# TORT LAW

**Edward J. Thater, Esq.[†] & Matthew D. Holmes, Esq. [††]**

CONTENTS



## INTRODUCTION

As has been the case multiple times in recent years, many of the most notable tort decisions by New York courts during the *Survey* year revolved around the governmental function immunity defense. This year, the authors determined that the new law was significant enough that it warranted an entire subsection of this Article. In other decisions of note, the Court of Appeals handed down several new decisions touching on foreseeability and the scope of duty, as well as several interesting decisions in the areas of defamation, copyright infringement, fraudulent inducement, and employment discrimination.

## I. TORT LIABILITY OF STATE AND LOCAL GOVERNMENTS

### *A. Governmental Function Immunity Defense*

The 2009 Court of Appeals case *McLean v. City of New York* modified and strengthened the application of the governmental function immunity defense.[1] As a result of the *McLean* decision, this defense has been successfully asserted by public entities in an increasingly wider variety of contexts, and the Court of Appeals and several appellate divisions handed down several decisions during the *Survey* year that

† Mr. Thater is an Associate with Gale Gale & Hunt, LLC; J.D. Syracuse University College of Law; M.P.P. Rutgers University; B.A. Nazareth College.

†† Mr. Holmes is an Associate with Ernstrom & Dreste, LLP; J.D. Syracuse University College of Law; B.A. Carthage College. This Article addresses recent developments in New York State tort law from July 1, 2016 to June 30, 2017.

1. 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173–74, 878 N.Y.S.2d 238, 244–45 (2009); *see also* Michael G. Bersani, *The Governmental Function Immunity Defense in Personal Injury Cases: An Analytical Template*, N.Y.S. BAR J., Oct. 2015, at 42.

further define the limits and application of this complicated, multi-layered defense.

As a brief review of the governmental function immunity defense, any government can claim complete immunity from liability for traditional government functions (as opposed to proprietary functions, which do not fall under the defense) if the government can show: (a) the government owed the plaintiff a special duty of care, and (b) the government's action at issue was the exercise of a discretionary function.[2] Thus, most of the decisions in this area resolve one of three questions: (1) Is the activity at issue a governmental function or a proprietary function? (2) Did the governmental actor have a special duty to the plaintiff? (3) Did the governmental action exercise discretion?

At the end of 2016, the Court of Appeals in *Turturro v. City of New York* affirmed a $20,000,000 damages award holding the City partially liable for the failure to conduct an adequate study of "traffic calming" on a city roadway with known speeding problems.[3] On appeal the question was "whether the City of New York was acting in a proprietary or governmental capacity when it failed to conduct an adequate study of . . . traffic calming measures . . . after it received numerous, repeated complaints of speeding on a Brooklyn roadway."[4] The Court was "also asked to determine whether the evidence was legally sufficient to uphold the jury's verdict regarding the issues of proximate cause and the City's qualified immunity."[5]

Back in 2004, the plaintiff, Anthony Turturro, then twelve years old, rode his bicycle on Gerritsen Avenue in Brooklyn.[6] Back then,

> [G]erritsen Avenue was a straight, four-lane road running roughly north to south with two lanes of traffic going in each direction, divided by a double yellow line. . . . [T]he western side of Gerritsen Avenue was bordered by storefronts and the eastern side was bordered by parkland and recreational areas. The speed limit on Gerritsen Avenue was [thirty] miles per hour.[7]

Anthony "was struck by a vehicle traveling southbound on Gerritsen Avenue, driven by defendant Louis Pascarella. . . . [A] police investigation determined that Pascarella was traveling at a speed of at least [fifty-four] miles per hour before the collision."[8] After the defendant

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2. Bersani, *supra* note 1, at 43–44.

3. (*Turturro I*), 127 A.D.3d 732–34, 5 N.Y.S.3d 306, 309 (2d Dep't 2015), *aff'd*, 28 N.Y.3d 469, 488, 68 N.E.3d 693, 708, 45 N.Y.S.3d 874, 889 (2016).

4. (*Turturro II*), 28 N.Y.3d at 474, 68 N.E.3d at 697, 45 N.Y.S.3d at 878.

5. *Id.*

6. *Id.*

7. *Id.* at 474, 68 N.E.3d at 697–98, 45 N.Y.S.3d at 878–79.

8. *Id.* at 474–75, 68 N.E.3d at 698, 45 N.Y.S.3d at 879.

pleaded guilty, the "[p]laintiffs commenced this negligence action against the City, Pascarella, and the owner of the vehicle Pascarella was driving."[9]

At trial, the plaintiffs criticized the City's response to the multiple speeding complaints, although the plaintiffs' expert admitted that speeding is primarily a matter for law enforcement.[10] Furthermore, the plaintiffs' expert failed to establish the existence of prior similar accidents, and even admitted that he had not performed any study to determine what additional traffic control measures the City could have implemented.[11]

The trial court allowed the jury to consider the City's study and to decide whether the study of the speeding complaints was proper and adequate, and the jury returned a massive verdict in favor of the plaintiff.[12] On appeal, the Second Department modified the verdict and remitted the matter for a new trial on damages unless the plaintiffs consented to a further reduction of the damages award.[13] "The appellate division rejected the City's contention that it was acting in a governmental capacity and therefore held that [the] plaintiffs had no obligation to prove special duty."[14] The appellate division went on to hold "that there was a rational process by which the jury could have concluded that the City was not entitled to qualified immunity and that the City's negligence was a proximate cause of the accident."[15]

In a 6-1 decision, the Court held that because the acts or omissions claimed to have caused the injury were within the field of roadway design and safety, the City of New York was acting in a proprietary capacity.[16] Collecting authorities, the Court concluded that maintenance of roadways is always a propriety function.[17] The Court indicated that although there was a component of this claim that involved policing, a government function, the essential test revolves around the acts or omissions claimed to have caused the injury, which in this case was roadway design.[18]

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9. *Turturro II*, 28 N.Y.3d at 475, 68 N.E.3d at 698, 45 N.Y.S.3d at 879.

10. *Id.* at 476, 68 N.E.3d at 698–99, 45 N.Y.S.3d at 879–80.

11. *Id.*

12. *Turturro I*, 127 A.D.3d 732, 733–38, 5 N.Y.S.3d 306, 309–12 (2d Dep't 2015).

13. *Id.* at 733–34, 5 N.Y.S.3d at 309.

14. *Turturro II*, 28 N.Y.3d at 477, 68 N.E.3d at 699, 45 N.Y.S.3d at 880 (citing *Turturro I*, 127 A.D.3d at 735, 5 N.Y.S.3d at 310).

15. *Id.* at 477, 68 N.E.3d at 699, 45 N.Y.S.3d at 880 (citing *Turturro I*, 127 A.D.3d at 737–38, 5 N.Y.S.3d at 312).

16. *Id.* at 483, 68 N.E.3d at 704, 45 N.Y.S.3d at 885.

17. *Id.* at 479, 68 N.E.3d at 701, 45 N.Y.S.3d at 882 (citing Wittorf v. City of New York, 23 N.Y.3d 473, 480, 15 N.E.3d 333, 336, 991 N.Y.S.2d 578, 581 (2014)).

18. *Id.* at 477–78, 68 N.E.3d at 700, 45 N.Y.S.3d at 881 (first quoting Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 425, 995 N.E.2d 131, 134, 972 N.Y.S.2d 169, 172 (2013);

Therefore, as the City was acting in a proprietary capacity, the governmental function immunity defense was not available, and the plaintiffs had no obligation to prove the existence of a special duty.[19]

The Court of Appeals in *Tara N.P. v. Western Suffolk Board of Cooperative Educational Services* was asked to determine whether Suffolk County was liable for damages resulting from the sexual assault of the plaintiff by a worker of a county-owned facility where the plaintiff attended adult education classes.[20] Defendant Smith was referred for a potential position through the County's "welfare to work" program to the lessee of the facility.[21] Based on the particular facts presented in this case, the Court held "the County's referral of defendant Smith was within the County's governmental capacity and the County did not assume a special duty to [the] plaintiff."[22] Therefore, summary judgment was properly granted to the County in a cause of action alleging negligence.[23]

Here, the plaintiff "was sexually assaulted while attending classes conducted by Western Suffolk Board of Cooperative Educational Services (BOCES) at a facility operated by North Amityville Community Economic Council (NACEC)."[24] NACEC leased the facility where classes were held from the County and NACEC agreed that the facility would be a work site for the County's welfare to work program operated by the County Department of Labor.[25] As part of this agreement, "NACEC agreed to accept referrals of individuals who did not have criminal records."[26]

The County Department of Labor referred Mr. Smith to NACEC for a potential position as a maintenance worker.[27] However, the County Department of Labor knew Mr. Smith was a level three sex offender.[28] "[M]onths later, while working at NACEC's facility, Smith sexually assaulted [the] plaintiff in an empty classroom."[29]

The plaintiff then brought an action to recover damages for personal injuries against the County, as well as Smith, NACEC, BOCES, and

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and then quoting Steering Comm. v. Port Auth. of N.Y. & N.J., 17 N.Y.3d 428, 447, 957 N.E.2d 733, 745, 933 N.Y.S.2d 164, 176 (2011)).

