

TORT LAW

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INTRODUCTION

The *Survey* year saw many interesting developments occur in all aspects of tort law. The most notable decisions touched on the governmental immunity defense, statutes of limitations, and assumption of the risk. The decisions described herein will have notable impacts on shaping future tort litigation.

I. ASSUMPTION OF THE RISK AND COMPARATIVE FAULT

Some of the most notable cases decided during the *Survey* year tested the limits of the doctrine of primary assumption of the risk and how it functions under the rules and corresponding precedents of Civil Practice Laws & Rules (CPLR) 14-a.

In *Rodriguez v. City of New York*, the Court of Appeals was required to answer the following question: “Whether a plaintiff is entitled to partial summary judgment on the issue of a defendant’s liability when . . . [the] defendant has arguably raised an issue of fact regarding [the] plaintiff’s comparative negligence.”¹ Stated another way, the Court of Appeals had to determine whether a plaintiff was required to establish the absence of his own comparative negligence in obtaining partial summary judgment in a comparative negligence case.² The Court of Appeals held that a plaintiff did not bear that burden.³ This case signals a strong desire of the

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1. (*Rodriguez IV*), 31 N.Y.3d 312, 315, 101 N.E.3d 366, 367, 76 N.Y.S.3d 898, 899 (2018).

2. *Id.*

3. *Id.*

Court to allow trial courts to narrow the issues that are presented to a jury as much as possible.

This case stems from an accident in which Mr. Rodriguez participated while employed as a garage utility worker by the New York City Department of Sanitation.⁴ One day, Mr. Rodriguez was outfitting a sanitation truck with tire chains and plows.⁵ To outfit one of these trucks, a driver has to back a truck into one of the garage bays while another person acts as a guide.⁶ At the time of the accident, Mr. Rodriguez stood between the front of a parked vehicle and a rack of tires outside of the garage bay while the driver began backing the sanitation truck into the garage.⁷ The driver's guide stood on the wrong side while directing the driver into the garage bay.⁸ At some point, the sanitation truck began skidding and crashed into the parked vehicle that was near Mr. Rodriguez.⁹ The crash threw Mr. Rodriguez into the air and pinned him against the tires.¹⁰ Mr. Rodriguez was permanently disabled as a result of the accident.¹¹

After the accident, Mr. Rodriguez filed an action against the City of New York.¹² After discovery, Mr. Rodriguez moved for partial summary judgment on the issue of liability, and the City of New York cross-moved for summary judgment.¹³ The supreme court denied both motions¹⁴ and “held that there were triable issues of fact regarding foreseeability, causation, and [the] plaintiff’s comparative negligence.”¹⁵

On appeal, the appellate division “affirmed the denial of Mr. Rodriguez’s motion for partial summary judgment,” holding that the “plaintiff was not entitled to partial summary judgment on the issue of

4. *Id.*

5. *Id.*

6. *Rodriguez IV*, 31 N.Y.3d at 315, 101 N.E.3d at 367, 76 N.Y.S.3d at 899.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Rodriguez IV*, 31 N.Y.3d at 315, 101 N.E.3d at 368, 76 N.Y.S. at 900.

12. *Rodriguez v. City of New York (Rodriguez I)*, No. 109444/2011, 2013 N.Y. Slip Op. 33140(U), at 1 (Sup. Ct. N.Y. Cty. Nov. 4, 2013), *aff’d, in part, (Rodriguez III)*, 142 A.D.3d 778, 778, 37 N.Y.S.3d 93, 94 (1st Dep’t 2016), *rev’d, in part, Rodriguez IV*, 31 N.Y.3d 312, 315, 101 N.E.3d 366, 367, 76 N.Y.S.3d 898, 899 (2018).

13. *Rodriguez v. City of New York (Rodriguez II)*, No. 109444/2011, 2014 N.Y. Slip Op. 33650(U), at 3 (Sup. Ct. N.Y. Cty. Oct. 22, 2014), *aff’d, in part, Rodriguez III*, 142 A.D.3d 778, 778, 37 N.Y.S.3d 93, 94 (1st Dep’t 2016), *and rev’d, in part, Rodriguez IV*, 161 A.D.3d 575, 77 N.Y.S.3d 46 (1st Dep’t 2018).

14. *Id.* at 8.

