questions presented in the

249. *Hunter*, 95 A.D.3d at 720, 945 N.Y.S.2d at 77 (Tom, J.P., dissenting).

250. *Id.*

251. *Id.* at 720-21, 945 N.Y.S.2d at 77-78.

252. Summer H. v. N.Y. Dep't of Educ., 19 N.Y.3d 1030, 1031, 954 N.Y.S.2d 1, 1 (2012).

253. 18 N.Y.3d 981, 983, 969 N.E.2d 197, 198, 946 N.Y.S.2d 81, 82 (2012).

254. Williams v. State, No. 94695, 2009 N.Y. Slip Op. 51103(U), at 4 (Ct. Cl. 2009).

255. Williams v. State, 84 A.D.3d 412, 412-13, 924 N.Y.S.2d 23, 24 (1st Dep't 2011).

256. *Id.* at 417, 924 N.Y.S.2d at 27.

257. *Williams*, 18 N.Y.3d at 983-84, 969 N.E.2d at 199, 946 N.Y.S.2d at 83.

negative.[258] The Court determined that, given the two years between the negligence and the ultimate attack on the plaintiff, the causal connection was too "attenuated and speculative to support liability."[259] The Court reasoned that there are any number of circumstances that might have arisen during the two year time period that possibly could have triggered a change in mental condition, many of which may be difficult or impossible to show.[260] The Court concluded by finding that the lapse of time simply was not reasonable and that the State was entitled to dismissal of the claim.[261]

G. Municipal Liability for Injuries to Employees for Compulsory Attendance at Disability Examinations

In *Bonomonte v. City of New York*, the issue of proximate cause again came to the attention of the Court of Appeals.[262] There, the plaintiff was injured when he was ordered to travel to a clinic for medical evaluation or face possible termination or suspension of employment and medical benefits.[263] While on his way to the mandated doctor's appointment, the plaintiff slipped and fell outside of his home and allegedly exacerbated a previous injury to his right arm.[264] The plaintiff contended that he had been advised by his physician not to travel, and, had he not been ordered to go to the examination, he would not have been injured.[265] The Appellate Division, First Department, in a four-to-one decision found that the evidence submitted by the plaintiff failed to establish proximate cause.[266] Appellate Justice Manzanet-Daniels dissented, expressing the view that "[i]t cannot be said, as a matter of law, that defendant employer owed plaintiff employee no duty."[267] The dissent further espoused the view that the plaintiff should have been subject to a field visit as a medical form in his chart had explained, but, despite the plaintiff's protests that he was under a physician's orders not to travel, he was nonetheless ordered to go to the

258. *Id.*

259. *Id.* at 984, 969 N.E.2d at 199, 946 N.Y.S.2d at 83.

260. *Id.*

261. *Id.*

262. Bonomonte v. City of N.Y., 17 N.Y.3d 866, 867, 956 N.E.2d 1266, 1266, 939 N.Y.S.2d 421, 421 (2011).

263. Bonomonte v. City of N.Y., 79 A.D.3d 515, 516, 914 N.Y.S.2d 19, 20 (1st Dep't 2010).

264. *Id.* at 515, 914 N.Y.S.2d at 20.

265. *Id.* at 516, 914 N.Y.S.2d at 20.

266. *Id.*

267. *Id.*

clinic or risk termination and denial of medical benefits.[268] Justice Manzanet-Daniels concluded that the employer owed him a duty, which, under the circumstances, arguably was breached.[269] The First Department then certified the question to the Court of Appeals, "'Was the order of this Court, which affirmed the order of Supreme Court, properly made?'"[270] The Court of Appeals unanimously answered in the affirmative and dismissed the plaintiff's action against the defendant on the basis that the defendant had established as a matter of law that any negligence on its part was not the proximate cause of injury to the plaintiff.[271]

H. Emergency Vehicle and Application of Vehicle and Traffic Law Section 1104

Last year, the *Survey* reported that the Court of Appeals in *Kabir v. County of Monroe* established a more definite test regarding the protections provided to public servants in Vehicle & Traffic Law section 1104 for the "emergency operation" of a vehicle.[272] In *Kabir*, it was established that the "reckless disregard standard" of section 1104(e) will be applied only when the proof shows that the public servant was actually in the process of performing one of the four activities specified in the law.[273] If such proof is lacking, the defendant does not get the benefit of the statute and liability will be assessed by ordinary rules of evidence.[274] This past *Survey* year there were a number of appellate division decisions applying this strict evaluation.

1. Must Be Involved in Emergency Operation

In order for the privilege afforded under section 1l04 to apply, the vehicle must be involved in an "emergency operation."[275] In *Mouszakes v. County of Suffolk*, the plaintiffs alleged they were injured when they were struck by a vehicle being operated by an intoxicated driver, while it was being pursued by a Suffolk County police officer.[276] Suffolk

268. *Bonomonte*, 79 A.D.3d at 516, 914 N.Y.S.2d at 20.

269. *Id.* at 517, 914 N.Y.S.2d at 21.

270. Bonomonte v. City of N.Y., 17 N.Y.3d 866, 956 N.E.2d 1266, 932 N.Y.S.2d 421 (2011).

271. *Id.* at 867, 956 N.E.2d at 1266, 932 N.Y.S.2d at 421 (citing Sheehan v. City of N.Y., 40 N.Y.2d 496, 503, 354 N.E.2d 832, 835, 387 N.Y.S.2d 92, 96 (1976)).

272. 16 N.Y.3d 217, 222, 945 N.E.2d 461, 463, 920 N.Y.S.2d 268, 270 (2011).

273. *See id.*

274. *See id.*

275. *See id.* at 220, 945 N.E.2d at 461, 920 N.Y.S.2d at 268; *see also* N.Y. VEH. & TRAF. LAW § 1104(a) (McKinney 2011).

276. 94 A.D.3d 829, 829, 941 N.Y.S.2d 850, 850-51 (2d Dep't 2012).

County Supreme Court Justice Basiley denied the defendants' motion for summary judgment dismissing the complaint and all cross claims.[277]

On appeal, the Appellate Division, Second Department, reversed on the law[278] and held that the pursuit of a suspect falls under the definition of "emergency operation."[279] The emergency operation of a police vehicle includes "pursuing an actual or suspected violator of the law."[280] The court held that the defendants "made a prima facie showing that the police officer involved in the pursuit of the intoxicated driver was engaged in an emergency operation at the time of the accident, and the police officer's conduct did not rise to the level of reckless disregard for the safety of others."[281]

In *Banks v. City of New York*, the First Department held that Judge Jaffe properly instructed the jury to consider whether the defendant was involved in an emergency operation.[282] The defendants asserted that the police officer involved in the accident was operating the vehicle at the time of the accident in an effort to investigate a person who, from a truck, may have waved to the police.[283] The plaintiff denied seeing the truck.[284] The court affirmed that the proof submitted presented issues of fact as to whether the police officer was actually engaged in the emergency operation of an authorized vehicle.[285] The court upheld a jury verdict in the plaintiff's favor.[286]

2. Must Be in the Process of Performing in One of the Four Categories Listed in Section 1104(b)

A number of cases this year demonstrated the strictly applied requirement that in order for the privileges afforded under section 1104 to apply to the actions of a public servant, he must be in the process of performing one of the four categories of actions listed in section 1104(b). In *Gonzalez v. City of New York*, the First Department unanimously reversed on the law the decision of Supreme Court Justice

277. *Id.*

278. *Id.*

279. *Id.* at 830, 941 N.Y.S.2d at 851.

280. *Id.* at 829-30, 941 N.Y.S.2d at 850 (quoting N.Y. VEH. & TRAF. LAW § 114(b)).

281. *Mouszakes*, 94 A.D.3d at 830, 941 N.Y.S.2d at 851 (citing Saarinen v. Kerr, 84 N.Y.2d 494, 503-04, 644 N.E.2d 988, 992-93, 620 N.Y.S.2d 297, 301-02 (1994); Gonzalez v. Zavala, 88 A.D.3d 946, 948, 931 N.Y.S.2d 396, 397-98 (2d Dep't 2011); Nurse v. City of N.Y., 56 A.D.3d 442, 443, 867 N.Y.S.2d 486, 487 (2d Dep't 2008)).

282. 92 A.D.3d 591, 591, 939 N.Y.S.2d 39, 39-40 (1st Dep't 2012).

283. *Id.*, 939 N.Y.S.2d at 40.

284. *Id.*

285. *Id.* (citations omitted).

286. *Id.*, 939 N.Y.S.2d at 39.

Wright which granted the defendant's motion for summary judgment.[287] The defendant was driving a fire truck to the scene of an emergency when the truck collided with a van.[288] The plaintiff had stopped and was turning right with the traffic light in his favor, when the fire truck hit the plaintiff's van.[289] The court held that actions of the defendant driver did not fall into any of the four categories of section 1104(b).[290] The defendant "was not stopping, standing or parking in violation of the rules of the road, proceeding past a red signal or stop sign, speeding, or proceeding in the wrong direction or making an unlawful turn."[291] If the conduct of the defendant does not fall into one of the categories, the alleged negligence of the defendant will be weighed by ordinary negligence principles and will not be governed by the reckless disregard standard of care provided in Vehicle & Traffic Law section 1104(e).[292]

In *Fajardo v. City of New York*, the Second Department reversed Supreme Court Justice Flug's order granting summary judgment dismissing the complaint.[293] While attempting to change lanes, a vehicle operated by the plaintiff was struck in the rear by a New York City Fire Department fire rescue truck that was responding to an emergency.[294] The court held that section 1104(b) does not exempt the driver of an authorized emergency vehicle engaged in an emergency operation from the rule that prohibits a driver of a vehicle from following too closely behind another vehicle.[295] The fire rescue truck struck the plaintiff approximately thirty seconds after the traffic signal controlling the lane in which both vehicles were traveling changed from red to green, and while the fire rescue truck was decelerating from approximately fifteen miles per hour in moderate-to-heavy traffic conditions.[296] Under the circumstances of the accident, the court found that the driver of the fire rescue truck was not engaged in the specific conduct exempted from the rules of the road by section 1104(b), and, therefore, the principles of ordinary negligence applied.[297]

287. 91 A.D.3d 582, 582, 936 N.Y.S.2d 892, 892 (1st Dep't 2012).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Gonzalez*, 91 A.D.3d at 582, 936 N.Y.S.2d at 892 (citing Kabir v. Cnty. of Monroe, 16 N.Y.3d 217, 217, 945 N.E.2d 461, 461-62, 920 N.Y.S.2d 268, 268-69 (2011); Tatishev v. City of N.Y., 84 A.D.3d 656, 656-57, 923 N.Y.S.2d 523, 523 (1st Dep't 2011)).

293. 95 A.D.3d 820, 820, 943 N.Y.S.2d 587, 588 (2d Dep't 2012).

294. *Id.*

295. *Id.* (citing N.Y. VEH. & TRAF. LAW § 1129(a) (McKinney 2011)).

296. *Fajardo*, 95 A.D.3d at 820, 943 N.Y.S.2d at 588.