19. *Turturro II*, 28 N.Y.3d at 483, 68 N.E.3d at 704, 45 N.Y.S.3d at 885.
20. 28 N.Y.3d 709, 711, 71 N.E.3d 950, 952, 49 N.Y.S.3d 362, 364 (2017).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 711–12, 71 N.E.3d at 952, 49 N.Y.S.3d at 364.
25. *Tara N.P.*, 28 N.Y.3d at 712, 71 N.E.3d at 952, 49 N.Y.S.3d at 364.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

others.[30] The County moved for summary judgment "on the grounds that it did not owe [the] plaintiff a duty of care and, in any event, was entitled to absolute governmental immunity for discretionary acts" of referring someone to the welfare to work program.[31] The supreme court denied the motion and the appellate division reversed on the ground of governmental immunity, holding that the County was acting in a governmental capacity and did not voluntarily assume a special duty to the plaintiff.[32] According to the appellate division, the plaintiff could not avoid the concept of governmental immunity because the act complained of was a governmental one.[33]

On appeal, the plaintiff argued "that the County's negligence arose out of its proprietary function as a landlord."[34] The plaintiff also argued "that the County's failure to provide minimal security or a warning to protect those on the premises against foreseeable harm raise[d] issues of fact that preclude[d] summary judgment."[35] Even assuming that the County was "found to have acted in a governmental capacity," the plaintiff argued that "the County had a special duty to [the] plaintiff and the act of referring Smith to NACEC was not discretionary."[36]

The Court of Appeals held that the plaintiff's arguments had no merit under well-established case law.[37] First, the Court explained that the plaintiff's allegation of negligence was not the failure to implement security measures to prevent the sexual assault, but the County's negligent referral of a sexual offender to the welfare to work program.[38] According to the Court, this was a failure within the County's administration of the governmental program.[39] Therefore, the County was immune from suit in the absence of a special duty owed to the plaintiff.[40]

In analyzing the existence of a special duty, the Court further found that even if the County promised that it would not refer anyone with a

30. *Tara N.P.*, 28 N.Y.3d at 712, 71 N.E.3d at 953, 49 N.Y.S.3d at 365.

31. *Id.* (citing Pietropaolo v. W. Suffolk Bd. Of Coop. Educ. Servs., No. 07-722, 2012 N.Y. Slip Op. 32288(U), at 2 (Sup. Ct. Suffolk Cty. Aug. 3, 2012)).

32. *Pietropaolo*, 2012 N.Y. Slip Op. 32288(U), at 8.

33. Tara N.P. v. W. Suffolk Bd. of Coop. Educ. Servs., 120 A.D.3d 1323, 1325, 993 N.Y.S.2d 98, 101 (2d Dep't 2014) (citing McLean v. City of New York, 12 N.Y.3d 194, 203, 905 N.E.2d 1167, 1173–74, 878 N.Y.S.2d 238, 244–45 (2009)).

34. *Tara N.P.*, 28 N.Y.3d at 712, 71 N.E.3d at 953, 49 N.Y.S.3d at 365.

35. *Id.*

36. *Id.* at 713, 71 N.E.3d at 953, 49 N.Y.S.3d at 365.

37. *Id.*

38. *Id.* at 714, 71 N.E.3d at 954, 49 N.Y.S.3d at 366.

39. *Tara N.P.*, 28 N.Y.3d at 716, 71 N.E.3d at 955, 49 N.Y.S.3d at 367 (quoting McLean v. City of New York, 12 N.Y.3d 194, 197, 905 N.E.2d 1167, 1169, 878 N.Y.S. 238, 240 (2009)).

40. *Id.* at 716, 71 N.E.3d at 956, 49 N.Y.S.3d at 368.

criminal background, the promise would not have been made directly to the plaintiff.[41] There was also no evidence that the plaintiff had any knowledge of the County's request.[42] As there was nothing to suggest that the plaintiff had any direct contact with the County that could have given rise to reasonable reliance on the County's promise, the Court concluded that no special duty existed and that the County was immune from suit.[43]

Several appellate divisions also handed down decisions that tested the limits of the governmental function immunity defense. In *Holloway v. City of New York*, the Second Department considered the question of whether a duty existed when firefighters responded to an emergency in response to a 911 call.[44] The decedent collapsed in her fourth-floor Brooklyn apartment after losing a significant amount of blood through the shunt in her arm that was used to treat her kidney failure through dialysis.[45] The plaintiff, who was the decedent's son, called 911, and the dispatcher sent a municipal fire engine crew as well as a municipal ambulance to respond to the scene.[46] The firefighters arrived first and, as directed by the 911 operator, knocked on the door of an apartment on the first floor.[47] After making some inquiries and not locating anyone who was aware of any emergencies, the firefighters left the building at approximately the same time as the ambulance arrived.[48] Despite the best efforts of the paramedics and the EMTs who arrived, the decedent passed away in the apartment.[49] The plaintiff filed suit alleging wrongful death—that the failure of the firefighters to locate the decedent and render immediate aid was a substantial cause of the decedent's death.[50] However, the Second Department dismissed the case under the governmental function immunity, noting that firefighters did not perform a sufficient affirmative undertaking as to create a special duty to act on the decedent's behalf.[51] The appellate division held that, even assuming

41. *Id.* at 715, 28 N.E.3d at 955, 49 N.Y.S.3d at 367. Note that direct contact between the governmental actor and a plaintiff and justifiable reliance on an undertaking are two essential elements to the establishment of a special duty under the doctrine of governmental function immunity. *Id.* (citing Cuffy v. New York, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987)).

42. *Id.* at 715, 28 N.E.3d at 955, 49 N.Y.S.3d at 367.

43. *Tara N.P.*, 28 N.Y.3d at 715–16, 28 N.E.3d at 955–56, 49 N.Y.S.3d at 367–68 (citing *Cuffy*, 69 N.Y.2d at 261, 505 N.E.2d at 940, 513 N.Y.S.3d at 375).

44. 141 A.D.3d 688, 689–90, 36 N.Y.S.3d 190, 191–92 (2d Dep't 2016).

45. *Id.* at 688–89, 36 N.Y.S.3d at 191.

46. *Id.* at 689, 36 N.Y.S.3d at 191.

47. *Id.*

48. *Id.*

49. *Holloway*, 141 A.D.3d at 689, 36 N.Y.S.3d at 191.

50. *Id.* at 689, 36 N.Y.S.3d at 191–92.

51. *Id.* at 690, 36 N.Y.S.3d at 192 (citing Bawa v. City of New York, 94 A.D.3d 926, 928, 942 N.Y.S.2d 191, 193 (2d Dep't 2012)).

the 911 operator's assurance that aid was en route constituted an affirmative assumption on behalf of the defendant, the plaintiff failed to demonstrate that the plaintiff or the decedent detrimentally relied upon that assurance, which is an essential element to establishing a special duty under the defense.[52]

The Fourth Department upheld a decision that a municipal agency in Buffalo performed a proprietary function when it facilitated a lead abatement program.[53] The Buffalo Urban Renewal Agency (BURA) managed a federally-funded grant program that performed lead abatement work around the City of Buffalo.[54] BURA's management of the program included, among other activities, soliciting homeowners to apply for enrollment in the project, determining the eligibility of applicants, performing pre- and post-abatement testing of properties, choosing contractors to perform abatement work, drafting and approving the contract between the contractors and the homeowners, and inspecting the remediation work as it was being performed.[55] BURA moved to dismiss the action on the basis of governmental function immunity, claiming that the project was a traditional government function, that no special duty had been created, and that the decisions it made in managing the program were discretionary in nature.[56] However, the appellate division ruled—based on prior case law—that the maintenance and care of buildings with tenants is generally a proprietary function, and therefore the defense was not available to BURA.[57]

The Third Department considered the question of whether the New York State Office of Mental Retardation and Development Disabilities (OMRDD) was legally liable for injuries sustained by a developmentally-disabled woman who resided in a private facility that was certified and regulated by OMRDD.[58] The plaintiff claimed that OMRDD negligently failed to follow the provisions of Mental Hygiene Law § 13.07(c), which required OMRRD to ensure persons with developmental disabilities receive high-quality services and that they are protected.[59]

The appellate division noted that, while the provision of mental

52. *Id.*

53. Moore v. Del-Rich Props., Inc., 151 A.D.3d 1817, 1818, 58 N.Y.S.3d 772, 774 (4th Dep't 2017).

54. *Id.* at 1818, 58 N.Y.S.3d at 773.