15. *Rodriguez IV*, 31 N.Y.3d at 316, 101 N.E.3d at 368, 76 N.Y.S. at 900; *Rodriguez II*, 2014 N.Y. Slip Op. 33650(U), at 6–7.

liability because he failed to make a prima facie showing that he was free of comparative negligence.”¹⁶

At the Court of Appeals, the Court evaluated CPLR 3212, 1411, and 1412 and noted that the resolution of the issue turned on the interpretation and the interplay of these provisions.¹⁷ Most notably, the Court explained that any attempts to place a burden on a plaintiff to prove that it was without comparative negligence is inconsistent with the plain language of CPLR 1412.¹⁸ “The approach urged by [the] defendant is therefore at odds with the plain language of CPLR 1412, because it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case on the issue of [the] defendant’s liability.”¹⁹

Further support for the Court’s decision came from the legislative history of CPLR 14-a, which makes clear that a “plaintiff’s comparative negligence is no longer a complete defense” such that the plaintiff must plead and prove its absence, “but rather is only relevant to the mitigation of [the] plaintiff’s damages and should be pleaded and proven by the defendant” as an affirmative defense.²⁰ The Court ultimately concluded that “[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of [the] defendant’s liability and the absence of his or her own comparative fault.”²¹

In *Deserto v. Gosehn Central School District*, the Second Department considered the extent to which a participant in a sporting event assumes the risk of increased risks in the vicinity of the playing area.²² The plaintiff in *Deserto* was a high school football player who was allegedly injured when he was forced out of bounds by a tackle during the game and subsequently struck his head on a steel plate covering the pole vault pit near the football field.²³ The defendants moved in the trial court that the plaintiff was barred from recovery under the doctrine of primary assumption of the risk.²⁴ The defendants argued that, under that doctrine, a voluntary participant in a sporting event assumes the risk that

16. *Rodriguez IV*, 31 N.Y.3d at 316, 101 N.E.3d at 368, 76 N.Y.S. at 900 (citing *Rodriguez III*, 142 A.D.3d at 778, 37 N.Y.S.3d at 94).

17. *Id.* at 317–18, 101 N.E.3d at 368–69, 76 N.Y.S. at 900–01 (first citing N.Y. C.P.L.R. 3212 (McKinney 2005); and then citing N.Y. C.P.L.R. 1411–1412 (McKinney 2012)).

18. *Id.* at 318, 101 N.E.3d at 369, 76 N.Y.S. at 901.

19. *Id.*

20. *Id.* at 321, 101 N.E.3d at 371, 76 N.Y.S. at 903.

21. *Rodriguez IV*, 31 N.Y.3d at 324–25, 101 N.E.3d at 374, 76 N.Y.S. at 906.

22. *See* 153 A.D.3d 595, 596, 57 N.Y.S.3d 423, 424 (2d Dep’t 2017).

23. *Id.*

24. *Id.*

flows from the participation.²⁵ The court below denied the motion, and the defendants appealed.²⁶

The appellate division affirmed the supreme court, noting that under long-held precedents, participants to a sporting event are generally not deemed to assume the risks of concealed or unreasonably increased risks.²⁷ Here, the court found that a factual issue remained as to whether the steel plate in question unreasonably increased the risk of injury to the football players.²⁸

However, in another case, the Second Department reversed the lower court and granted summary judgment in favor of the City of New York for an injury that occurred on a city-owned basketball court.²⁹ The plaintiff in that case, Joel Philius, was allegedly injured while playing basketball after he tripped on a crack in the surface of the court.³⁰

The appellate division reversed, however, noting that the plaintiff had played on the allegedly defective court for years, the plaintiff was aware of the cracks in the court, and that the crack was open and obvious, as evidenced by photographs of the court that were in evidence.³¹ Thus, the majority of the court determined that this case was a straightforward application of the established doctrine of primary assumption of the risk.³²

Justice Francesca Connolly, joined by Justice Leonard Austin, concurred in the majority's result, but wrote separately to argue that the doctrine of primary assumption of the risk was not applicable to the facts

25. *Id.* (first quoting *Brown v. Roosevelt Union Free Sch. Dist.*, 130 A.D.3d 852, 853, 14 N.Y.S.3d 140, 142 (2d Dep't 2015); and then quoting *Morgan v. New York*, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 207, 662 N.Y.S.2d 421, 426 (1997)) (first citing *Custodi v. Town of Amherst*, 20 N.Y.3d 83, 88, 980 N.E.2d 933, 935, 957 N.Y.S.2d 268, 270 (2012); then citing *Simone v. Doscas*, 142 A.D.3d 494, 494, 35 N.Y.S.3d 720, 721 (2d Dep't 2016); and then citing *Philippou v. Baldwin Union Free Sch. Dist.*, 105 A.D.3d 928, 929, 963 N.Y.S.2d 701, 703 (2d Dep't 2013)).