297. *Id.*

In *Kantanov v. County of Nassau*, the Second Department held that the emergency operations exception did not apply when a police officer hit a pedestrian in a parking lot.[298] The court reversed Supreme Court Justice Brandveen's order granting summary judgment dismissing the complaint.[299] The plaintiff was struck in the parking lot of an assisted living home while the police officer was responding to a 911 call.[300] The court held that the injury causing conduct of the police officer while making a turn into a parking space and traveling at approximately two miles per hour did not fall within any of the categories of conduct set forth in section 1104(b).[301]

3. What Constitutes Reckless Disregard?

If it can be shown that the public servant was involved in an emergency operation and that his conduct is covered by one of the four categories included under section 1104(b) then ordinary negligence principles no longer govern and the section 1104(e) "substantial disregard standard" is applied.[302]

In *Elnakib v. County of Suffolk*, the Second Department affirmed Supreme Court Justice Costello's interlocutory judgment denying the defendants' motion pursuant CPLR section 4401 for a judgment as a matter of law at the close of evidence and upon a jury verdict on the issue of liability in favor of the plaintiff.[303] The jury found that a police officer had acted with reckless disregard when he struck the plaintiff's car in an intersection.[304] The evidence showed that police officer drove through a stop sign at a view-obstructed intersection at a high rate of speed, striking the plaintiff's vehicle.[305] In order to find reckless disregard, proof must be provided "that the officer intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow."[306] The court held that based on this evidence a jury could find that there was reckless disregard.[307]

298. 91 A.D.3d 723, 725, 936 N.Y.S.2d 285, 287 (2d Dep't 2012).

299. *Id.* at 723-24, 936 N.Y.S.2d at 286.

300. *Id.*

301. *Id.* at 725, 936 N.Y.S.2d at 287.

302. Kabir v. Cnty. of Monroe, 16 N.Y.3d 217, 220, 945 N.E.2d 461, 461-62, 920 N.Y.S.2d 268, 268-69 (2011).

303. 90 A.D.3d 596, 596, 934 N.Y.S.2d 223, 224 (2d Dep't 2011).

304. *Id.* at 597, 934 N.Y.S.2d at 224-25.

305. *Id.*

306. *Id.* (quoting Badalamenti v. City of N.Y., 30 A.D.3d 452, 453, 817 N.Y.S.2d 134, 135 (2d Dep't 2006) (internal quotation marks omitted).

307. *Elnakib*, 90 A.D.3d at 597, 934 N.Y.S.2d at 224-25.

Three cases this *Survey* year demonstrate how difficult it is to prove reckless disregard. In *Spencer v. Astralease Associated, Inc.*, the First Department found that the defendant was entitled to summary judgment and dismissed the complaint.[308] The infant plaintiff was in the rear-seat when the vehicle was struck by the defendant who was operating an ambulance.[309] The car the plaintiff was riding in was struck while the driver was proceeding through an intersection with a green light in her favor.[310] The ambulance driver was responding to an emergency situation and had activated his siren and emergency lights prior to the accident, hit the ambulance's air horn several times, and slowed his rate of speed as he approached the intersection.[311] The court determined that, based on the facts established in the record, the driver had a qualified privilege to proceed through the red light.[312] Further, the court stated that there was no evidence that the driver acted with reckless disregard for the safety of others.[313]

In *Gonzalez v. Zavala*, the Second Department reversed Supreme Court Justice Spinola's order denying the defendant's motion for summary judgment.[314] The plaintiff was struck by a van that was being pursued by the defendant, a Nassau County police officer.[315] The defendant police officer attempted to stop a van after it made an illegal u-turn, and the van did not pull over.[316] The officer pursued the van, which reached speeds of seventy miles per hour and failed to stop for nine red lights while swerving in out of traffic.[317] During the pursuit, the defendant police officer stopped at each red light before catching up with the van.[318] During the chase, the van sideswiped another car, hit a taxi, and then swerved onto the sidewalk and hit the plaintiff pedestrian.[319] The court found that the defendant "made a prima facie showing that [the officer] was engaged in an emergency operation at the time of the subject accident, and that his conduct did not rise to the level of reckless disregard for the safety of others."[320]

308. 89 A.D.3d 530, 531, 932 N.Y.S.2d 480, 481 (1st Dep't 2011).
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Spencer*, 89 A.D.3d at 531, 932 N.Y.S.2d at 481.
314. 88 A.D.3d 946, 947, 931 N.Y.S.2d 396, 397 (2d Dep't 2011).
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Gonzalez*, 88 A.D.3d at 947, 931 N.Y.S.2d at 397.
320. *Id.* at 948, 931 N.Y.S.2d at 398.

In *Nikolov v. Town of Cheektowaga*, the Fourth Department unanimously affirmed Supreme Court Justice Feroleto's order granting the defendants' motion for summary judgment dismissing the complaint.[321] The plaintiff was struck at an intersection by the defendant police officer.[322] At the time of the collision, the defendant officer was operating a police vehicle while responding to a dispatch call concerning a reckless driver.[323] The court found that because the defendant officer was engaged in an "emergency operation" the standard of liability pursuant section 1104(e) was reckless disregard for the safety of others.[324] The court reasoned that even if the officer had not engaged the police vehicle's lights and sirens, or even if the officer experienced a short-term reduction in visibility of the intersection, those factors did not rise to the level of the reckless disregard.[325]

The court found that there was no evidence that the defendant officer "intentionally [did] an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and [did] so with conscious indifference to the outcome."[326]

III. MOTOR VEHICLE

A. No Fault: Serious Injury and the Need for Contemporaneous Quantitative Assessments Under Toure

In *Toure v. Avis Rent A Car Systems, Inc.*, the Court of Appeals sets forth quantitative and qualitative assessments as a guide to determining whether or not an injured party can proceed with a personal injury action in motor vehicle cases.[327] *Toure* required that the plaintiff prove through numerically quantified objective proof the serious nature of an injury.[328]

Following the *Toure* decisions, most appellate courts throughout the state began to dismiss many personal injury cases, adding a specific requirement not necessarily contemplated by *Toure* that the plaintiff

321. 96 A.D.3d 1372, 1372, 946 N.Y.S.2d 734, 734-35 (4th Dep't 2012).

322. *Id.*, 946 N.Y.S.2d at 734.

323. *Id.*

324. *Id.*

325. *Id.* at 1373, 946 N.Y.S.2d at 735.

326. *Nikolov*, 96 A.D.3d at 1374, 946 N.Y.S.2d at 735 (quoting Saarinen v. Kerr, 84 N.Y.2d 494, 501, 644 N.E.2d 988, 991, 620 N.Y.S.2d 297, 300 (1994)) (internal quotation marks omitted).

327. 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 1199, 746 N.Y.S.2d 865, 868 (2002).

328. *Id.*; *see also* Friscia v. Mak Auto, Inc., 59 A.D.3d 492, 493, 873 N.Y.S.2d 197, 197 (2d Dep't 2009).

demonstrate quantitatively the effects of the injury both contemporaneously or close to the accident date, and confirm the findings later before trial.[329]

On October 19, 2011, the Court of Appeals heard argument in a trilogy of cases where the plaintiffs' actions for personal injury were dismissed at the appellate level for lack of contemporaneous objective evidence quantified by an examining physician near the time of the accident.[330] These cases dealt with three specific serious injury categories under the New York State Insurance Law, including permanent loss of use of a body organ, member, function, or system; permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.[331] In *Travis*, the court also dealt with the issue of whether the plaintiff had sustained a serious injury based on the basis of a medically determined injury or impairment of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute such persons usual and customary daily routines for not fewer than 90 days during the next 180 days immediately following the occurrence of the injury or the impairment.[332] In a decision released November 22, 2011, Judge Smith wrote for a unanimous court in reversing the appellate division findings in *Perl* and *Adler*, finding that the evidence that the plaintiff submitted was legally sufficient, but affirmed the appellate division decision in the *Travis* case.[333]

The *Perl* decision starts with language used by former Chief Judge Judith Kaye in reaffirming the Court's belief that "[a]buse . . . abounds" in serious injury claims in New York State.[334] The plaintiffs in each of the cases relied on one or both of the first two categories in section 5102(d) of the Insurance Law, claiming permanent and/or significant

329. *See* Stevens v. Sampson, 72 A.D.3d 793, 794, 898 N.Y.S.2d 657, 658 (2d Dep't 2010); Little v. Locoh, 71 A.D.3d 837, 838, 897 N.Y.S.2d 183, 184-85 (2d Dep't 2010); Sierra v. Gonzalez First Limo, 71 A.D.3d 864, 865, 895 N.Y.S.2d 863, 864 (2d Dep't 2010).

330. *See* Adler v. Bayer, 77 A.D.3d 692, 693, 909 N.Y.S.2d 526, 527 (2d Dep't 2010), *leave to appeal granted* 16 N.Y.3d 702, 942 N.E.2d 319, 917 N.Y.S.2d 108 (2011); Perl v. Meher, 74 A.D.3d 930, 930, 902 N.Y.S.2d 632, 633 (2d Dep't 2010); Travis v. Batchi, 75 A.D.3d 411, 411, 905 N.Y.S.2d 66, 67 (1st Dep't 2010).

331. *See Adler*, 77 A.D.3d at 693, 909 N.Y.S.2d at 527; *Perl*, 74 A.D.3d at 930, 902 N.Y.S.2d at 633; *Travis*, 75 A.D.3d at 412, 905 N.Y.S.2d at 67.

332. *See Travis*, 75 A.D.3d at 411, 905 N.Y.S.2d at 67; N.Y. INS. LAW § 5102(d) (McKinney 2009).

333. Perl v. Meher, 18 N.Y.3d 208, 215, 960 N.E.2d 424, 426, 936 N.Y.S.2d 655, 657 (2011).

334. *Id.* at 214, 960 N.E.2d at 426, 936 N.Y.S.2d at 657 (quoting Pommells v. Perez, 4 N.Y.3d 566, 571, 830 N.E.2d 278, 280, 797 N.Y.S.2d 380, 382 (2005)) (internal quotation marks omitted).

limitations of use of a body organ or system.[335] In *Travis*, the plaintiff also relied upon the third category, claiming that she was prevented from performing substantially all of the material acts of her usual and customary daily activities for at least 90 out of the first 180 days following her accident.[336]

The *Perl* defendants moved for motion for summary judgment, and Supreme Court, Kings County, Justice Martin, issued an order dated April 15, 2009 in which he denied the request.[337] The Appellate Division, Second Department, by a three-to-two decision, reversed the decision and dismissed the plaintiff's case.[338]

The *Adler* case went to trial and resulted in a jury verdict for the plaintiffs, after which the appellate division reversed and dismissed the complaint.[339]

In *Travis*, Justice Walker, Bronx County, Supreme Court, granted the defendant's motion for summary judgment dismissing the complaint for lack of serious injury, and the Appellate Division, First Department, affirmed.[340] The Court of Appeals unanimously affirmed the appellate division decision in *Travis*, based on the fact that they found no evidence of either a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system.[341] The Court also found that there was no adequate proof of a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all the material acts which constitute her usual and customary daily activities for not fewer than 90 days during the 180 days immediately following the occurrence of the injury or impairment.[342]

The question that was presented to the Court was whether or not quantitative and qualitative assessments and measurements must be taken and recorded early on in an injured plaintiff's treatment, and supported by objective proof.[343] In both *Perl* and *Adler*, the plaintiffs relied on the same medical physician, Dr. Leonard Bleicher.[344] In both *Perl* and *Adler*, the plaintiffs testified as to the qualitative restrictions