55. *Id.* at 1819–20, 58 N.Y.S.3d at 774–75.

56. *Id.* at 1818, 58 N.Y.S.3d at 773–74.

57. *Id.* at 1819, 58 N.Y.S.3d at 774.

58. T.T. v. New York, 151 A.D.3d 1345, 1345, 58 N.Y.S.3d 187, 189 (3d Dep't 2017).

59. *Id.* at 1348, 58 N.Y.S.3d at 191 (citing N.Y. MENTAL HYG. LAW § 13.07(c) (McKinney 2011)).

health care is a proprietary function, OMRDD did not provide any direct care but instead oversaw and regulated the facility in question, which was unquestionably a governmental function.[60] The court then concluded that no special duty existed, as a negligent violation of a statute, by itself, does not create a duty.[61] Furthermore, the appellate division noted that the Legislature created a statutory remedy to provide residents and their legal guardians with a recourse to address cases where OMRDD does not discharge its duties adequately.[62] Thus, the court held that when, as here, the Legislature creates a detailed statutory scheme that provides a method to redress grievances that does not include a private right of action, no private right of action can be recognized under that same statute.[63]

Finally, the Fourth Department held in *Malay v. City of Syracuse* that the professional judgment rule necessarily includes the exercise of discretion and therefore permits municipalities to invoke the governmental function immunity defense.[64] In this case, the owner of the plaintiff's apartment building shot his own wife and took other relatives hostage.[65] After negotiators were unable to resolve the stand-off, police fired CS gas canisters into the building, including the plaintiff's apartment by mistake.[66] The police eventually extracted the plaintiff and held her for several hours without any medical assistance or decontamination efforts.[67] The Fourth Department concluded that both the decision to fire CS gas canisters and the decision to interview the plaintiff immediately rather than permit her to seek medical assistance were exercises of the professional judgment of police officers at the scene and, thus, the defendants were immune from liability as a matter of law.[68]

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60. *Id.* at 1347, 58 N.Y.S.3d at 190 (first citing Metz v. New York, 20 N.Y.3d 175, 179, 982 N.E.2d 76, 79, 958 N.Y.S.2d 314, 317 (2012); then citing Scruggs-Leftwich v. Rivercross Tenants' Corp., 70 N.Y.2d 849, 851–52, 517 N.E.2d 1337, 1339, 523 N.Y.S.2d 451, 453 (1987); then citing Worth Distribs. v. Latham, 59 N.Y.2d 231, 237, 451 N.E.2d 193, 194, 464 N.Y.S.2d 435, 436 (1983); and then citing O'Connor v. New York, 58 N.Y.2d 184, 189, 447 N.E.2d 33, 34–35, 460 N.Y.S.2d 485, 486–87 (1983)).

61. *Id.* at 1348, 58 N.Y.S.3d at 191.

62. *Id.* (citing N.Y. MENTAL HYG. LAW § 45.07 (McKinney 2011)).

63. *T.T.*, 151 A.D.3dat 1349, 58 N.Y.S.3d at 192 (first citing MENTAL HYG. § 13.07(c); then citing McWilliams v. Catholic Diocese of Rochester, 145 A.D.2d 904, 905, 536 N.Y.S.2d 285, 286–87 (4th Dep't 1988); and then citing Justice v. New York, 116 A.D.3d 1196, 1198, 985 N.Y.S.2d 294, 296–97 (3d Dep't 2014)).

64. 151 A.D.3d 1624, 1625, 57 N.Y.S.3d 267, 268 (4th Dep't 2017) (first citing Johnson v. City of New York, 15 N.Y.3d 676, 680, 942 N.E.2d 219, 222, 917 N.Y.S.2d 10, 13 (2010); and then citing Valdez v. City of New York, 18 N.Y.3d 69, 75–76, 960 N.E.2d 356, 361, 936 N.Y.S.2d 587, 592 (2011)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1626, 57 N.Y.S.3d at 269 (first citing *Johnson*, 15 N.Y.3d at 681, 942 N.E.2d at 222, 917 N.Y.S.2d at 13; then citing Arias v. City of New York, 22 A.D.3d 436,

*B. Decisions Regarding Notices of Claim*

The Court of Appeals also decided a pair of decisions that dealt with service of notices of claim under General Municipal Law § 50-e. In the first case, the court considered the burden of a claimant to prove prejudice when filing a motion for leave to serve late notice of a claim under General Municipal Law § 50-e(5).[69] In *Newcomb v. Middle Country Central School District*, the "petitioner's son, who was sixteen at the time, was hit by a car while attempting to cross an intersection" near his high school.[70] "[The] [p]etitioner and his counsel repeatedly asked the police department and the district attorney for access to the police accident file."[71] Finally, six months after the accident and well after the time to file a notice of claim had expired, the petitioner's counsel received access to the police file, which showed a large sign at the intersection advertising a play at another high school in the district.[72] Claiming the large sign was negligently placed in such a way as to obstruct the view of pedestrians crossing at that intersection, the petitioner brought an order to show cause for leave to serve a late notice of claim under §50-e(5).[73] Of note, the School District's opposition to the order to show cause consisted solely of an affirmation of counsel that argued that the District "did not have actual knowledge of the essential facts" because the police had made no mention of the sign to the School District and because the School District's actual notice of the "accident failed to connect the accident to the sign."[74]

In considering the order to show cause, the supreme court placed the burden on the petitioner to demonstrate that the School District was not substantially prejudiced by the delay in service.[75] The court concluded that the graduation of students and the change of personnel, as well as the fading memories of witnesses after the passage of time, would "presumably hinder the [S]chool [D]istrict's ability to collect information about the sign."[76] Thus, the trial court concluded that the School District

437, 802 N.Y.S.2d 209, 210–11 (2d Dep't 2005); and then citing Lubecki v. City of New York, 304 A.D.2d 224, 234–35, 758 N.Y.S.2d 610, 617 (4th Dep't 2003)).

69. N.Y. GEN. MUN. LAW § 50-e(5) (McKinney 2016).

70. 28 N.Y.3d 455, 461, 68 N.E.3d 714, 716–17, 45 N.Y.S.3d 895, 897–98 (2016).

71. *Id.* at 461, 68 N.E.3d at 717, 45 N.Y.S.3d 898.

72. *Id.* at 461–62, 68 N.E.3d at 717, 45 N.Y.S.3d at 898.

73. *Id.* at 462, 68 N.E.3d at 717, 45 N.Y.S.3d at 898 (citing GEN. MUN. § 50-e(5)).

74. *Id.* at 463, 68 N.E.3d at 718, 45 N.Y.S.3d at 899.

75. *Newcomb*, 28 N.Y.3d at 464, 68 N.E.3d at 718, 45 N.Y.S.3d at 899. Note that a lack of substantial prejudice is one of four factors a court must weigh while considering a motion for leave to file a late notice of claim. *Id.* at 463, 68 N.E.3d at 718, 45 N.Y.S.3d at 899 (citing GEN. MUN. § 50-e(5)).

76. *Id.* at 464, 68 N.E.3d at 718–19, 45 N.Y.S.3d at 899–90 (quoting Newcomb v. Middle Cty. Cent. Sch. Dist., No. 31807/2013, 2014 N.Y. Slip Op. 31320(U), at 4 (Sup. Ct.

was substantially prejudiced, and the appellate division affirmed.[77]

However, the Court of Appeals reversed.[78] The Court noted that while a lack of knowledge and lengthy delays are important factors courts must consider in determining substantial prejudice, mere inferences alone cannot support a finding of substantial prejudice.[79] Rather, the Court held that a determination of substantial prejudice must be based upon evidence in the record.[80] The Court went further and crafted a new burden-shifting rule regarding notices of claims.[81] The initial burden rests on the petitioner to present some evidence or some plausible argument that supports a finding of no substantial prejudice.[82] Once the petitioner makes that initial showing, the burden shifts to the governmental entity to rebut that showing with particularized evidence demonstrating a substantial prejudice.[83]

In a unanimous opinion by Judge Stein, the Court of Appeals also affirmed a holding that service of a notice of claim is not required under § 50-e(1)(b) when a municipal entity acts solely as an insurer of an employee but is under no obligation to indemnify that employee.[84]

General Municipal Law § 50-e(1)(b) requires a notice of claim as a condition precedent to the commencement of an action against an officer, employee, or agent of a municipal corporation "only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law."[85] In *Villar v. Howard*, the plaintiff commenced suit against the Erie County Sheriff for failing to protect him from sexual assault while he was an inmate in the Erie County Correctional Facility.[86] The defendant moved to dismiss on the grounds, inter alia, that no notice of claim was served on Erie County, which, the defendant claimed, had a legal duty to indemnify him.[87]

The legal duty in question came from a resolution of the Erie County

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Suffolk Cty. May 13, 2014)).