26. *Id.* at 595–96, 57 N.Y.S.3d at 423–24.

27. *Deserto*, 153 A.D.3d at 596, 57 N.Y.S.3d at 424 (first citing *Brown*, 130 A.D.3d at 854, 14 N.Y.S.3d at 142; then citing *Morgan*, 90 N.Y.2d at 485, 685 N.E.2d at 208, 662 N.Y.S.2d at 427; and then citing *Simone*, 142 A.D.3d at 494, 35 N.Y.S.3d at 722).

28. *Id.* at 595–96, 57 N.Y.S.3d at 424 (first citing *Simone*, 142 A.D.3d at 494–95, 35 N.Y.S.3d at 722; then citing *Philippou*, 105 A.D.3d at 930, 963 N.Y.S.2d at 704; and then citing *Viola v. Carmel Cent. Sch. Dist.*, 95 A.D.3d 1206, 1207, 945 N.Y.S.2d 155, 157 (2d Dep't 2012)).

29. *Philius v. City of New York*, 161 A.D.3d 787, 787, 75 N.Y.S.3d 511, 513 (2d Dep't 2018).

30. *Id.*

31. *Id.* at 789, 75 N.Y.S.3d at 514.

32. *Id.* at 790, 75 N.Y.S.3d at 515 (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925–26 (1986)).

at issue in the case.³³

In a lengthy and thorough analysis that examined the historical development of the doctrine of assumption of the risk and New York's sometimes-conflicting precedent on the issue, Justice Connolly argued that primary assumption of the risk stems from a person's implied consent to risks that are inherent to the nature of the sport.³⁴ She noted that, in her view, "whether a playing surface was in its designed condition, or whether it had fallen into disrepair, is a crucial distinguishing factor in determining whether the doctrine of primary assumption of the risk is applicable."³⁵

Justice Connolly, finding that the defendants failed to establish the risk of tripping on a crack in the court is a risk inherent in the sport of basketball, refused to apply the doctrine of primary assumption of the risk to the facts of the case at bar.³⁶ Nonetheless, Justice Connolly also indicated that the Second Department's precedents compelled dismissal as the plaintiff "was aware of the cracks on the court and voluntarily chose to play basketball at this location."³⁷

Finally, the Third Department, in *DeMarco v. DeMarco*, considered whether jumping on a trampoline in the yard of a private residence fits with the doctrine of assumption of the risk.³⁸ The plaintiff was jumping on a trampoline in the side yard of her brother's house with her nine-year-old nephew when the nephew intentionally began jumping out of sync with the plaintiff, which is referred to as "double jumping."³⁹ As a result of the double jumping, the plaintiff was thrown off balance and broke a number of bones in her left foot when she landed.⁴⁰

33. *Id.* (Connolly, J., concurring).

34. *See Philius*, 161 A.D.3d at 796, 75 N.Y.S.3d at 520 (Connolly, J., concurring) (citing *Morgan v. New York*, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 207, 662 N.Y.S.2d 421, 426 (1997)).

35. *Id.* at 796, 75 N.Y.S.3d at 519 (Connolly, J., concurring) (first citing *Morgan*, 90 N.Y.2d at 479, 685 N.E.2d at 204, 662 N.Y.S.2d at 423; then citing *Trevett v. City of Little Falls*, 6 N.Y.3d 884, 885, 849 N.E.2d 961, 961, 816 N.Y.S.2d 738, 738 (2006); and then citing *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)).

36. *See id.* at 790, 75 N.Y.S.3d at 515 (Connolly, J., concurring).

37. *Id.* (Connolly, J., concurring) (first citing *Palladino v. Lindenhurst Union Free Sch. Dist.*, 84 A.D.3d 1194, 1195, 924 N.Y.S.2d 474, 475 (2d Dep't 2011); then citing *Wilck v. Country Pointe at Dix Hills Homeowners Ass'n, Inc.*, 111 A.D.3d 822, 823, 975 N.Y.S.2d 145, 146 (2d Dep't 2013); and then citing *Casey v. Garden City Park-New Hyde Park Sch. Dist.*, 40 A.D.3d 901, 901-02, 837 N.Y.S.2d 186, 187 (2d Dep't 2007)).