335. *Perl*, 18 N.Y.3d at 214, 960 N.E.2d at 426, 936 N.Y.S.2d at 657.
336. *Id.*
337. Perl v. Meher, 74 A.D.3d 930, 930, 902 N.Y.S.2d 632, 633 (2d Dep't 2010).
338. *See id.* at 932, 902 N.Y.S.2d at 633.
339. Adler v. Bayer, 77 A.D.3d 692, 692, 909 N.Y.S.2d 526, 526 (2d Dep't 2010.
340. Travis v. Batchi, 75 A.D.3d 411, 411-12, 905 N.Y.S.2d 66, 66-67 (1st Dep't 2010).
341. *Perl*, 18 N.Y.3d at 219-20, 96 N.E.2d at 429; 936 N.Y.S.2d at 660.
342. *Id.* at 220, 960 N.E.2d at 430, 936 N.Y.S.2d at 661.
343. *See id.* at 216, 960 N.E.2d at 427, 936 N.Y.S.2d at 658.
344. *Id.*

that they had after the accident as a result of the injuries sustained in their respective accidents.[345] The plaintiff in *Perl* testified that he could no longer garden, carry packages, or have marital relations.[346] The plaintiff in *Adler* testified that he could not move around easily, could not read for a long time, and could not pick up his children.[347] The question presented to the Court of Appeals was whether Dr. Bleicher's quantitative findings were made too long after the accidents to be reliable objective proof of the serious injuries to which the parties complained.[348] The defendants had argued, and the appellate divisions in both *Perl* and *Adler* had agreed, that plaintiffs are required to demonstrate objective proof by way of restriction of range of motion or other findings of an objective nature both contemporaneous to the accident and on recent findings prior to trial, a motion for summary judgment.[349]

The Court of Appeals determined that there was no such requirement of "contemporaneous" quantitative measurements, and held that there was no justification for such a requirement under *Toure v. Avis Rent A Car Systems*.[350] The Court determined that:

> [A] rule requiring 'contemporaneous' numerical measurements of range of motion could have perverse results. Potential plaintiff should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.[351]

The Court also reviewed the *Perl* proof in accord with a defense raised by the defendants relying on *Pommells v. Perez* that the plaintiff had preexisting degenerative disease that was the cause of plaintiff's restrictions.[352] The Court noted, however, that the plaintiff's submitted evidence that created a question of fact by a radiologist in the form of an affidavit agreeing that the magnetic resonance imaging ("MRI") results are consistent with degenerative disease, but saying that the

345. *Id.*

346. *Perl*, 18 N.Y.3d at 216, 960 N.E.2d at 427, 936 N.Y.S.2d at 658.

347. *Id.*

348. *Id.* at 217, 960 N.E.2d at 428, 936 N.Y.S.2d at 659.

349. *See* Perl v. Meher, 74 A.D.3d 930, 931, 902 N.Y.S.2d 632, 634 (2d Dep't 2010); *see generally* Adler v. Bayer, 77 A.D.3d 692, 909 N.Y.S.2d 526 (2d Dep't 2010).

350. *Perl*, 18 N.Y.3d at 217, 960 N.E.2d at 428, 936 N.Y.S.2d at 659.

351. *Id.* at 218, 960 N.E.2d at 428, 936 N.Y.S.2d at 659.

352. *Id.*; *see generally* Pommells v. Perez, 4 N.Y.3d 566, 83 N.E.2d 278, 797 N.Y.S.2d 380 (2005).

question as to whether trauma is responsible for the plaintiff's condition can best be judged "by the patients treating physician in conjunction with exam, history, and any previous tests."[353] Dr. Bliecher had given the opinion that since *Perl* "had not suffered any similar symptoms before the accident or had any prior injuries/medical conditions that would result in these findings" that the findings were causally related to the accident. [354]

The Court of Appeals found that it was certainly within the realm of reason that an eighty-two-year-old man would have significant degenerative changes, but that it was impossible for them to say that such changes were the sole cause of the plaintiff's injuries.[355] The Court found that the issue presented was one of credibility, and not one in which the Court of Appeals could decide.[356]

In *Travis*, the Court could not decipher from the record what the plaintiff's alleged permanent impairment was, since her treating physician's report did not describe the disability, but gave the opinion that she had a mild partial permanent disability, and that she was currently able to perform the essential functions of her job.[357] The Court gave particular weight to the fact that the plaintiff was able to perform all the activities of her work and the essential functions of her job even though there were some "restrictions," but the record did not show any medically determined injury that would satisfy the "90/180" provision of Insurance Law section 5102(d).[358]

As a result, the Court has clarified what was a troublesome issue for the appellate courts in New York; that being the need or lack thereof of a contemporaneous quantitative and qualitative assessment in cases that involve serious injury.[359] It can be now said that the *Toure*, *Pommells*, and *Perl* Court of Appeals decisions have now set out four basic rules for determining whether or not there is adequate proof to satisfy the permanent/consequential definitions of serious injury:

1. The plaintiff must come forward with quantitative and qualitative assessments through objective testing to survive a motion for

353. *Perl*, 18 N.Y.3d at 219, 960 N.E.2d at 429, 936 N.Y.S.2d at 660 (internal quotation marks omitted).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 220, 960 N.E.2d at 430, 936 N.Y.S.2d at 661.

358. *Perl*, 18 N.Y.3d at 220, 960 N.E.2d at 430, 936 N.Y.S.2d at 661.

359. *See id.*

summary judgment or to sustain a jury verdict.[360]

2. If there is a gap in treatment, plaintiff must come forward with a reasonable explanation for the gap in order to survive a motion for summary judgment or to sustain a jury verdict.[361]

3. If there is evidence of pre-accident degenerative disease, and the defense presents that as evidence of the cause of injury, then the plaintiff must come forward with affirmative proof that supports a claim that plaintiff's injury at the time of the accident was the cause, and not the pre-existing degenerative disease.[362]

4. It is not necessary for medical providers to do quantitative and qualitative assessments contemporaneously or soon after an accident that is alleged to cause injury. It is sufficient to show a reasonable link between the early treatment and the later quantitative and qualitative assessments required under *Toure*.[363]

B. No Fault: Application of the Toure/Pommells/Perl *Rules in the Post-*Perl *Era*

During the *Survey* year, a number of appellate courts have had occasion to review cases dealing with the judicial mandates expressed in *Toure*, *Pommells*, and *Perl*. In *Williams v. Perez*, the Appellate Division, First Department, in a post-*Perl* decision, dealt with an issue where the plaintiff's expert did not come forward with proof expressly ruling out defendant's proof that pre-existing degenerative changes in the plaintiff's back were the cause of the plaintiff's injuries and limitations.[364] In that case, the plaintiff's physician testified that the plaintiff's accident was the cause of his current medical condition, and the cause of his need to have two distinct surgeries, one to his back, and the other to repair a defect in his right shoulder.[365] The defendant's experts presented findings that the plaintiff had normal range of motion of both his back and his shoulders.[366] In response, the plaintiff presented two treating physicians, both of whom found large loss of range of motion in both the plaintiff's back and arm, and that their examinations showed weakness and spasms, thus leading them to the

360. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 1199, 746 N.Y.S.2d 866, 867 (2002).

361. Pommells v. Perez, 4 N.Y.3d 566, 572, 830 N.E.2d 278, 281, 797 N.Y.S.2d 380, 383 (2005).

362. *Id.*

363. *Perl*, 18 N.Y.3d at 217-18, 960 N.E.2d at 428, 936 N.Y.S.2d at 659.

364. Williams v. Perez, 92 A.D.3d 528, 529, 938 N.Y.S.2d 536, 537-38 (1st Dep't 2012).

365. *Id.*

366. *Id.*, 938 N.Y.S.2d at 537.

opinion that the plaintiff had sustained a permanent consequential limitation, all as a result of the accident.[367] The Appellate Division, First Department, found, unanimously, that even though the plaintiff's proof in opposition to the defendant's motion for summary judgment did not specifically address the defendant's experts' opinions regarding pre-existing degenerative changes being the cause of the plaintiff's maladies, the court found that there was enough to raise triable issues of fact to defeat defendant's motion for summary judgment.[368]

In two cases, decided by the Appellate Division, Third Department, the court was called upon to review cases showing the limitations of proof with regard to a serious injury claim proven only by qualitative evidence as opposed to quantitative and qualitative evidence.[369] In *Peterson v. Cellery*, the plaintiff was rear-ended, and after being treated at the hospital for her injuries, began treatment with her primary physician who diagnosed a back sprain and recommended physical therapy.[370] Four months later, the plaintiff was in a second accident when she was struck from behind by defendant Picotte.[371] The plaintiff was removed from the vehicle by backboard and continued to be treated for back problems that she alleged got significantly worse as a result of the April accident.[372] An MRI done in July showed "degenerative disc dessication [sic] with a posterior tear at L5-S1 and mild posterior disc bulge at L4-L5" and she underwent a number of injections in her lumbar spine leading ultimately to spinal fusion surgery in May 2008.[373] Three months later she had two additional surgeries for spinal implants in an effort to alleviate her pain.[374] The plaintiff then brought action against the defendants *Cellery* and *Picotte*, the drivers of the two offending vehicles.[375] The defendants each moved separately for summary judgment on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d).[376] The supreme court granted defendant Cellery's motion in its entirety but found a question of fact with regard to significant disfigurement and significant limitation of use with regard to

367. *Id.*

368. *See id.* at 528, 938 N.Y.S.2d at 537-38.

369. *See* Peterson v. Cellery, 93 A.D.3d 911, 911, 940 N.Y.S.2d 194, 195 (3d Dep't 2012); Lipscomb v. Cohen, 93 A.D.3d 1059, 1060, 942 N.Y.S.2d 235, 236 (3d Dep't 2012).

370. *Peterson*, 93 A.D.3d at 911, 940 N.Y.S.2d at 195.

371. *Id.*

372. *Id.* at 912, 940 N.Y.S.2d at 195.

373. *Id.*, 940 N.Y.S.2d at 195-96.

374. *Id.*, 940 N.Y.S.2d at 196.

375. *Peterson*, 93 A.D.3d at 912, 940 N.Y.S.2d at 196.

376. *Id.*

Picotte's motion.[377] Defendant Picotte appealed to the appellate division.[378] The appellate division affirmed the grant of defendant Cellery's motion for summary judgment based upon the fact that there was no qualitative or quantitative assessment of the plaintiff's limitations set forth in the plaintiff's papers, but only a conclusory statement that the plaintiff suffered a significant limitation of her cervical, thoracic and lumbar spine which was "not mild but significant and hindered her movements."[379] The court found that the plaintiff's expert failed to make any distinction of mild or moderate that could establish a significant limitation of use.[380] In addressing Picotte's motion for summary judgment, the court noted that given the proof submitted on the motion through the affidavit of physician Daniel Silverman that the defendant presented enough evidence to shift the burden to the plaintiff to provide evidence of the claim of serious injury and to connect that evidence to the second accident involving Picotte.[381] In response, the plaintiff submitted the affidavit of her treating chiropractor who submitted the opinions that plaintiff suffered significant limitations of function of her low back because of the second accident based on the July 2007 MRI that showed the annular tear at L50-S1 and disc bulge at L4-L5.[382] The treating chiropractor also quantified the limitation of the cervical and lumbar ranges of motion, which was measured by a digital dual inclinometer, and gave the opinion that the plaintiff's limitations progressively worsened over time as a result of the second accident.[383] The plaintiff also submitted the affidavit of the plaintiff's treating neurosurgeon and a physician that examined the plaintiff several times after each accident, both of whom gave the opinion that the serious injuries sustained by the plaintiff were caused by the Picotte accident.[384] The experts' opinions were supported by physical examinations, objective medical evidence, including the plaintiff's MRI as well as spinal instability and bilateral compression of several nerve roots found at the May 2008 surgery.[385] The court also found that a five-inch-long vertical scar on plaintiff's back and a nearly three-inch-long horizontal scar from the implant surgery created a question of fact with regard to plaintiff's claim of significant