77. *Id.* at 464, 68 N.E.3d at 719, 45 N.Y.S.3d at 900.

78. *Id.*

79. *Newcomb*, 28 N.Y.3d at 465, 68 N.E.3d at 719–20, 45 N.Y.S.3d at 900–01 (citing Williams v. Nassau Cty. Med. Ctr., 6 N.Y.3d 531, 539, 847 N.E.2d 1154, 1158, 814 N.Y.S.2d 580, 584 (2006)).

80. *Id.* at 465–66, 68 N.E.3d at 720, 45 N.Y.S.3d at 901.

81. *See id.* at 466, 68 N.E.3d at 720, 45 N.Y.S.3d at 901.

82. *Id.*

83. *Id.* at 467, 68 N.E.3d at 720, 45 N.Y.S.3d at 901.

84. Villar v. Howard, 28 N.Y.3d 74, 78, 64 N.E.3d 280, 281, 41 N.Y.S.3d 460, 461 (2016) (citing N.Y. GEN. MUN. LAW § 50-e(1)(b) (McKinney 2016)).

85. GEN. MUN. § 50-e(1)(b).

86. *Villar*, 28 N.Y.3d at 78, 64 N.E.3d at 281, 41 N.Y.S.3d at 461.

87. *Id.* at 78, 64 N.E.3d at 282, 41 N.Y.S.3d at 462 (citing N.Y. C.P.L.R. 3211 (McKinney 2016)).

Legislature that provided by its terms that the County would act as an insurer for the Sheriff for the consideration of one dollar annually, as the liability insurance the County had previously purchased for the Sheriff had become prohibitively expensive.[88] The resolution, by its terms, did not extend to punitive or exemplary damages and specifically noted that the County would not be vicariously liable for the acts of the Sheriff.[89]

The Court concluded that a legal agreement to act as an insurer was substantively different than a legal obligation to indemnify that would trigger a requirement for a notice of claim under § 50-e.[90] The Court further noted that the County was constitutionally prohibited from indemnifying the Sheriff, so the County could not have obligated itself to indemnify the Sheriff even if it attempted to do so.[91] Thus, the Court concluded that no notice of claim was required and upheld the denial of the Sheriff's motion to dismiss on those grounds.[92]

## II. OTHER COURT OF APPEALS TORT DECISIONS

### *A. Negligence Cases*

The Court of Appeals concluded in *Pink v. Rome Youth Hockey Association, Inc.* that an assault committed against a spectator by another spectator after the conclusion of a youth hockey game was not a reasonably foreseeable result of a failure to take protective measures that would give rise to liability.[93] The plaintiff attended a youth hockey game and attempted to break up an altercation between two other spectators that occurred after the conclusion of the game.[94] The brother of one of the spectators struck the plaintiff and caused a head injury.[95] The brother subsequently pleaded guilty to the crime of assault against the plaintiff.[96]

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88. *Id.* at 79, 64 N.E.3d at 282, 41 N.Y.S.3d at 462 (first citing GEN. MUN. § 50-e(1)(b); and then citing N.Y. PUB. OFF. LAW § 18 (McKinney 2008)).

89. *Id.* at 80, 64 N.E.3d at 282, 41 N.Y.S.3d at 462.

90. *See id.* at 80, 64 N.E.3d at 283, 41 N.Y.S.3d at 463 (citing GEN. MUN. § 50-e(1)(a)–(b)).

91. *Villar*, 28 N.Y.3d at 78–80, 64 N.E.3d at 281–83, 41 N.Y.S.3d at 461–63 (first citing Recommendation of Law Revision Commission to the 1981 Legislature, *reprinted in* 1981 McKinney's Sess. Laws of N.Y., at 2315, 2321 n.47; and then citing Bardi v. Warren Cty. Sherriff's Dep't, 194 A.D.2d 21, 23, 603 N.Y.S.2d 90, 91 (3d Dep't 1993)) ("Although the constitutional bar has since been removed, Erie County has not adopted an obligation to indemnify the Sheriff or otherwise altered its 1985 resolution.").

92. *Id.* at 78, 80, 64 N.E.3d at 281, 283, 41 N.Y.S.3d at 461, 463 (citing GEN. MUN. § 50-e(1)(b)).

93. 28 N.Y.3d 994, 996, 998, 63 N.E.3d 1148, 1149, 1151, 41 N.Y.S.3d 204, 205, 207 (2016).

94. *Id.* at 996, 63 N.E.3d at 1149, 41 N.Y.S.3d at 205.

95. *Id.*

96. *Id.*

The plaintiff subsequently commenced a suit against several parties, including the organizers of the event, claiming that the defendant Hockey Association owed him a duty to protect him against criminal activity.[97] The Hockey Association moved for summary judgment on the grounds that it had no duty to protect, which was denied both by the trial court and by the appellate division.[98]

However, in a memorandum opinion, the Court reversed and granted summary judgment on the grounds of foreseeability.[99] The Court found that the defendant did have "a duty to protect spectators from foreseeable criminal conduct" and that the defendant had met that duty by putting in place and enforcing measures to address player and spectator conduct.[100] However, the Court concluded on the record before it that the criminal assault on the plaintiff was not a reasonably foreseeable result of any failure to take preventative measures, insofar as nothing could have put the defendant on notice that a "failure to eject any specific spectator would result in a criminal assault, particularly since such an assault had not happened before" at any of the games organized by the defendant.[101]

In another case touching upon foreseeability, the Court of Appeals held that a farm was not entitled to summary judgment in a wrongful death action involving a decedent who was struck and killed by a car while attempting to rescue a farm's calf that was loose on the road.[102]

A calf belonging to the defendant, Drumm Family Farm, had escaped from its nearby enclosure and was running loose on a rural road late one evening.[103] The plaintiff's decedent allegedly parked and left her vehicle in an attempt to rescue the calf.[104] While the plaintiff was outside of her vehicle, she was struck and killed by a vehicle driven by another co-defendant.[105] The plaintiff commenced this action against the farm and the driver.[106] The plaintiff alleged "the Farm was negligent for failing to

97. *Id.* at 996, 63 N.E.3d at 1150, 41 N.Y.S.3d at 206.

98. *See* Pink v. Ricci, 125 A.D.3d 1376, 1377, 3 N.Y.S.3d 823, 824 (4th Dep't 2015), *rev'd*, 28 N.Y.3d at 998, 63 N.E.3d at 1151, 41 N.Y.S.3d at 207 (2016) (citing Barry v. Gorecki, 38 A.D.3d 1213, 1215, 833 N.Y.S.2d 329, 331 (4th Dep't 2007)).

99. *Pink*, 28 N.Y.3d at 998, 63 N.E.3d at 1151, 41 N.Y.S.3d at 207.

100. *Id.*

101. *Id.* (first citing Maheshwari v. City of New York, 2 N.Y.3d 288, 294, 810 N.E.2d 894, 897–98, 778 N.Y.S.2d 442, 445–46 (2004); and then citing Sanchez v. New York, 99 N.Y.2d 247, 252, 784 N.E.2d 675, 678, 754 N.Y.S.2d 621, 624 (2002)).

102. Hain v. Jamison, 28 N.Y.3d 524, 526, 68 N.E.3d 1233, 1235, 46 N.Y.S.3d 502, 504 (2016).

103. *Id.*

104. *Id.* at 527, 68 N.E.3d at 1236–37, 28 N.Y.S.3d at 505.

105. *Id.* at 526, 68 N.E.3d at 1235, 28 N.Y.S.3d at 504.

106. *Id.*

maintain its fence" and for failing to "restrain or retrieve the calf."[107]

The Farm then moved for summary judgment dismissing the claim against it, arguing that the decedent's act of exiting her vehicle was both an unforeseeable act and an intervening event that severed the proximate cause between the Farm's alleged negligence and the decedent's death.[108] The supreme court denied the motion, but the appellate division reversed.[109] The Court of Appeals reversed the appellate division and restored the case against the farm.[110]

As to the question of foreseeability, "the Farm concede[d] that the danger presented to motorists [of] a wandering farm animal is foreseeable insofar as a . . . vehicle may collide directly with the animal."[111] However, the Farm contested that the decedent's "purportedly extraordinary decision" to park her car and "leave the safety of her vehicle" to rescue the calf was not a reasonably foreseeable act.[112] However, the Court rejected this reasoning, noting that the Farm's alleged negligence—specifically its failure to securely restrain and/or retrieve the calf—was an ongoing occurrence that created dangerous circumstances and risks, risks that were still present at the time of the decedent's accident.[113] Therefore, the Court concluded that the question of whether the decedent's actions were reasonably foreseeable was a question for the finder of fact.[114] The Court also concluded that a factfinder could reasonably conclude that the decedent's death could flow directly from the Farm's negligent conduct in permitting the calf to stray and thus could not determine, as a matter of law, that the causal nexus between the negligence and the injury had been severed.[115]

The Court of Appeals in *Artibee v. Home Place Corp.* held that New York State is not subject to liability apportionment by the factfinder in supreme court when a plaintiff claims that "the State and a private party

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107. *Hain*, 28 N.Y.3d at 526,68 N.E.3d at 1235, 28 N.Y.S.3d at 505.