377. *Id.*
378. *Id.*
379. *Id.* at 913, 940 N.Y.S.2d at 197.
380. *Peterson*, 93 A.D.3d at 913, 940 N.Y.S.2d at 197.
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.* at 914, 940 N.Y.S.2d at 198.
385. *Peterson*, 93 A.D.3d at 914-15, 940 N.Y.S.2d at 198.

disfigurement.[386]

In *Lipscomb v. Cohen*, the plaintiff was struck from behind, and when the plaintiff moved for summary judgment on the issue of liability, the defendant moved for summary judgment on the grounds that plaintiff had not sustained a serious injury.[387] The plaintiff claimed never to have a neck injury before and alleged that his neck began to bother him after the accident.[388] Approximately one-and-one-half months after the accident the plaintiff returned to his family practitioner, started physical therapy, and six months later was referred to a neurosurgeon who began treating with exercises and steroid injections.[389] The plaintiff's pain became unbearable, and a neurosurgeon performed anterior cervical disc fusion at two levels a year and ten months after the accident.[390]

In response to the defendant's doctor's assertion that the limitations that the plaintiff suffered were as a result of the plaintiff's pre-existing degenerative condition, the plaintiff submitted more detailed opinions by the plaintiff's treating physicians that had reviewed the medical history and studies that had been done that gave the unequivocal opinion that the accident destabilized the plaintiff's cervical spine and led to the cervical intervention.[391] The court found that the qualitative opinions given by the plaintiff's physicians were enough to satisfy the *Toure* requirements, even though there was no specific quantitative objective testimony given or received via affidavit.[392] Concerning the "gap" in the plaintiff's treatment, the plaintiff came forward with a reasonable explanation for not having treated during that time.[393] His treating physician had given him exercises to do at home and agreed to see him on an "as needed" basis, and the plaintiff did not want to have surgery and had other health issues during the interim until the pain became unbearable.[394] The court found this to be a reasonable explanation for the gap.[395] In conclusion,

386. *Id.* at 915, 940 N.Y.S.2d at 198.

387. Lipscomb v. Cohen, 93 A.D.3d 1059, 1060, 942 N.Y.S.2d 235, 236 (3d Dep't 2012).

388. *Id.*

389. *Id.*

390. *Id.*, 942 N.Y.S.2d at 237.

391. *Id.* at 1061, 942 N.Y.S.2d at 237.

392. *Lipscomb*, 93 A.D.3d at 1061, 942 N.Y.S.2d at 237; *see* Toure v. Avis Rent A Car Sys., Inc., 98 N.Y.2d 345, 350-51, 774 N.E.2d 1197, 1200, 746 N.Y.S.2d 865, 868 (2002).

393. *Lipscomb*, 93 A.D.3d at 1061, 942 N.Y.S.2d at 237.

394. *Id.*

395. *Id.*

the court found that the plaintiff had suffered qualitative limitations and that this was sufficient as a description of the resulting limitations so as to qualify under the *Toure* standards.[396]

In the case of *Overhoff v. Perfettio*, the Fourth Department reversed a denial of the defendant's motion for summary judgment in a case where the plaintiff's physician expert failed to refute opinions set forth by the defense that the plaintiff did not sustain a functional disability or limitation related to the accident.[397] In *Overhoff*, the plaintiff's examining physician failed to compare the plaintiff's restrictions or the plaintiff's range of motion limitations both pre- and post-accident, and further failed to assess any of the plaintiff's pre and post-accident qualitative limitations, and by doing so, failed to meet their burden to prove a serious injury.[398] The plaintiff's expert also failed to address the manner in which the plaintiff's physical injuries were causally related to the accident in light of the prior medical condition.[399] In other words, the plaintiff failed to, in any way, prove qualitatively or quantitatively facts that would lead to a finding of "serious injury" or that the injury was causally related.[400]

C. No Fault—the Relationship Between Negligence, Liability, and Serious Injury

In 2003, the Appellate Division, First Department, clarified pre-existing case law and held that the matter of serious injury in a no-fault action is a matter separate and distinct from the determination of the issue of fault.[401] On May 30, 2012, the Second Department joined with the First and Third departments in also determining that the issue of liability is separate from the issue of serious injury.[402] In *Alexander v. Gordon*, the Appellate Division, Second Department, modified the decision of Supreme Court Justice Bayne, Kings County, and reinstated the plaintiff's complaint while denying the defendant's motion for summary judgment.[403] The defendants in that case had moved for summary judgment on the issue of serious injury, and that motion was

396. *Id.* at 1061-62, 942 N.Y.S.2d at 237-38 (citing *Toure*, 98 N.Y.2d at 350-51, 774 N.E.2d at 1200, 746 N.Y.S.2d at 868).

397. *See generally* 92 A.D.3d 1255, 938 N.Y.S.2d 403 (4th Dep't 2012).

398. *See id.* at 1256, 938 N.Y.S.2d at 403.

399. *Id.*, 938 N.Y.S.2d at 404.

400. *Id.*

401. *See* Reid v. Brown, 308 A.D.2d 331, 332, 764 N.Y.S.2d 260, 261-62 (1st Dep't 2003).

402. *See generally* Alexander v. Gordon, 95 A.D.3d 1245, 945 N.Y.S.2d 397 (2d Dep't 2012).

403. *Id.* at 1245, 945 N.Y.S.2d at 398-99.

granted by supreme court.[404] The plaintiff cross-moved for summary judgment on the issue of liability and serious injury.[405] The Appellate Division, Second Department, found that the defendant's motion should have been denied and, given the lateness of the plaintiff's motion, that the branch of the plaintiff's cross-motion for summary judgment on the issue of liability could not be reviewed by the court, as it was an issue of liability and was a matter separate and apart from the issue of serious injury, and therefore unrelated to the motion made by the defendant.[406] In doing so, the court upheld the well settled case law in the First, Second, and Third Departments that the issue of liability is separate from the issue of serious injury.[407]

However, the Appellate Division, Fourth Department has held that the issue of serious injury is included in a finding of liability, and as a result, in order to be successful in a motion for summary judgment, the plaintiff must prove negligence, causation, and serious injury.[408] The *Ruzycki* case was determined by the Fourth Department on November 15, 2002, not long before the First Department had clarified the issue of liability in *Reid v. Brown*.[409] Thus, in *Ruzycki v. Baker*, the Appellate Division, Fourth Department, based its decision on some of the older cases of the First Department that were specific overruled in *Reid v. Brown*.[410] In *Ruzycki*, the Appellate Division, Fourth Department recognized that the Second Department and Third Department both refer to "liability" in motor vehicle accident cases as not including the issue of serious injury within that term.[411] To this date, the *Ruzycki v. Baker* rationale has not been disturbed in the Appellate Division, Fourth

404. *Id.*, 945 N.Y.S.2d at 398.

405. *Id.*

406. *Id.* at 1247, 945 N.Y.S.2d at 399-400.

407. *See generally Alexander*, 95 A.D.3d 1245, 945 N.Y.S.2d 397.

408. *See generally* Ruzycki v. Baker, 301 A.D.2d 48, 750 N.Y.S.2d 680 (4th Dep't 2002).

409. *See generally id.*; Reid v. Brown, 308 A.D. 2d 331, 764 N.Y.S.2d 260 (1st Dep't 2000).

410. *See generally* Maldonado v. DePalo, 277 A.D.2d 21, 715 N.Y.S.2d 245 (1st Dep't 2000); Porter v. SPD Trucking, 284 A.D.2d 181, 727 N.Y.S.2d 70 (1st Dep't 2001).

411. *Ruzycki*, 301 A.D.2d 48 at 51-52, 750 N.Y.S.2d at 681 (citing Crespo v. Kramer, 295 A.D.2d 467, 467, 744 N.Y.S.2d 187, 189 (2d Dep't 2002); Hess v. Dart, 282 A.D.2d 810, 810-11, 722 N.Y.S.2d 433, 433 (3d Dep't 2001); Pola v. Nycz, 281 A.D.2d 839, 840, 722 N.Y.S.2d 818, 819 (3d Dep't 2001); Moreno v. Chemtob, 271 A.D.2d 585, 585, 706 N.Y.S.2d 150, 151 (2d Dep't 2000); Skellham v. Hendricks, 270 A.D.2d 619, 620, 704 N.Y.S.2d 684, 685 (3d Dep't 2000); Kelley v. Balasco, 226 A.D.2d 880, 880, 640 N.Y.S.2d 652, 653 (3d Dep't 1996); Perez v. State, 215 A.D.2d 740, 741, 627 N.Y.S.2d 421, 421 (2d Dep't 1995); Ives v. Corell, 211 A.D.2d 899, 900, 621 N.Y.S.2d 179, 180 (3d Dep't 1995); Powell v. N.Y.C. Transit Auth., 186 A.D.2d 728, 728-29, 589 N.Y.S.2d 71, 72 (2d Dep't 1992); Small v. Zelin, 152 A.D.2d 690, 691-92, 544 N.Y.S.2d 27, 28-29 (2d Dep't 1989)).

Department.[412] In *Monette v. Trummer*,[413] the Appellate Division, Fourth Department, again held the long-standing Fourth Department rule to be that the issue of liability includes the issue of serious injury.[414]

In doing so, the appellate division panel unanimously reversed the supreme court decision and found that the finding of the supreme court with regard to "liability" was not appropriate as the issue of serious injury must be necessarily decided, and in this case, there was a question of fact on the issue of serious injury.[415] As a result, the court resettled the order so as to allow for plaintiff's summary judgment on the issue of negligence, leaving separate the issues of proximate causation and serious injury.[416]

It is clear that the Fourth Department has continued to hold on to the last vestige of "liability" as including the issue of serious injury. Because of the departments' split, and the fact that there are so many cases that are litigated concerning this issue, it is possible that the Court of Appeals may soon have to review this issue.

D. No Fault—Where the Plaintiff's Expert Does Not Expressly Reject the Defendant's Theory of Degenerative Disease in Causation Yet Attributes Injuries to a Different Yet Equally Plausible Cause

In *Pommells v. Perez*, the Court of Appeals decided a triad of cases that dealt primarily with gaps in treatment, and the defendant's proof of degenerative disease on the issue of causation.[417] The *Pommells* trilogy of cases dealt with the issue of causation, and the adequacy of proof that the plaintiff must come forward with to make a question of fact given a treatment gap and/or pre-existing degenerative condition.[418] In *Carrasco v. Mendez*, one of the trilogy of cases resolved in the *Pommells v. Perez* action, the Court of Appeals unanimously affirmed the dismissal of the plaintiff's case, where the defendant came forward with proof that the plaintiff's injuries and limitation were caused by a degenerative condition as opposed to the accident, and the plaintiff did not come forward with evidence refuting the pre-existing condition as a

412. *See* Limardi v. McLeod, 100 A.D.3d 1375, 1375, 953 N.Y.S.2d 762, 762 (4th Dep't 2012); Verkey v. Hebard, 99 A.D.3d 1205, 1205, 952 N.Y.S.2d 356, 357 (4th Dep't 2012); Monette v. Trummer, 96 A.D.3d 1547, 1547, 946 N.Y.S.2d 529, 529 (4th Dep't 2012); Sauter v. Calabretta, 90 A.D.3d 1702, 1702, 936 N.Y.S.2d 469, 469 (4th Dep't 2011).

413. *Monette*, 96 A.D.3d at 1547, 946 N.Y.S.2d at 529.

414. *Id.*

415. *Id.*

416. *Id.*

417. 4 N.Y.3d 566, 572, 830 N.E.2d 278, 282-87, 797 N.Y.S.2d 380, 384-89 (2005).

418. *See id.*

cause.[419] The Court found that the plaintiff had the burden to come forward with evidence addressing the defendant's claimed lack of causation, and in the absence of any such evidence, defendant was entitled to summary dismissal of the complaint.[420]

In *Vaughan v. Leon*, the Appellate Division, First Department, was called upon to review a lower court denial of defendant's motion for summary judgment even though the proof was that degenerative disease was an equally plausible theory in causing the plaintiff's injuries.[421] In a three-to-two decision affirming Supreme Court Justice Tuitt, of Bronx County's denial of the defendants' motion for summary judgment, the majority determined that even though plaintiff's expert, Dr. Khakhar, did not expressly reject the defendants' opinion that the injuries were caused by degenerative disease, but rather presented a different, yet equally plausible cause that the plaintiff's injuries were caused by the accident, and thus raised a triable issue of fact for jury determination.[422] The two justice dissent, authored by Justice Friedman, and joined by presiding Justice Andrias, felt that inasmuch as the plaintiff "submitted no evidence specifically addressing [or] rebutting the view of the defense radiologist that [the] plaintiff's [limitations and injuries] were the result of a [pre-existing] degenerative condition" that the "defendants were entitled to summary judgment dismissing the complaint" so far as the plaintiff sought recovery for "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system."[423] The dissent went to great lengths to relay how the plaintiff's testify expert physician, Dr. Khakhar, "relied on an MRI report of an unidentified physician" without making the MRI report part of the record and without describing that the contents of the report were otherwise describing "how the unseen and undescribed report supported his conclusion."[424] Justice Friedman went on to explain that given the fact that the defense made a prima facie case on the issue of causation, that the plaintiff cannot and should not be able to "simply rely on a treating physician's unsupported assertion that the symptoms were somehow

419. *See id.* at 580, 830 N.E.2d at 287, 797 N.Y.S.2d at 389.

420. *See id.*

421. 94 A.D.3d 646, 646-48, 943 N.Y.S.2d 63, 64-65 (1st Dep't 2012).

422. *Id.* at 648-49; 943 N.Y.S.2d at 66 (citing Yuen v. Arka Memory Cab Corp., 80 A.D.3d 481, 482, 915 N.Y.S.2d 529, 529-31 (1st Dep't 2011); Linton v. Nawaz, 62 A.D.3d 434, 439-40, 879 N.Y.S.2d 82, 87 (1st Dep't 2009)).

423. *Vaughan*, 94 A.D.3d at 650, 943 N.Y.S.2d at 67 (citing N.Y. INS. LAW § 5102(d) (McKinney 2011)).

424. *Vaughan*, 94 A.D.3d at 654, 943 N.Y.S.2d 63 at 70.

causally related or connected to the accident."[425] The dissent went on to conclude based upon *Pommells* and *Perl* that the plaintiff's action should be dismissed, as there was no "principle basis for departing from a rule so well established and so well founded in reason and fairness."[426] Because of the two justice dissent, this case will no doubt be the subject of Court of Appeals review.

IV. LABOR LAW

A. Application of Labor Law Section 240(1) When an Employee Engaged in a Manufacturing Process Falls from a Defective Ladder While Involved in the Process of Cleaning a Product that Will Be Used in Construction

Since 2009, the Court of Appeals has adopted a liberal and expansive view of the application section 240 of the Labor Law.[427] The Court's liberal interpretation of Labor Law section 240(1) has dramatically changed the way that courts throughout the state now look at the mandate of absolute liability under the statute.[428] Most notably, as long as an injury is a direct result of the application of the forces of gravity, liability will generally attach even if the results are of a small or de minimis fall, or even when the falling or collapsing object has a base at the same level as work being performed.[429]

In *Dahar v. Holland Ladder & Manufacturing Co*., the Court of Appeals chose to take a much more conservative view of the application of section 240(1) in a claim that involved cleaning a product in a factory during the manufacturing process.[430] In *Dahar*, the plaintiff was a factory worker who was employed by West Metal Works, Inc., located in Cheektowaga, New York.[431] He was injured while cleaning a wall module manufactured by his employer that was to be installed in a nuclear waste treatment plant in Richland, Washington.[432] The module

425. *Id.*

426. *Id.* at 656-57, 943 N.Y.S.2d at 72.

427. *See* Runner v. N.Y. Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 867-68, 895 N.Y.S.2d 279, 281-82 (2009); Wilinski v. 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y3d 1, 10, 959 N.E.2d 488, 494, 935 N.Y.S.2d 551, 557 (2011); *see also* Cherundolo, *supra* note 121 at 938-43; Hon. John C. Cherundolo, *Tort Law, 2010-11 Survey of New York Law*, 62 SYRACUSE L. REV. 791, 792-99 (2012).

428. *See, e.g.*, *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 867-68, 895 N.Y.S.2d at 281-82; *Wilinski*, 18 N.Y.3d at 10, 959 N.E.2d at 494, 935 N.Y.S.2d at 557.

429. *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 867-68, 895 N.Y.S.2d at 281-82.

430. 79 A.D.3d 1631, 1633, 914 N.Y.S.2d 817, 819 (4th Dep't 2010).

431. *Id.* at 1632, 914 N.Y.S.2d at 818.

432. *Id.*

would be constructed into a building wall where it would provide support for pipes used in the waste process.[433] The module had been manufactured, and was in the process of being cleaned by the plaintiff when, as the plaintiff was descending the ladder, a rung broke causing the plaintiff to be injured.[434] The plaintiff then brought action against the owners (lessors) of the property in which the fabricating plant was located (Martins and also against Becktel Corporation and Becktel National, Inc.), the purchasers and ultimate planned installers.[435]

"At the time of the accident, [the] plaintiff was not performing work on any part" of the building in which he was employed, and was not admittedly not performing any "[b]uilding [c]onstruction, [d]emolition and [r]epair [w]ork."[436] Supreme Court, Erie County, Justice Mintz granted the motions for summary judgment of the defendants Martins and Becktel dismissing the Labor Law section 240(1) claim and denied the plaintiff's cross-motion seeking partial summary judgment on liability also with respect to the section 240(1) claim.[437]

The plaintiff then appealed to the Appellate Division, Fourth Department, and the appellate panel affirmed the supreme court's dismissal of the plaintiff's complaint on the basis that the plaintiff at the time of his fall and injury was engaged in a "normal manufacturing process" at a factory building, and not engaged in the type of activity for which section 240(1) of the Labor Law provides protection.[438] The appellate division, in the three-to-two decision, held that the Labor Law section 240(1) applies only when the injured person is engaged in building construction, demolition and repair work, and not to someone engaged in the normal manufacturing process.[439] Appellate division Justices Lindley and Green dissented and argued that the wall module was a structure as defined by the Labor Law, inasmuch as it was "any production or piece of work artificially built up or composed of parts joined together in some definite manner."[440] The dissent also felt that

433. *Id.*

434. *Id.*

435. *Dahar*, 79 A.D.3d at 1632, 914 N.Y.S.2d at 818.

436. *Id.* (citing N.Y. LAB. LAW § 240(1) (McKinney 2009)).

437. Dahar v. Holland Ladder & Mfg. Co., 18 N.Y.3d 521, 523-34, 964 N.E.2d 402, 403, 941 N.Y.S.2d 31, 32 (2012) (citing *Dahar*, 79 A.D.3d at 1631, 914 N.Y.S.2d at 817).

438. *Dahar*, 79 A.D.3d at 1633, 914 N.Y.S.2d at 898 (internal quotation marks omitted).

439. *Id.*

440. *Id.* at 1634, 914 N.Y.S.2d at 820 (citing Lewis-Moors v. Contel of N. Y., Inc., 78 N.Y.2d 942, 942, 578 N.E.2d 434, 434, 573 N.Y.S.2d 636, 636 (1991); Pino v. Robert

the plaintiff "established that he was engaged in a protected activity . . . 'cleaning' at the time of the accident" even though the plaintiff was not involved in building construction, demolition or repair.[441] The dissent, in quoting from *Broggy v. Rockefeller Group, Inc*., stated:

> The crucial consideration under section 240(1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240(1). . . . Rather, liability turns on whether the particular [cleaning] task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against."[442]

In conclusion, the Justices Lindley and Green would modify the lower court decision, and grant summary judgment to the plaintiff on the Labor Law section 240(1) cause of action in that the owners of the building (Martins) "failed to raise a triable issue of fact sufficient to defeat [the plaintiff's] crossmotion."[443]

Plaintiff appealed as of right to the Court of Appeals, and in a unanimous decision, the court found that the plaintiff was not engaged in an activity which the statute protects.[444] In the decision written by Judge Smith, the Court determined that it was clear that the New York State Legislature chose to provide the protection under the Labor Law only to workers who were employed in the "erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure."[445] The Plaintiff argued that, at the time of the incident, he was certainly in the act of cleaning, and that the wall module was a structure as previously defined by the Court of Appeals.[446] The Court of Appeals, however, held the Legislature never intended the statute to expand to the manufacturing process, as the legislative history shows that the Legislature's main concern were the dangers involved in the construction industry.[447] The Court recognized that previous Court of

Martin Co., 22 A.D.3d 549, 552, 802 N.Y.S.2d 501, 503 (2d Dep't 2005)) (internal quotation marks omitted).

441. *Dahar*, 79 A.D.3d at 1634, 914 N.Y.S.2d at 820.

442. *Id.* (citing Broggy v. Rockefeller Grp., Inc., 8 N.Y.3d 675, 682, 870 N.E.2d 1144, 1147, 839 N.Y.S.2d 714, 717 (2007)) (emphasis omitted).

443. *Dahar*, 79 A.D.3d at 1635, 914 N.Y.S.2d at 820.

444. *Dahar*, 18 N.Y.3d 521 at 526, 964 N.E.2d at 405, 941 N.Y.S.2d at 34.

445. *Id.* at 524-25, 964 N.E.2d at 404, 941 N.Y.S.2d at 33.

446. *Dahar*, 18 N.Y.3d at 525, 964 N.E.2d at 404, 941 N.Y.S.2d at 33 (2012) (citing Caddy v. Interborough Rapid Transit Co., 195 N.Y. 415, 420, 88 N.E. 747, 749 (1909); Lewis-Moors v. Contel of N.Y., Inc., 78 N.Y.2d 942, 942, 578 N.E.2d 434, 434, 573 N.Y.S.2d 636, 636 (1991); Joblon v. Solow, 91 N.Y.2d 457, 464, 695 N.E.2d 237, 241, 672 N.Y.S.2d 286, 290 (1998)).

447. *Dahar*, 18 N.Y.3d at 525, 964 N.E.2d at 404, 941 N.Y.S.2d at 33.