108. *Id.* at 527, 68 N.E.3d at 1235–36, 46 N.Y.S.3d at 505.

109. Hain v. Jamison, 130 A.D.3d 1562, 1562–63, 14 N.Y.S.3d 267, 267 (4th Dep't 2015).

110. *Hain*, 28 N.Y.3dat 534, 68 N.E.3d at 1241–42, 46 N.Y.S.3d at 510.

111. *Id.* at 532, 68 N.E.3d at 1240, 46 N.Y.S.3d at 509 (citing Hastings v. Sauve, 21 N.Y.3d 122, 125, 989 N.E.2d 940, 942, 967 N.Y.S.2d 658, 660 (2013)).

112. *Id.*

113. *Id.* at 533, 68 N.E.3d at 1240–41, N.Y.S.3d 509–10 (first citing Derdiarian v. Felix Contractor Corp., 51 N.Y.2d 308, 316, 414 N.E.2d 666, 671, 434 N.Y.S.2d 166, 170 (1980); and then citing Campbell v. Cent. N.Y. Reg'l Transp. Auth., 7 N.Y.3d 819, 820–21, 855 N.E.2d 1165, 1165, 822 N.Y.S.2d 751, 751 (2006)).

114. *See id.* at 533, 68 N.E.3d at 1240, 46 N.Y.S.3d at 509.

115. *Hain*, 28 N.Y.3d at 534, 68 N.E.3d at 1241, 46 N.Y.S.3d at 510 (quoting *Derdiarian*, 51 N.Y.2d at 315, 414 N.E.2d at 670, 434 N.Y.S.2d at 169–70).

are liable for noneconomic losses in a personal injury action."[116]

In this case, the "[p]laintiff Carol Artibee and her spouse, derivatively, commenced [an] action . . . to recover for injuries that [she] sustained while traveling on a state highway when a large branch broke off a tree bordering the road, fell through [her] Jeep and struck her on the head."[117] The "defendant allegedly own[ed] the property on which the tree was located."[118] The plaintiff alleged that the defendant was negligent in failing to inspect, trim and remove the dead or diseased tree. [The p]laintiffs also filed a claim against the State of New York in the Court of Claims, alleging that Department of Transportation employees were negligent in failing to monitor open and obvious hazards along the state highway, properly maintain the trees, or warn drivers of the hazard. At trial, the defendant moved to introduce evidence . . . of the State's negligence and for a jury charge directing the apportionment of liability for [the] plaintiff's injuries between [the] defendant and the State. [The p]laintiff expressed her position that nothing bars the supreme court jury from hearing evidence at trial as to the State of New York's potential liability for [the plaintiff's] injuries, but objected to allowing the jury to apportion fault against the State.[119]

In response, the supreme court ruled that, while evidence of the State's negligence would be admissible, the jury would not be instructed to apportion liability between [the] defendant and the State. The court concluded that based on the language of CPLR 1601 . . . the statute and equitable considerations required denial of [the] defendant's request for a jury instruction regarding the apportionment.[120]

On appeal and in a case of first impression, the Third Department reversed the supreme court ruling and determined that evidence of the State's negligence was admissible at trial and that the jury should be charged on the issue of the State's potential liability.[121] Therefore, the jury should have been able to apportion fault between the defendant and the State.[122]

The sole question to the Court of Appeals was "whether the

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116. (*Artibee II*), 28 N.Y.3d 739, 742, 71 N.E.3d 1205, 1206, 49 N.Y.S.3d 638, 639 (2017).

117. *Id*. at 742, 71 N.E.3d at 1206–07, 49 N.Y.S.3d at 639–40.

118. *Id.* at 742, 71 N.E.3d at 1207, 49 N.Y.S.3d at 640.

119. *Id.* at 742–43, 71 N.E.3d at 1207, 49 N.Y.S.3d at 640 (internal quotations omitted).

120. *Id.* at 743–44, 71 N.E.3d at 1207, 49 N.Y.S.3d at 639 (citing N.Y. C.P.L.R. 1601(1) (McKinney 2012)).

121. Artibee v. Home Place Corp. (*Artibee I*), 132 A.D.3d 96, 99–100, 14 N.Y.S.3d 817, 820 (3d Dep't 2015).

122. *Id.* at 100, 14 N.Y.S.3d at 820.

factfinder in the [s]upreme [c]ourt may apportion fault to the State under CPLR 1601(1) when a plaintiff claims that both the State and a private party are liable for noneconomic losses in a personal injury action."[123] In a 4-2 decision (with one judge not participating), the majority took the position that "jurisdiction," in the statutory language of CPLR 1601, means either personal jurisdiction or subject matter jurisdiction, which includes the supreme court's lack of jurisdiction over actions against the State.[124] Furthermore, the Court determined that the legislative history of CPLR 1601 supported its decision, noting "that the statute reflects careful deliberations over the appropriate situations for a modified joint and several liability rule."[125] The Court also recognized that CPLR 1601

> was the product of a painstaking balance of interests . . . includ[ing], among many others, the burdens to be imposed on innocent plaintiffs as well as a concern that defendants at fault to a small degree were consistently paying a disproportionate share of damages awards, adversely affecting the availability and affordability of liability insurance.[126]

As such, "[g]iven the assiduous balancing of interests that went into this statute—including the provision permitting apportionment in the Court of Claims to benefit the State, at the State's request—[the Court] declin[ed] to recognize the availability of apportionment where [CPLR 1601] does not expressly permit it."[127]

Perhaps more interesting than the majority's position in this case is the dissenting opinion from Judge Abdus-Salaam. Judge Abdus-Salaam stated, "[t]he majority's interpretation of CPLR 1601 is a strained reading of the statutory language."[128] It also "contravenes the legislative goal of limiting the liability of any and all tortfeasors who are responsible for

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123. *Artibee II*, 28 N.Y.3d at 742, 71 N.E.3d at 1206, 49 N.Y.S.3d at 639 (citing N.Y. C.P.L.R. 1601(1)).

124. *Id.* at 748, 71 N.E.3d at 1211, 49 N.Y.S.3d at 638 (first citing N.Y. C.P.L.R. 1601(1); and then citing DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 168C (5th ed. Jan. 2017 Supp.)).

125. *Id.* at 749–50, 71 N.E.3d at 1212, 49 N.Y.S.3d at 645 (quoting Governor's Memorandum, *reprinted in* 1986 McKinney's Sess. Laws of N.Y., ch. 682, at 2841 (July 30, 1986) (defining the limited liability of persons jointly liable)) (first citing Chianese v. Meier, 98 N.Y.2d 270, 275, 774 N.E.2d 722, 724, 746 N.Y.S.2d 657, 659 (2002); then citing Rangolan v. Cty. of Nassau, 96 N.Y.2d 42, 49, 749 N.E.2d 178, 183–84, 725 N.Y.S.2d 611, 617 (2001); and then citing Morales v. Cty. of Nassau, 94 N.Y.2d 218, 224–25, 724 N.E.2d 756, 759, 703 N.Y.S.2d 61, 64 (1999)).

126. *Id.* at 750, 71 N.E.3d at 1212, 49 N.Y.S.3d at 643 (alteration in original) (omission in original) (internal quotations omitted) (quoting *Morales*, 94 N.Y.2d at 224–25, 724 N.E.2d at 759, 703 N.Y.S.2d at 64).

127. *Id.* at 750, 71 N.E.3d at 1212–13, 49 N.Y.S.3d at 645–46.

128. *Artibee II*, 28 N.Y.3d at 752, 71 N.E.3d at 1214, 49 N.Y.S.3d at 647 (Abdus-Salaam, J., dissenting).