Appeals cases have rejected the contention that Labor Law section 240(1) only applies to work performed on construction sites or that the protection under the statute was limited to cleaning that was only part of a construction, demolition or repair project.[448] While recognizing that the Court has applied the protection of section 240(1) of the Labor Law to other cleaning activities, including the cleaning of windows, and the cleaning of a railroad car by the plaintiff not in the course of construction, demolition, or repair, the Court made it clear that an exhaustive evaluation of previous case law confirms that the Court has not extended the statutes coverage to every activity, and the Court declined to extend the protection of the statute so far beyond the purposes that the Court judges felt it was designed to serve.[449] As a result, the Court affirmed the order of the Appellate Division and dismissed the plaintiff's case accordingly.[450]

B. Sole Proximate Cause and Recalcitrant Employee Defenses

If a defendant in a Labor Law section 240(1) case proves that the injured worker's own conduct was the sole proximate cause of the worker's accident and injuries, then the failure to use an available safety device can result in dismissal of a plaintiff's case.[451] If the defendant conclusively shows that no Labor Law section 240(1) violation contributed to or was a proximate cause of the accident and the accident was solely by the plaintiff's own conduct, then the defendant may be granted summary judgment.[452] However, if the plaintiff makes a

448. *Id.* at 525, 964 N.E.2d at 405, 941 N.Y.S.2d at 34 (citing *Joblon*, 91 N.Y.2d at 464, 695 N.E.2d at 241, 672 N.Y.S.2d at 290; Broggy v. Rockefeller Grp., Inc., 8 N.Y.3d 675, 679-80, 870 N.E.2d 1144, 1146-47, 839 N.Y.S.2d 714, 716-17 (2007)). *See, e.g.*, Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 319, 908 N.E.2d 869, 870, 880 N.Y.S.2d 879, 880 (2009); Swiderska v. N.Y. Univ., 10 N.Y.3d 792, 793, 886 N.E.2d 155, 155-56, 856 N.Y.S.2d 533, 533 (2008); Bauer v. Female Acad. of the Sacred Heart, 97 N.Y.2d 445, 449, 767 N.E.2d 1136, 1137, 741 N.Y.S.2d 491, 492 (2002); Brown v. Christopher St. Owens Corp., 87 N.Y.2d 938, 939, 663 N.E.2d 1251, 1251, 641 N.Y.S.2d 221, 221 (1996); Connors v. Borstein, 4 N.Y.2d 172, 173, 149 N.E.2d 721, 722, 173 N.Y.S.2d 288, 289 (1958); Koenig v. Patrick Const. Corp., 298 N.Y. 313, 315, 83 N.E.2d 133, 133 (1948); Gordon v. E. Ry. Supply, 82 N.Y.2d 555, 558, 626 N.E.2d 912, 913, 606 N.Y.S.2d 127, 128 (1993).

449. *See Dahar*, 18 N.Y.3d at 526, 964 N.E.2d at 405, 941 N.Y.S.2d at 34.

450. *Id.*

451. *See* Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 40, 823 N.E.2d 439, 441, 790 N.Y.S.2d 74, 76 (2004); *see also* Blake v. Neighborhood Hous. Servs. of N.Y.C., 1 N.Y.3d 280, 289, 803 N.E.2d 757, 762, 771 N.Y.S.2d 484, 489 (2003).

452. *Blake*, 1 N.Y.3d at 289 n. 8, 803 N.E.2d at 762 n. 8, 771 N.Y.S.2d at 489 n. 8. *See, e.g.*, Stark v. Eastman Kodak Co., 256 A.D.2d 1134, 1134, 682 N.Y.S. 2d 749, 750 (4th Dep't 1998); Custer v. Cortland Hous. Auth., 266 A.D.2d 619, 621, 697 N.Y.S.2d 739, 741 (3d Dep't 1999).

showing that a violation of section 240(1) caused or contributed to the plaintiff's fall or accident, summary judgment can, and generally will be defeated.[453]

In *Grove v. Cornell University*, the plaintiff was a glazier working on a mechanical telescoping boom lift when he fell approximately thirty feet and landed on a slab of concrete and suffered significant injuries.[454] The plaintiff's co-worker saw that even though the plaintiff had a harness and lanyard, that he failed to attach it to the basket, and that after the plaintiff fell the gate on the bucket was in the open position.[455] The co-worker had reminded the injured the plaintiff to attach his lanyard, and even though the bucket gate had a latch, a spring loaded mechanism on the latch was broken such that the latch had to be activated by hand.[456] The plaintiff brought an action against the owner and contractor seeking recovery under Labor Law section 240(1).[457] The plaintiff then moved for summary judgment on the issue of liability with regard to the Labor Law section 240(1) claim, and defendant cross moved for summary judgment dismissing plaintiff's section 240(1) claim.[458] The supreme court granted the defendant's cross-motion for summary judgment and dismissed the 240(1) claim, and plaintiff then appealed to the Appellate Division, Third Department.[459] The Third Department affirmed the supreme court decision, holding that the evidence established that "the gate and lanyard were available, adequate and operable safety devices, and that if [the] plaintiff had either attached his lanyard as required or closed and latched the gate manually, the provided safety devices would have prevented him from falling out of the basket."[460]

The court went on to say that there was no evidence before the court that any other adequate available or operable safety device would have prevented the plaintiff's fall.[461] The appellate panel held that plaintiff had failed to establish the statutory violation, and that the plaintiff's own negligent conduct was the sole proximate cause of his

453. *Blake*, 1 N.Y.3d at 289, 803 N.E.2d at 763, 771 N.Y.S.2d at 490 (citing Duda v. John W. Rouse Constr. Corp., 32 N.Y.2d 405, 410, 298 N.E.2d 667, 669, 345 N.Y.S.2d 524, 527 (1973)).

454. 75 A.D.3d 718, 719, 904 N.Y.S.2d 559, 560 (3d Dep't 2010).

455. *Id.*

456. *Id.* at 719-20, 904 N.Y.S.2d at 560-61.

457. *Id.*, 904 N.Y.S.2d at 560.

458. *Id.*

459. *Grove*, 75 A.D.3d at 720, 904 N.Y.S.2d at 560.

460. *Id.*, 904 N.Y.S.2d at 561.

461. *Id.*

injuries.[462]

Appellate Justices Lahtinen and Garry dissented based upon the undisputed fact that the gate on the basket was not functioning properly and did not close as designed and that the plaintiff testified that "he was unaware of the gate's defective condition before [the] accident."[463] The dissenters felt that a jury could determine that the gate as a safety device was defective and that the plaintiff was not aware of that defect when he fell.[464] Thus, the dissent felt that there was a question of fact as to whether the defective safety device (i.e. the gate) was a contributing cause of his fall.[465] The dissenters went on to espouse the view that the plaintiff submitted sufficient evidence that the failure to provide a basket with a properly operating self-closing gate was a contributing cause to the plaintiff's fall, and that the defendants did not show that the defective gate was not a proximate cause of the accident or that the plaintiff's own conduct was the sole proximate cause of the accident.[466] The case was then appealed to the Court of Appeals, and in a unanimous decision of only two sentences in length, the Court agreed with the dissenters at the appellate division and determined that there were "[t]riable issues of fact . . . as to whether [the] defendants failed to provide an adequate safety device to [the] plaintiff in violation of Labor Law [section] 240(1) or whether [the] plaintiff's conduct was the sole proximate cause of his injuries."[467]

As a result, the Court modified the appellate division findings, and the plaintiff's section 240(1) action was reinstated.

C. What Risks Are Ordinary and Obvious Hazards that Are Part of or Inherent in the Workplace?

In *Vega v. Restani Construction Corp.*, the Court of Appeals was split in a four-to-three decision dealing with a plaintiff park maintenance worker's claim that she was injured as a result of a contractor's negligent disposal of concrete at a construction project in

462. *Id.* (Robinson v. E. Med. Ctr., 6 N.Y.3d 550, 554, 847 N.E.2d 1162, 1165, 814 N.Y.S.2d 589, 591 (2006); Roberti v. Advance Auto Parts, 55 A.D.3d 1022, 1023, 871 N.Y.S.2d 399, 401 (3d Dep't 2008); Albert v. Williams Lubricants, Inc., 35 A.D.3d 1115, 1116, 828 N.Y.S.2d 593, 595 (3d Dep't 2006)).

463. *Grove*, 75 A.D.3d at 721, 904 N.Y.S.2d at 561.

464. *Id.*

465. *Id.*, 904 N.Y.S.2d at 562.

466. *Id.* (citing Torres v. Monroe Coll., 12 A.D.3d 261, 262, 785 N.Y.S.2d 57, 58 (1st Dep't 2004)).

467. Grove v. Cornell Univ., 17 N.Y.3d 875, 876-77, 957 N.E.2d 1137, 1137, 933 N.Y.S.2d 635, 635 (2011) (emphasis omitted).

Loreto Park.[468] In *Vega*, the plaintiff was injured when she attempted to pull a trashcan to the front entrance of Loreto Park for pickup by New York City Department of Sanitation.[469] The plaintiff was a park maintenance worker who, as a result of her attempted efforts to move the can, had a serious injury to her shoulder.[470] A co-worker saw chunks of concrete in the trashcan that "could only have come from the 'other workers who were repairing/fixing the park."[471] The plaintiff brought action against the general contractor and a fence subcontractor, GFC, claiming that the defendants were negligent.[472] The defendants moved for summary judgment to dismiss the claim, and Supreme Court, Bronx County, Justice Wright denied GFC's motion for summary judgment seeking to dismiss the complaint.[473] That finding was affirmed by the Appellate Division, First Department, in a four-to-one decision, with the majority holding that the dumping by contractors of concrete into trashcans in a city park is not necessarily an ordinary and obvious hazard of employment that would warrant dismissal of the plaintiff's claim.[474] In dissent, Justice Catterson wrote an extensive opinion asserting that an injury as a result of excess weight of a trashcan is an ordinary and obvious hazard of the plaintiff's duties, which was a hazard that the plaintiff faced in her employment as she was required to move trash cans from one location or another.[475] The dissent further argued that even if GFC discarded pieces of concrete (which it asserted there was no proof of on the record) that that action cannot be considered negligence.[476]

On appeal, Chief Judge Lippman wrote for the majority, and held that defendant GFC failed to meet its burden to make a prima facie showing of entitlement to summary judgment inasmuch as the defendant did not put forth any evidence that would show that the disposal of construction debris into a public trash can by a subcontractor would not constitute negligence.[477] The Court looked at the inconsistencies and the defendant's affidavit submitted in support of its motion, and emphasized a witnesses sworn statement that there was

468. 18 N.Y.3d 499, 502, 965 N.E.2d 240, 241, 942 N.Y.S.2d 13, 14 (2012).
469. *Id.* at 503, 965 N.E.2d at 242, 942 N.Y.S.2d at 15.
470. *Id.*
471. *Id.* (internal quotation marks and brackets omitted).
472. *Id.*
473. *Vega*, 18 N.Y.3d at 502, 965 N.E.2d at 241, 942 N.Y.S.2d at 14.
474. Vega v. Restani Constr. Corp., 73 A.D.3d 641, 643, 901 N.Y.S.2d 51, 53 (1st Dep't 2010).
475. *Id.* at 646, 901 N.Y.S.2d at 55.
476. *Id.* at 647, 901 N.Y.S.2d at 56.
477. *Vega*, 18 N.Y.3d at 504, 965 N.E.2d at 243, 942 N.Y.S.2d at 16.

concrete in the trashcan, that the plaintiff hurt her shoulder trying to move the trash can and that she saw chunks of cement within the can.[478] The majority also found an issue of material fact as to whether other members of the public could have dumped the concrete in the trashcan in the days before the accident, and that GFC did not prove that they could not be responsible for putting the concrete into the trashcan.[479] Judge Lippman went on to write for the majority that defendant GFC offered no evidence concerning plaintiff's usual duties, and that there was no showing by the defense that the hazard was "ordinary and obvious" as urged by the defense and the dissent.[480] As a result, the majority held that there were issues of fact as to whether the concrete was an ordinary and obvious part of the plaintiff's job description, or whether the concrete was visible or otherwise obvious, and as a result affirmed the appellate division's findings.[481] Judge Smith, writing on behalf of himself with Judges Read and Pigott concurring, wrote that there was no basis on which a finder of fact could conclude that GFC placed the concrete in the trashcan.[482] Judge Smith proposed that, on the proof before the Court, the concrete could have been dumped either by the general contractor, Restani, or by GFC, but more likely Restani, and as a result there is no way that the evidence could preponderate in favor of the plaintiff.[483] Judge Smith concluded the dissent by saying "no plaintiff's verdict here could rest on anything but speculation [and] [s]ummary judgment should have been granted dismissing the complaint."[484]