[fifty percent] or less of the total liability."[129] Additionally, Judge Abdus-Salaam stated that the majority's analysis gave "the State a preferred status over other tortfeasors, despite indication" of the Legislature's intent.[130]

Also, according to Judge Abdus-Salaam, "the majority's holding created anomalous situations" that were not intended by the Legislature.[131] The first situation was that "a defendant in supreme court [could not] shift liability to the nonparty State, but a State defendant in the Court of Claims [could] shift liability to a private party."[132] The second situation was that "a plaintiff in the Court of Claims [would] face apportionment with the State . . . but a plaintiff in the supreme court would not face apportionment."[133] As such, Judge Abdus-Salaam would have affirmed the appellate division's order that determined that evidence of the State's negligence was admissible at trial and that the jury should be charged on the issue of the State's potential liability.[134]

The Court of Appeals in *Oddo v. Queens Village Committee for Mental Health for Jamaica Community Adolescent Program, Inc.* considered the issue of whether the defendant, a mental health and substance abuse treatment facility, owed a duty of care to the plaintiff, a person who was assaulted by a discharged resident, and held that the defendant owed no duty of care to the plaintiff because it did not have any control over him at the time of the incident.[135]

The starting point in this case came from an incident where a nonparty, Sean Velentzas, was arrested after forcing a cab driver to withdraw money from an ATM at gunpoint.[136] Instead of being incarcerated, Mr. Velentzas was given an opportunity to participate in a specialized alternative treatment center called Treatment Alternatives for Safer Communities (TASC).[137] TASC worked with programs and centers like Queen's Village Community (the defendant).[138] At some point, Mr. Velentzas was admitted to the Jamaica Community Adolescent Program for an eighteen-month program.[139] Three weeks into the program, he was involved in a physical altercation with another resident and admitted to

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 752–53, 71 N.E.3d at 1214, 49 N.Y.S.3d at 647.
133. *Artibee II*, 28 N.Y.3d at 753, 71 N.E.3d at 1214, 49 N.Y.S.3d at 647.
134. *Id.* (citing *Artibee I*, 132 A.D. at 100, 14 N.Y.S.3d at 820).
135. 28 N.Y.3d 731, 733, 71 N.E.3d 946, 947, 49 N.Y.S.3d 358, 359 (2017).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

having consumed alcohol.[140] He was ultimately discharged because of this incident.[141] While filling out transfer paperwork, Velentzas became enraged to the point of needing to be escorted from the defendant's premises.[142] Shortly after his discharge, he assaulted his mother's boyfriend by "repeatedly punching him in [the] face and stabbing him in the shoulder."[143]

The plaintiff commenced a negligence action against the defendant and contended that his injuries were solely the result of the defendant releasing Mr. Velentzas.[144] In its motion for summary judgment dismissing the complaint, the defendant argued that it "owed no duty to [the] plaintiff because Velentzas was properly discharged from the facility for having violated its policies."[145] Evidence in support of the defendant's motion included deposition testimony stating that "residents can leave the program against medical advice" and the defendant's staff are not authorized to prevent someone from leaving the facility.[146]

The trial court denied the motion for summary judgment and held that the defendant owed a duty of care to the plaintiff.[147] The appellate division also determined that the defendant owed a duty of care to the plaintiff.[148] On appeal, the certified question to the Court was as follows: "Was the order of this Court, which affirmed the Order of the [s]upreme [c]ourt, properly made?"[149]

The Court of Appeals answered that question in the negative and concluded that the defendant did not have a duty to protect the general public from Mr. Velentzas after his proper discharge from the defendant's facility.[150] The Court went on to state:

Since JCAP had dismissed Velentzas from the program, it was not in control of him at the time of the incident giving rise to this lawsuit. Indeed, to hold otherwise would raise the question of how long any prior control would last. . . . [I]t is difficult, if not impossible, to determine when JCAP's duty to protect the public from Velentzas would end if any duty existed beyond his discharge.[151]

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140. *Oddo*, 28 N.Y.3d at 733–34, 71 N.E.3d at 947, 49 N.Y.S.3d at 359.
141. *Id.* at 734, 71 N.E.3d at 947, 49 N.Y.S.3d at 359.
142. *Id.* at 734, 71 N.E.3d at 948, 49 N.Y.S.3d at 360.
143. *Id.* at 734, 71 N.E.3d at 947, 49 N.Y.S.3d at 359.
144. *Id.*
145. *Oddo*, 20 N.Y.3d at 734, 71 N.E.3d at 947, 49 N.Y.S.3d at 359.
146. *Id.*
147. *Id.* at 735, 71 N.E.3d at 948, 49 N.Y.S.3d at 360.
148. *Id.*
149. *Id.*
150. *Oddo*, 20 N.Y.3d at 738, 71 N.E.3d at 950, 49 N.Y.S.3d at 362.
151. *Id.* at 737, 71 N.E.3d at 949, 49 N.Y.S.3d at 361.

The Court also held that it would be "unreasonable to impose upon facilities like [the defendant's] a duty to protect the public from individuals they have dismissed from their charge because the duty would essentially be limitless."[152]

In *Burlington Insurance Co. v. NYC Transit Authority*, the Court of Appeals concluded that "where an insurance policy is restricted to liability for any bodily injury caused, in whole or in part by the acts or omissions of the named insured, the coverage applies to injury proximately caused by the named insured."[153]

In this case, the plaintiff, Burlington Insurance Company, issued an insurance policy to nonparty Breaking Solutions, Inc. (BSI) and listed the New York City Transit Authority (NYCTA) and MTA New York City Transit (MTA) as additional insureds.[154] "NYCTA contracted with BSI to provide equipment and personnel and for BSI to perform tunnel excavation work on a New York City subway construction project. To comply with NYCTA's insurance requirements, BSI purchased commercial general liability insurance from Burlington . . . ."[155] The policy contained an endorsement that listed NYCTA, MTA, and New York City as additional insureds.[156]

During the coverage period, an NYCTA employee fell off an elevated platform as he tried to avoid an explosion after a BSI machine touched a live electrical cable buried in concrete at the excavation site. The employee and his spouse brought an action against the City and BSI in federal court . . . .[157]

Burlington assumed the defense of BSI and accepted the City's tender of its defense under a reservation of rights.[158] The City impleaded NYCTA and MTA, asserting claims for indemnification and contribution.[159] NYCTA tendered its defense to Burlington as an additional insured.[160]

At some point, the parties learned that the BSI machine-operator could not have known about the location of the cable or the fact that it was electrified, and as a result, the trial court dismissed the plaintiff's claims against BSI with prejudice.[161] Burlington then commenced a

152. *Id.*
153. 29 N.Y.3d 313, 317, 79 N.E.3d 477, 478, 57 N.Y.S.3d 85, 86 (2017).
154. *Id.*
155. *Id.* at 317, 79 N.E.2d at 479, 57 N.Y.S.3d at 87.
156. *Id.* at 317–18, 79 N.E.2d at 479, 57 N.Y.S.3d at 87.
157. *Id.* at 318, 79 N.E.2d at 479, 57 N.Y.S.3d at 87.
158. *Burlington Ins. Co.*, 29 N.Y.3d at 318, 79 N.E.2d at 479, 57 N.Y.S.3d at 87.
159. *Id.*
160. *Id.* at 319, 79 N.E.2d at 479, 57 N.Y.S.3d at 87.
161. *Id.* at 319, 79 N.E.2d at 480, 57 N.Y.S.3d at 88.

subrogation and coverage action against NYCTA and MTA.[162] The trial court granted Burlington's motion for summary judgment and concluded that NYCTA and MTA were not additional insureds.[163] The appellate division reversed and stated that "the act of triggering the explosion . . . was a cause of [the employee's] injury" within the meaning of the policy.[164]

On appeal, Burlington argued that NYCTA and MTA were not additional insureds because the acts or omissions of BSI were not a proximate cause of the injury.[165] Burlington maintained that the coverage did not apply where the additional insured was the sole proximate cause of the injury.[166]

NYCTA and MTA claimed that by the policy's

express terms the endorsement applies to any act or omission by BSI that resulted in injury, regardless of the additional insured's negligence. They further argued that the [a]ppellate [d]ivision properly concluded that BSI's operation of its excavation machine provided the requisite causal nexus between injury and act to trigger coverage under the policy.[167]

The Court of Appeals ultimately decided that Burlington had "the better argument."[168] The Court concluded that there was no coverage obligation because, "by its terms, the policy endorsement is limited to those injuries proximately caused by BSI."[169] The Court went on to acknowledge that "but for BSI's machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured," but "that triggering act was not the proximate cause of the employee's injuries."[170] As such, "BSI was not at fault" and the plaintiff's "injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize [sic] the cable."[171]

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162. *Id.*

163. Burlington Ins. Co. v. N.Y.C. Transit Auth., No. 102774/2011, 2012 N.Y. Slip Op. 52370(U), at 13 (Sup. Ct. N.Y. Cty. Dec. 20, 2012).

164. Burlington Ins. Co. v. N.Y.C. Transit Auth., 132 A.D.3d 127, 134–35, 14 N.Y.S.3d 377, 382 (1st Dep't 2015).

165. *Burlington Ins. Co.*, 29 N.Y.3d at 320, 79 N.E.3d at 480–81, 57 N.Y.S.3d at 88–89.

166. *Id.* at 320, 79 N.E.3d at 481, 57 N.Y.S.3d at 89.

167. *Id.*

168. *Id.*

169. *Id.* at 320–21, 79 N.E.3d at 481, 57 N.Y.S.3d at 89.

170. *Burlington*, 29 N.Y.S.3d at 325, 29 N.E.3d at 484, 57 N.Y.S.3d at 92.

171. *Id.*

### *B. Other Tort Decisions of Note*

In *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, the Court considered the question of whether a defamation action by the owner of a corporation could be sustained against a news organization that portrayed the plaintiff's corporation in an unflattering news story.[172] In a CBS News broadcast on November 30, 2011, a reporter stood in front of the Cheetah Club, a strip club owned by the plaintiff, for a remote story reporting that several strip clubs in New York City, including the Cheetah Club, were part of a trafficking ring run by members of the Bonanno and Gambino crime families to illegally bring in Eastern-European women into the United States.[173]

The plaintiffs, which included the three owners of the corporation named in the suit, commenced a suit against the news station alleging defamation, claiming the defendant's story consisted of false statements about the club being associated with the mafia, subjecting the club to "scorn and ridicule and adversely affect[ing] [the club's] ability to earn income."[174] The defendant moved to dismiss the claim by the three individual owners, arguing that the news reports were not "of and concerning" the plaintiff.[175] The supreme court granted the motion, and the appellate division affirmed.[176]

The Court upheld the dismissal, arguing that the plaintiff had failed to establish a prima facie case of defamation.[177] The Court reviewed the actual reports and concluded that "the challenged statements were not of and concerning" the three owners of the plaintiff-corporation, only the organization itself.[178] The report "did not mention any employees of the club or of the management and talent agencies" involved in the operation of the club, let alone the three individual plaintiffs.[179] As the defendant's broadcast did not include "sufficient particulars of identification[,]" the Court concluded the broadcast was insufficient to sustain an action by the

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172. 28 N.Y.3d 82, 84, 65 N.E.3d 35, 36, 42 N.Y.S.3d 64, 65 (2016).

173. *Id.* at 84–85, 65 N.E.3d at 36, 42 N.Y.S.3d at 65.

174. *Id.* at 86, 65 N.E.3d at 36–37, 42 N.Y.S.3d at 66–67.

175. *Id.* at 86, 65 N.E.3d at 37, 42 N.Y.S.3d at 66 (citing N.Y. C.P.L.R. 3211(a)(1), (7) (McKinney 2016)).

176. Three Amigos SJL Rest., Inc. v. CBS News, Inc., No. 152184/2012, 2013 N.Y. Slip Op. 31081(U), at 16 (Sup. Ct. N.Y. Cty. Mar. 19, 2013); Three Amigos SJL Rest., Inc. v. CBS News, Inc., 132 A.D.3d 82, 90, 15 N.Y.S.3d 36, 43 (1st Dep't 2015)).

177. *Three Amigos SJL Rest., Inc.*, 28 N.Y.3d at 87, 65 N.E.3d at 37–38, 42 N.Y.S.3d at 66–67.

178. *Id.* at 87, 65 N.E.3d at 37, 42 N.Y.S.3d at 66.

179. *Id.* (first citing Hays v. Am. Defense Soc'y Inc., 252 N.Y. 266, 269–70, 169 N.E. 380, 381 (1929); then citing Carlucci v. Poughkeepsie Newspapers, Inc., 57 N.Y.2d 883, 885, 442 N.E.2d 442, 443, 456 N.Y.S.2d 44, 45 (1982); and then citing Kirch v. Liberty Media Corp., 449 F.3d 388, 398 (2d Cir. 2006)).

individual plaintiffs.[180]

In an intellectual property action that touches on tort law, the Court determined in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* that "New York common law copyright does not recognize a right of public performance for creators of sound recordings."[181]

In a case certified to the Court of Appeals by the Second Circuit, two original members of the rock band The Turtles brought a putative class action against Sirius XM Radio, alleging that the buffering process used by Sirius creates unlicensed digital copies of the plaintiff's songs in infringement of the plaintiff's copyright under federal and New York law.[182] The District Court for the Southern District of New York had denied the defendant's motion for summary judgment on the grounds, inter alia, that New York's common law copyright includes a right of public performance that must be licensed.[183]

After reviewing existing law, the Court concluded that New York's common law copyright solely prevents unauthorized "copying of a work, [and] does not prevent someone from using a [lawfully] procured copy . . . in any other way the purchaser sees fit."[184] Thus, the Court concluded, a copyright under New York common law does not recognize a right of public performance.[185] The plaintiff's tort action for copyright infringement, therefore, could not be sustained on New York law grounds.[186]

In *Connaughton v. Chipotle Mexican Grill, Inc*., the Court of Appeals confirmed that that in order to successfully allege fraudulent inducement, a plaintiff must clearly allege actual "out-of-pocket loss" instead of relying on lost opportunity, potential loss of reputation, and/or potential to incur litigation expenses.[187]

Back in 2011, the plaintiff, a British television chef, was hired by Chipotle Mexican Grill, Inc. ("Chipotle") to develop a ramen-style

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180. *Id.* at 87, 65 N.E.3d at 38, 42 N.Y.S.3d at 67 (citing Brady v. Ottaway Newspapers, Inc., 84 A.D.2d 226, 233, 445 N.Y.S.2d 786, 791 (2d Dep't 1981)).

181. 28 N.Y.3d 583, 589, 70 N.E.3d 936, 937, 48 N.Y.S.3d 269, 270 (2016).

182. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 821 F.3d 265, 267–68 (2d Cir. 2016); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 27 N.Y.3d 1015, 52 N.E.3d 240, 32 N.Y.S.3d 576 (2016).

183. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 338, 353 (S.D.N.Y. 2014).

184. *Flo & Eddie, Inc.*, 28 N.Y.3d at 603, 70 N.E.3d at 947, 48 N.Y.S.3d at 280.

185. *Id.* at 605–06, 70 N.E.3d at 949, 48 N.Y.S.3d at 282.

186. *See* Flo & Eddie, Inc., v. Sirius XM Radio, Inc., 849 F.3d 14, 17 (2d Cir. 2017).

187. (*Connaughton II*), 29 N.Y.3d 137, 143, 75 N.E.3d 1159, 1163–64, 53 N.Y.S.3d 598, 602–03 (2017) (citing Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 422, 668 N.E.2d 1370, 1373, 646 N.Y.S.2d 76, 80 (1996)).

restaurant that was similar to Chipotle.[188] By the time Chipotle hired the plaintiff, he had already spent a significant amount of time developing the concept of a ramen-style national chain.[189] In the employment agreement between the plaintiff and the defendant, there was a provision regarding the plaintiff's employment "at-will status, and that both [parties] had the right to terminate the contract at any time without notice or cause."[190] There was also a provision for compensation that discussed bonuses and shares in Chipotle stock.[191]

Motivated by the compensation structure, the plaintiff continued developing the ramen-style restaurant and even progressed all the way to finding a "flagship location."[192] One night in October 2012, the plaintiff attended a dinner with representatives of Chipotle and learned that Chipotle would not hire any employees of a certain noodle restaurant because that particular restaurant planned on suing Chipotle when the plaintiff's ramen restaurant opened.[193] The plaintiff also learned that Chipotle had a nondisclosure agreement (NDA) with the particular noodle restaurant to develop a similar ramen-style chain.[194] The plaintiff confronted Chipotle about the NDA and refused to continue working on his own style of restaurant.[195] Chipotle then terminated the plaintiff for this refusal.[196]

In a lawsuit alleging fraudulent inducement against Chipotle, the key issue before the Court of Appeals was whether the courts below properly dismissed the lawsuit for failing to state a cause of action.[197] The Court of Appeals ultimately affirmed the First Department's decision and held that damages in a fraud action "are to be calculated to compensate [the] plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained."[198] The Court further held that "there

188. Connaughton v. Chipotle Mexican Grill, Inc. (*Connaughton I*), 135 A.D.3d 535, 541, 23 N.Y.S.3d 216, 221 (1st Dep't 2016) (Saxe, J., dissenting); Stewart Bishop, *Celeb Chef Wants Chipotle Suit over Ramen Concept Revived*, LAW 360 (Mar. 26, 2015, 6:42 PM), https://www.law360.com/articles/636285/print?section=appellate.

189. *See Connaughton I*, 135 A.D.3d at 541, 23 N.Y.S.3d at 221. The plaintiff began developing his idea for the restaurant in 2010 and signed an employment contract with Chipotle in February 2011. *Id.*

190. *Connaughton II*, 29 N.Y.3d at 139, 75 N.E.3d at 1161, 53 N.Y.S.3d at 600.