V. PREMISES LIABILITY

A. Liability of Dog Owners and the Requirement of Showing Vicious Propensities

If a dog owner in New York State knows or has reason to know of their dogs "vicious propensities," the owner will be answerable in damages if the dog acts upon those propensities and injures another

478. *Id.* at 504-05, 965 N.E.2d at 243, 942 N.Y.S.2d at 16.
479. *Id.* at 505, 965 N.E.2d at 243-44, 942 N.Y.S.2d at 16-17.
480. *Id.* at 507, 965 N.E.2d at 245, 942 N.Y.S.2d at 18.
481. *See id.*
482. *Vega*, 18 N.Y.3d at 507, 965 N.E.2d at 245, 942 N.Y.S.2d at 18 (Smith, J., dissenting).
483. *Id.* at 508, 965 N.E.2d at 246, 942 N.Y.S.2d at 19.
484. *Id.*

person.[485] The question before the Court of Appeals in *Smith v. Reilly* was to what extent must the vicious propensities of a dog known to the owner align with the actual act that the dog performs that causes injury.[486] The plaintiff in *Smith v. Reilly* was riding his bicycle on a neighborhood road "when a dog owned by [the] defendant ran into the road and collided with [the] plaintiff's bicycle, causing [the] plaintiff" to be injured.[487] At the supreme court, the defendant moved for summary judgment dismissing the complaint on the basis that, even though the defendant knew that the dog had a propensity to "bolt" and that the dog was in and around the roadway on several occasions, the dog never evidenced any "vicious propensity" to chase cars, bicycles, or pedestrians or otherwise interfere with traffic.[488] The supreme court denied the motion for summary judgment, and the defendant appealed.[489] The Appellate Division, Fourth Department, in a three-to-two decision, relying on witness testimony that observed the dog loose on a few occasions and saw the dog running for the roadway, found that the dog had a proclivity to act in a way that puts others at risk of harm, and as a result a question of fact existed as to whether the defendant had notice of the dogs proclivities that created the risk of harm to the plaintiff and resulted in the accident.[490] Justices Scudder and Smith, writing together in dissent, felt that the "defendant established . . . she had no knowledge of any vicious propensities of the dog" or any propensity to interfere with traffic.[491] The dissenting justices relied upon the defendant's sworn testimony that although she had seen the dog occasionally run into the road, that she knew of no incidents where it had ever chased after vehicles, impeded the flow of traffic, or otherwise interfered with traffic on the road.[492] The dissent would have held, according to the dissenting judges, that "plaintiff's evidence that the dog was occasionally allowed to run loose and would then sometimes go into the road, is insufficient . . . to raise a question of fact on that issue."[493]

485. Collier v. Zambito, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004) (citing Hosmer v. Carney, 228 N.Y. 73, 75, 126 N.E. 650, 651 (1920); RESTATEMENT (SECOND) OF TORTS § 509 (1977)).

486. *See* 17 N.Y.3d 895, 896, 957 N.E.2d 1149, 1149, 933 N.Y.S.2d 645, 646 (2011).

487. 83 A.D.3d 1492, 1493, 921 N.Y.S.2d 423, 424 (4th Dep't 2011).

488. *Id.*

489. *Id.*

490. *Id.*, 921 N.Y.S.2d at 425.

491. *Id.* at 1494, 921 N.Y.S.2d at 425.

492. *Smith*, 83 A.D.3d at 1494, 921 N.Y.S.2d at 425.

493. *Id.* at 1494-95, 921 N.Y.S.2d at 425-26 (citing Alia v. Fiorina, 39 A.D.3d 1068, 1069, 883 N.Y.S.2d 761, 763 (3d Dep't 2007)).

As a result, the dissent felt that the plaintiff failed to raise an issue of fact with regard to the alleged actual or constructive notice of the defendant of the dog's propensity to interfere with vehicular traffic.[494] The dissent concluded by saying that "proof that a dog roamed the neighborhood or occasionally ran into the road is insufficient although proof that the dog had a habit of chasing vehicles or otherwise interfering with traffic could constitute a vicious propensity."[495]

Thus, Judges Scudder and Smith would have reversed the order and dismissed the plaintiff's complaint.[496] Because of the two-justice dissent, the case was then appealed to the Court of Appeals as a matter of right, and the Court held, in a unanimous decision, that the appellate division's order should be reversed and that the defendant's motion for summary judgment dismissing the complaint should be granted.[497] The Court of Appeals relied on the fact that the plaintiff "had no knowledge of the dog's alleged propensity to interfere with traffic," and the fact that "the dog, on three to five occasions, escaped defendant's control . . . and ran towards the road is insufficient to establish a triable issue of material fact."[498]

B. The Duty of a Homeowner Towards Visitors When Leaving the Property After a Visit

The long-standing black letter law in New York is that homeowners or social hosts owe a duty to control and supervise intoxicated guests on their property or in an area under their control.[499] The scope of this duty of a social host or homeowner was the subject of the New York Court of Appeals decision of *Martino v. Stolzman*.[500] In *Martino*, the defendant homeowners hosted a New Year's Eve party at their home, and a friend of theirs attended the party and consumed

494. *Smith*, 83 A.D.3d at 1494, 921 N.Y.S.2d at 426.

495. *Id.* (quoting Rigley v. Utter, 53 A.D.3d 755, 756, 862 N.Y.S.2d 147, 148-49 (2008)) (internal quotation marks omitted).

496. *Smith*, 83 A.D.3d at 1494, 921 N.Y.S.2d at 426 (Scudder, P.J. and Smith, J., dissenting).

497. Smith v. Reilly, 17 N.Y.3d 895, 895-96, 957 N.E.2d 1149, 1149, 933 N.Y.S.2d 645, 646 (2011).

498. *Id.* at 896, 957 N.E.2d at 1149, 933 N.Y.S.2d at 646 (citing Collier v. Zambito, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 255, 775 N.Y.S.2d 205, 206 (2004)).

499. *See, e.g.*, D'Amico v. Christie, 71 N.Y.2d 76, 85, 518 N.E.2d 896, 900, 524 N.Y.S.2d 1, 5 (1987); Aquino v. Higgins, 68 A.D.3d 1650, 1651, 891 N.Y.S.2d 853, 855 (4th Dep't 2009).

500. Martino v. Stolzman, 18 N.Y.3d 905, 908, 964 N.E.2d 399, 402, 941 N.Y.S.2d 28, 31 (2012).

alcohol.[501] Shortly after midnight the guest, Michael Stolzman, left the party with his friend, Judith Rost, and backed his vehicle out of the homeowners' driveway and onto the main road, where they were struck by a vehicle driven by the plaintiff, Martino.[502] Martino and Rost suffered severe injuries.[503] A blood alcohol test showed that Stolzman had a blood alcohol level of 0.14% (close to twice the legal limit), and he pled guilty to driving while intoxicated in violation of Vehicle and Traffic Law section 1192(3).[504] Martino and Rost brought separate actions against the defendants, including against the homeowners for a claim of violation of the Dram Shop Act, as well as common law negligence.[505] The plaintiffs contended that the homeowners "served Stolzman an unreasonable amount of alcohol, rendering him intoxicated, and [then] failed to control [him] while he was on their property."[506] The plaintiffs also alleged that the homeowners had a duty to warn Stolzman as he backed out of their driveway that vehicles parked on the road may obstruct the view.[507] The homeowners moved for summary judgment seeking dismissal of the Dram Shop Act claim as well as the common law negligence claims.[508] Supreme Court, Niagara County, denied the motions of the defendants on both the negligence action and the Dram Shop action.[509] The homeowner defendants appealed, and the Appellate Division, Fourth Department, in a three-to-two decision, modified the order by granting the homeowner's motion to dismiss the Dram Shop action because there was no evidence that the homeowners were selling the alcohol for profit and thus had no expectation of pecuniary gain.[510] The majority in the appellate division decision also found that there was a question of fact concerning the knowledge that the defendant homeowners had regarding Stolzman's condition when he left the party and that "both had an opportunity to control or at least to guide Stolzman as he exited their driveway . . . and [had] acknowledged that the sightlines near the

501. *Id.* at 907, 964 N.E.2d at 401, 941 N.Y.S.2d at 30.

502. *Id.*

503. *Id.*

504. *Id.* (citing N.Y. VEH. & TRAF. LAW §1192(3) (McKinney 2012)).

505. *Martino*, 18 N.Y.3d at 907, 964 N.E.2d at 401, 941 N.Y.S.2d at 30; N.Y. GEN. OBLIG. LAW §11-101 (McKinney 2012).

506. *Martino*, 18 N.Y.3d at 907, 964 N.E.2d at 401, 941 N.Y.S.2d at 30.

507. *Id.*

508. *Id.*

509. *See id.*

510. Martino v. Stolzman, 74 A.D.3d 1764, 1766, 902 N.Y.S.2d 731, 733 (4th Dep't 2010); *see also Martino*, 18 N.Y.3d at 908, 964 N.E.2d at 402, 941 N.Y.S.2d at 31.

end of their driveway were limited at the time of the accident."[511]

Appellate Division Justices Smith and Peradotto, argued that the Oliver's motion for summary judgment as to the negligence claims should also be dismissed as the homeowners had no duty to prevent Stolzman either from leaving the house or two assist him in backing out of the driveway.[512]

The appellate division granted Oliver's motion for leave to appeal to the Court of Appeals and certified the question to the Court of Appeals "was the order of this court . . . properly made?"[513]

In a unanimous memorandum decision, the Court of Appeals agreed with the dissenting justices at the appellate division and dismissed the negligent claim against the defendant homeowners, holding that "requiring social hosts to prevent intoxicated guests from leaving their property would inappropriately expand the concept of duty."[514]

The Court of Appeals also held that the homeowners had no duty to assist Stolzman as he pulled out of their driveway or otherwise warn him of any potential obstruction of view when exiting.[515] The Court held that "the parked vehicles adjacent to [the homeowners'] driveway did not create a latent or dangerous condition on [the homeowners'] property," and even if the homeowners were aware of any potential obstruction, no duty was created to assist or warn.[516]

C. Liability of Snow Removal Contractor to Injured Third Parties

The general rule in New York that a snow removal contractor, who contracts with a land owner will not be liable to an injured third-party, unless: (1) the contractor, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) the plaintiff detrimentally relies on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor had entirely displaced the owners duty to safely maintain the

511. *Martino*, 74 A.D.3d at 1767, 402 N.Y.S.2d at 733; *see also Martino*, 18 N.Y.3d at 908, 964 N.E.2d at 401, 941 N.Y.S.2d at 30.

512. *Martino*, 74 A.D.3d at 1767, 902 N.Y.S.2d at 734.

513. *Martino*, 18 N.Y.S.3d at 908, 964 N.E.2d at 401-02, 941 N.Y.S.2d at 30-31.

514. *Id.*, 964 N.E.2d at 402, 941 N.Y.S.2d at 31 (quoting *Martino*, 74 A.D.3d at 1767, 902 N.Y.S.2d at 734) (Smith and Perdetto, JJ., dissenting in part).

515. *Martino*, 18 N.Y.2d at 908, 964 N.E.2d at 402, 941 N.Y.S.2d at 31.

516. *Id.* (citing Pulka v. Edelman, 40 N.Y.2d 781, 785, 358 N.E.2d 1019, 1022, 390 N.Y.S.2d 393, 396 (1976)).

premises.[517] The scope of a snow removal contractor's liability was reviewed by the Court of Appeals during the *Survey* year in the case of *Lehman v. North Greenwich Landscaping, LLC*. In *Lehman*, the plaintiff slipped and fell on a patch of ice in a parking lot owned by the defendant, Horton.[518] The plaintiff then commenced an action against the property owner (Horton) and the snow removal contractor (North Greenwich Landscaping, LLC). The contractor had made an oral agreement with the property owner to provide snow removal services.[519] The defendant contractor moved for summary judgment to dismiss the complaint on the basis that under existing case law, it owed no duty to the plaintiff that arose out of the snow removal contract.[520] Supreme Court Justice Nicolai, Westchester County, denied the motion and found that there was an issue of fact as to whether the snow removal company assumed a comprehensive and exclusive maintenance obligation at the property.[521] On appeal, the Appellate Division, Second Department, reversed and dismissed the plaintiff's action against the snow removal contractor, holding that there was "no triable issue of fact" and that "the limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property."[522] It was undisputed that the property owner, Horton, retained some oversight and, in fact, participated in the snow removal process, and as a result, the snow removal contractor did not absorb the landowner's duty to safely maintain the premises.[523] The appellate division went on to hold that there was no evidence that the plaintiff detrimentally relied on the snow removal contractors performance or that the snow removal contractor launched a force or instrument of harm.[524] The Court of Appeals, in a

517. *See* Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 140, 773 N.E.2d 485, 488, 746 N.Y.S.2d 120, 123 (2002); Bickelman v. Herrill Bowling Corp., 49 A.D.3d 578, 579, 853 N.Y.S.2d 383, 385 (2d Dep't 2008); Scott v. Bergstol, 11 A.D.3d 526, 526-27, 783 N.Y.S.2d 617, 618 (2d Dep't 2004); Baratta v. Home Depot, USA, Inc., 303 A.D.2d 434, 435, 756 N.Y.S.2d 605, 607 (2d Dep't 2003); Lehman v. N. Greenwich Landscaping, LLC, 65 A.D.3d 1291, 1292, 887 N.Y.S.2d 136, 137 (2d Dep't 2009).

518. *Lehman*, 65 A.D.3d at 1292, 887 N.Y.S.2d at 137.

519. *Id.*

520. *Id.* at 1292, 887 N.Y.S.2d at 137.

521. *Id.*

522. *Id.*, 387 N.Y.S.2d at 136-37 (citations omitted).

523. *Lehman*, 65 A.D.3d at 1293, 887 N.Y.S.2d at 137, (citing Palka v. Servicemaster Mgmt. Servs. Corp., 83 N.Y.2d 579, 584, 634 N.E.2d 189, 192, 611 N.Y.S.2d 817, 820 (1994); Castrov v. Maple Run Condo. Ass'n, 41 A.D.3d 412, 413, 837 N.Y.S.2d 729, 731 (2d Dep't 2007); Pavlovich v. Wade Assocs., Inc., 274 A.D.2d 382, 382-83, 710 N.Y.S.2d 615, 616 (2d Dep't 2002)).

524. *Lehman*, 65 A.D.3d at 1293, 887 N.Y.S.2d at 137.

unanimous decision, agreed that upon the record submitted, that the snow removal contractor did not assume a duty of care towards third parties who use the property, and that the appellate division appropriately held that Horton did not relinquish its duty to inspect and safely maintain the premises.[525]

VI. PRODUCT LIABILITY

A. Federal Preemption and the Lack of Seat Belts on Buses

A common defense to a products liability claim is federal preemption. Defendants will often argue that State common law tort actions are preempted by federal regulations. The United States Supreme Court addressed the issue of preemption in claims stemming from products liability actions involving automobiles on several occasions.[526]

In *Doomes v. Best Transit Corp*., the New York State Court of Appeals took up the issue of preemption as a defense to common law claims resulting from the alleged failure of the defendant to install passenger seatbelts on a bus.[527]

On April 24, 1994, a bus carrying approximately twenty-one passengers rolled over several times, injuring many of the passengers.[528] While driving on the New York State Thruway, the driver, defendant Wagner M. Alcivar, "dozed off" while the bus was traveling approximately sixty miles per hour.[529] The bus veered across the highway from the right-hand lane into the passing lane, encountered a median strip, and a sloping embankment. Alcivar awakened, but his attempts to regain control of the bus were futile.[530]

> [The plaintiffs] commenced actions against defendants Best Transit Corp. (Best), the owner of the bus; Ford Motor Co. (Ford), the manufacturer of the chassis and cab of the bus; Warrick Industries,

525. Lehman v. N. Greenwich Landscaping, LLC, 16 N.Y.3d 747, 748, 942 N.E.2d 1046, 1046, 917 N.Y.S. 621, 621 (2011) (citing Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 226, 556 N.E.2d 1093, 1096, 557 N.Y.S.2d 286, 289 (1990); Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167-68, 159 N.E. 896, 898 (1928); Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 141, 773 N.E.2d 485, 489, 746 N.Y.S.2d 120, 124 (2002)).

526. *See, e.g.*, Williamson v. Mazda Motor of Am., Inc. 131 S. Ct. 1131, 1134 (2011); Geier v. Am. Honda Motor Co., 529 U.S. 861, 864 (2000).

527. Doomes v. Best Transit Corp., 17 N.Y.3d 594, 599, 958 N.E.2d 1183, 1185, 935 N.Y.S.2d 268, 270 (2011).

528. *Id.*

529. *Id.*

530. *Id.*

> Inc. (Warrick), the manufacturer who completed the construction of the bus; J&R Tours, the prior owner of the bus; and Alcivar, the bus driver. Plaintiffs alleged that the absence of passenger seatbelts and the improper weight distribution of the bus, created by the negligent modification of the bus' [sic] chassis, caused the injuries.[531]

"[The] [s]upreme [c]ourt dismissed the claims against J&R Tours, plaintiffs settled with Ford, and Alcivar was deported."[532]

> Warrick moved to preclude any evidence that the bus was defective or that it was negligent due to a lack of seatbelts on the ground that Federal Motor Vehicle Safety Standard . . . [section] 208, which did not require the installation of passenger seatbelts, preempted any claims of liability for failure to install such seatbelts. Supreme Court reserved decision on the motion.[533]

Following trial, a jury determined with respect to the seatbelts claims that Best negligently operated the bus without passenger seatbelts and Warrick breached the warranty of fitness for ordinary purposes by failing to install seatbelts.[534]

"These failures were deemed substantial factors in causing the accident, and the absence of seatbelts was determined to be a substantial factor in causing injury to all plaintiffs."[535]

"The Appellate Division reversed the judgments and dismissed the complaints against Warrick."[536] "The court held the seatbelts claims were preempted, reasoning that these claims conflicted with the federal goal of establishing a uniform regulatory scheme for transit safety."[537]

The New York Court of Appeals reversed on appeal, finding that the plaintiffs' seatbelt claims were not preempted by federal regulation.[538] Under the Supremacy Clause of the United States Constitution, preemption analysis requires that the intent of the United States Congress is ascertained.[539] Preemptive intent can be evidenced by a finding of either express or implied intent.

Express preemptive intent is discerned from the plain language of a

531. *Id.* at 600, 958 N.E.2d at 1185, 935 N.Y.S.2d at 270.
532. *Doomes*, 17 N.Y.3d at 600, 958 N.E.2d at 1185, 935 N.Y.S.2d at 270.
533. *Id.* (internal citation omitted).
534. *Id.*, 958 N.E.2d at 1185-86, 935 N.Y.S.2d at 270-71.
535. *Id.*
536. *Id.* (internal citation omitted).
537. *Doomes*, 17 N.Y.3d at 601, 958 N.E.2d at 1186, 935 N.Y.S.2d at 271.
538. *Id.*
539. Spitzer v. Applied Card Sys., Inc., 11 N.Y.3d 105, 113, 894 N.E.2d 1, 5, 863 N.Y.S.2d 615, 619 (2008) (citations omitted).

statutory provision.[540] Looking to the express language of the statute, the Court found that compliance with applicable federal motor vehicle safety standards is not necessarily a preclusive bar to liability.[541] The preemption clause included by Congress in the National and Motor Vehicle Safety Act must be read in conjunction with the "saving" clause.[542] The saving clause provided that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[543]

The Court relied heavily on the reasoning set forth by the United States Supreme Court. In *Geier*, the Supreme Court considered the preemptive effect of a pre-1994 edition of the National and Motor Vehicle Safety Act.[544] It concluded that Congress did not intend the preemption clause to be construed so broadly as to preclude State common law tort claims because the "saving" clause explicitly reserved a right to assert common-law claims.[545]

After dispensing with express preemption, the Court of Appeals then turned to implied preemption. Implied preemption can be found either when "the Federal legislation is so comprehensive in its scope that it is inferable that Congress wished fully to occupy the field of its subject matter ('field preemption'), or because State law conflicts with the Federal law."[546]

The Court found that there was no implied field preemption "as the explicit permission of common-law claims indicates that the federal statutes promulgated under the Safety Act are not so pervasive as to encompass the entire scheme of motor vehicle safety guidelines."[547] The Court reasoned that the saving clause represents a purposeful intent to allow meaningful State participation as a finding of preemption would "treat all such federal standards as if they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state

540. *See* Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 356, 845 N.E.2d 1246, 1255, 812 N.Y.S.2d 416, 425 (2006) (citation omitted).

541. *See Doomes*, 17 N.Y.3d at 602, 958 N.E.2d at 1187, 935 N.Y.S.2d at 272.

542. *Id.*

543. 49 U.S.C. § 30103(e) (2006).

544. *See generally* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 866 (2000); *see also* 15 U.S.C. § 1392(d) (1988).

545. *Geier*, 529 U.S. at 870.

546. Guice v. Charles Schwab & Co., 89 N.Y.2d 31, 39, 674 N.E.2d 282, 285, 651 N.Y.S.2d 352, 355 (1996).

547. *Doomes*, 17 N.Y.3d at 603, 958 N.E.2d at 1188, 935 N.Y.S.2d at 273.

tort law."[548]

Implied conflict preemption can arise in two situations, where "it is 'impossible for a private party to comply with both State and federal requirements' or where State law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" [549] The United States Supreme Court has made clear that a State law will only become an obstacle where it would frustrate "a significant objective of the federal regulation."[550] In *Williamson*, the United States Supreme Court held that a seat belt claim was not preempted in an action alleging a car manufacturer failed to properly install an over the shoulder seat belt in the back seat, when the governing federal regulation only required a lap belt.[551]

The standards governing the bus type in question only mandate the inclusion of protective devices for the driver's seat of a bus and are absolutely silent regarding the installation of passenger seatbelts.[552] The Court held that, as in *Williamson*, there was no preemptive intent to be discerned from regulations with respect to State common-law claims seeking the inclusion of passenger seatbelts in buses of this type.[553]

Judge Pigott dissented, arguing that by expressly leaving out any requirement that seatbelts be used on large buses, the intent of Congress is clear that no such safety devices are required.[554] He further argued that allowing common law claims would be an obstacle to uniformity.[555]

Thus, in *Doomes*, the Court laid out a clear road map for courts and practitioners to follow when determining if the defense of federal preemption applies in a products.

548. *Id.* (citing Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011)).

549. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (internal citations omitted).

550. *Williamson*, 131 S. Ct. at 1136.

551. *Id.* at 1140.

552. *See Doomes*, 17 N.Y.3d at 604, 958 N.E.2d at 1188, 935 N.Y.S.2d at 273.

553. *Id.* at 607, 958 N.E.2d at 1191, 935 N.Y.S.2d at 276.

554. *Id.* at 611, 958 N.E.2d at 1193, 935 N.Y.S.2d at 278.

555. *Id.*