191. *Id.*

192. *See Connaughton I*, 135 A.D.3d at 536, 23 N.Y.S.3d at 217; *see also Connaughton II*, 29 N.Y.3d at 140, 75 N.E.3d at 1161, 53 N.Y.S.3d at 600.

193. *Connaughton I*, 135 A.D.3dat 542–43, 23 N.Y.S.3d at 222 (Saxe, J., dissenting).

194. *Connaughton II*, 29 N.Y.3d at 140, 75 N.E.3d at 1161, 53 N.Y.S.3d at 600.

195. *Id.*

196. *Id.*

197. *Id.* at 140–41, 75 N.E.3d at 1161–62, 53 N.Y.S.3d at 600–01 (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

198. *Id.* at 142, 75 N.E.3d at 1163, 53 N.Y.S.3d at 602 (quoting Lama Holding Co. v.

can be no recovery of profits which would have been realized in the absence of fraud."[199]

Based on the affirmation of the "out-of-pocket" rule, the Court determined that the "[p]laintiff did not assert or provide facts from which it could be inferred that he lost standing within the restaurant industry, or that he is unemployable as a result of his association with Chipotle."[200] The Court also held that the plaintiff's complaint would have been properly pleaded if he alleged that in stopping his soliciting "he rejected another prospective buyer's offer to purchase the concept."[201]

The Court then went on to discuss the plaintiff's alleged entitlement to nominal damages. "[W]hile nominal damages are typically available in a contracts case to vindicate a party's contractual rights, nominal damages are only available in tort actions to 'protect an important technical right'" and they "are not available when actual harm is an element of the tort."[202] Here, actual harm was an element of the tort of fraudulent inducement, and therefore the plaintiff was not entitled to nominal damages.[203]

In a proceeding brought by former employees—who had served as laborers for a moving company that contracted to provide moving services for a motor carrier—for recovery under New York State Human Rights Law for discrimination on the basis of criminal convictions and for violation of Fair Labor Standards Act (FLSA), the Court of Appeals in *Griffin v. Sirva, Inc.* answered three certified questions from the Second Circuit.[204] The certified questions from the Second Circuit were as follows:

1. "Does [§] 296(15) of the New York State Human Rights Law,

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Smith Barney Inc., 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 1373, 646 N.Y.S.2d 76, 80 (1996)) (first citing Foster v. Di Paolo, 236 N.Y. 132, 134, 140 N.E. 220, 220 (1923); then citing AFA Protective Sys. v. AT&T, 57 N.Y.2d 912, 914, 442 N.E.2d 1268, 1270, 456 N.Y.S.2d 757, 758 (1982); and then citing Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 22, 465 N.Y.S.2d 606, 618 (4th Dep't 1983)).

199. *Connaughton II*, 29 N.Y.3d at 142, 75 N.E.3d at 1163, 53 N.Y.S.3d at 602 (quoting *Lama Holding Co.*, 88 N.Y.2d at 421, 668 N.E.2d at 1373, 646 N.Y.S.2d at 80) (first citing *Foster*, 236 N.Y. at 134, 140 N.E. at 220; then citing *AFA Protective Sys.*, 57 N.Y.2d at 914, 442 N.E.2d at 1270, 456 N.Y.S.2d at 758; and then citing *Cayuga Harvester, Inc.*, 95 A.D.2d at 22, 465 N.Y.S.2d at 618).

200. *Id.* at 143, 75 N.E.3d at 1163–64, 53 N.Y.S.3d at 602–03.

201. *Id.* at 143, 75 N.E.3d at 1163, 53 N.Y.S.3d at 602.

202. *Id.* at 143, 75 N.E.3d at 1164, 53 N.Y.S.3d at 603 (first citing Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 95, 612 N.E.2d 289, 292, 595 N.Y.S.2d 931, 934 (1993); then citing RESTATEMENT (SECOND) OF TORTS § 907 (AM. LAW INST. 1983); and then citing LEE S. KREINDLER ET AL., 16 NEW YORK LAW OF TORTS § 21:2 (1997)).

203. *Id.* at 144, 75 N.E.3d at 1164, 53 N.Y.S.3d at 603.

204. 29 N.Y.3d 174, 179–80, 76 N.E.3d 1063, 1064–65, 54 N.Y.S.3d 360, 361–62 (2017).

prohibiting discrimination in employment on the basis of a criminal conviction, limit liability to an aggrieved party's 'employer?'"[205]

2. If so, "what is the scope of the term 'employer,'" i.e., does the term extend beyond an employee's "direct employer" to include those who exercise "a significant level of control over the discrimination policies and practices of the aggrieved party's direct employer?"[206]

3. Does the "aiding and abetting liability" provision contained in § 296(6) of the New York State Human Rights Law apply to § 296(15),"such that an out-of-state principal corporation that requires its New York State agent to discriminate in employment on the basis of a criminal conviction may be held liable for the employer's violation of [§] 296(15)?"[207]

The Court answered the first question in the affirmative and held that liability under § 296(15) is limited only to an aggrieved party's employer.[208] To help answer this question, the Court relied on the fact that § 296(15) imposes liability where there has been a violation of Article 23-A.[209]

The Court reformulated the second question based on certain definitions and New York common law.[210] Pursuant to New York common law, the Court determined that four factors, i.e., the alleged employer's involvement in: "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct" were relevant.[211] Of these factors, the Court held that the "greatest emphasis [should be] placed on the alleged employer's power to order and control the employee in his or her performance of work."[212] Accordingly, the Court answered the reformulated second certified question as follows: "[C]ommon-law principles, as discussed in [certain case law], determine who may be liable as an employer under [§] 296(15)of the Human Rights Law, with greatest emphasis placed on the alleged employer's power to order and control the employee in his or her performance of work."[213]

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205. Griffin v. Sirva Inc., 835 F.3d 283, 294 (2d Cir. 2016) (citing N.Y. EXEC. LAW § 296(15) (McKinney 2010 & Supp. 2018)).

206. *Id.* (citing EXEC. § 296(15)).

207. *Id.* (citing EXEC. § 296(6), (15)).

208. *Griffin*, 29 N.Y.3d at 183–84, 76 N.E.3d at 1067, 54 N.Y.S.3d at 364 (citing EXEC. § 296(15)).

209. *Id.* at 182, 76 N.E.3d at 1066, 54 N.Y.S.3d at 363 (first citing EXEC. § 296(15); and then citing N.Y. CORRECT. LAW Art. 23-A (McKinney 2005)).

210. *Id.* at 186, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366.

211. *Id.* (quoting Emrich v. GTE Corp., 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dep't 1985)).

212. *Id.* (internal quotations omitted).

213. *Griffin*, 29 N.Y.3d at 186, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366 (internal

With respect to the third question, the Court determined that:

[T]his question does not concern whether there was discrimination in this particular case, but rather seeks clarification as to who may be liable under [§] 296(6)—similar to the two prior questions regarding [§] 296(15). Therefore, we reformulate the question to ask whether [§] 296(6) extends liability to an out-of-state nonemployer who aids or abets employment discrimination against individuals with a prior criminal conviction.[214]

To this reformulated question, the Court answered the question in the affirmative.[215]

To assist the Court in coming to this conclusion, the Court determined that § 296(6) also applied to out-of-state defendants because "[t]he obvious intent of the State Human Rights Law is to protect 'inhabitants' and persons 'within' the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York."[216]

## CONCLUSION

Looking ahead, the most interesting topic to monitor is how the courts will continue to shape the governmental function immunity defense. After several years of a Court of Appeals that increasingly broadened the scope of the defense, several of the decisions outlined in this year's *Survey* indicate that perhaps courts are willing to reign in some of the expansion. Additionally, the Court's recent decisions on role of foreseeability in defining the scope of duty, coupled with the *Davis v. South Nassau Communities Hospital* case described in last year's *Survey*,[217] suggest that the courts will use future litigation to continue describing the specific interplay of foreseeability and duty.

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quotations omitted).

214. *Id.* at 187, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366 (citing EXEC. § 296(6), (15)).

215. *Id.*

216. *Id.* at 188, 76 N.E.3d at 1070, 54 N.Y.S.3d at 367 (quoting Hoffman v. Parade Publ'ns, 15 N.Y.3d 285, 291, 933 N.E.2d 744, 747, 907 N.Y.S.2d 145, 148 (2010)) (citing EXEC. § 296(6)).

217. Dirk J. Oudemool, *2015–16 Survey of New York Law: Torts*, 67 SYRACUSE L. REV. 1155, 1161 (2016) (citing 26 N.Y.3d 563, 46 N.E.3d 614, 26 N.Y.S.3d 231 (2015)).