38. *See* 154 A.D.3d 1226, 1226, 63 N.Y.S.3d 586, 588 (3d Dep't 2017).

39. *Id.*

40. *Id.*

The appellate division declined to extend the doctrine of primary assumption of the risk to the facts in this case.⁴¹ The court noted that jumping on a trampoline is not a type of socially valuable sport or recreational activity that the doctrine encourages,⁴² nor would applying the doctrine to this case further the policy goals of the doctrine, “namely, ‘to facilitate free and vigorous participation in athletic activities.’”⁴³

II. GOVERNMENTAL FUNCTION IMMUNITY DEFENSE

As was noted in last year’s *Survey* of Tort Law, application of the governmental function immunity defense continues to be a major source of appellate litigation in New York in the wake of *McLean v. City of New York* and its progeny.⁴⁴

In *Connolly v Long Island Power Authority*, the Court of Appeals was required to answer the following question:

[W]hether defendants Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO) and National Grid Electric Services, LLC (“National Grid”) are entitled to dismissal of [the] amended complaints on the rationale that the actions challenged were governmental and discretionary as a matter of law, and, even assuming the actions were not discretionary, the plaintiffs’ failure to allege a special duty is a fatal defect.⁴⁵

41. *Id.* at 1227–28, 63 N.Y.S.3d at 589 (quoting *Custodi v. Town of Amherst*, 20 N.Y.3d 83, 89, 980 N.E.2d 933, 936, 957 N.Y.S.2d 268, 271 (2012)) (first citing *Trupia v. Lake George Cent. Sch. Dist.*, 14 N.Y.3d 392, 395–96, 927 N.E.2d 547, 549, 901 N.Y.S.2d 127, 129 (2010); and then citing *Filer v. Adams*, 106 A.D.3d 1417, 1418–19, 966 N.Y.S.2d 553, 555–56 (3d Dep’t 2013).

42. *Id.* at 1228, 63 N.Y.S.3d at 589 (first quoting *Wolfe v. North Merrick Union Free Sch. Dist.* 122 A.D.3d 620, 621, 996 N.Y.S.2d 125, 126 (2d Dep’t 2014); and then quoting *Trupia*, 14 N.Y.3d at 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129) (first citing *Duffy v. Long Beach City Sch. Dist.* 134 A.D.3d 761, 763–64, 22 N.Y.S.3d 88, 91 (2d Dep’t 2015); and then citing *Liccione v. Gearing*, 252 A.D.2d 956, 956, 675 N.Y.S.2d 728, 729 (2d Dep’t 1998)).

43. *DeMarco*, 154 A.D.3d at 1228, 63 N.Y.S.3d at 589 (quoting *Benitez v. N.Y.C. Bd. of Educ.*, 73 N.Y.2d 650, 657, 541 N.E.2d 29, 33, 543 N.Y.S.2d 29, 33 (1989)) (first citing *Custodi*, 20 N.Y.3d at 88, 980 N.E.2d at 935, 957 N.Y.S.2d at 270; then citing *Bukowski v. Clarkson Univ.*, 19 N.Y.3d 353, 358, 971 N.E.2d 849, 852, 948 N.Y.S.2d 568, 571 (2012); and then citing *Trupia*, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129).

44. *See* 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009) (discussing how there is no statutory provision for governmental tort liability for city-registered day care facility). For a primer in the application of the governmental function immunity defense, see Edward J. Thater & Matthew D. Holmes, *Tort Law*, 68 SYRACUSE L. REV. 1037, 1037–38 (2018), and see also Michael G. Bersani, *The Governmental Function Immunity Defense in Personal Injury Cases; An Analytical Template*, N.Y.S. BAR J., Oct. 2005, at 42.

45. (*Connolly II*), 30 N.Y.3d 719, 724, 94 N.E.3d 471, 473, 70 N.Y.S.3d 909,

The Court held that the “defendants [had] not met their threshold burden of demonstrating that the action was governmental in context of these pre-answer, pre-discovery, CPLR 3211(a)(7) motions.”⁴⁶ Therefore, the claims against the defendants were allowed to go forward.⁴⁷

This case stems from multiple individual actions against the defendants that were consolidated on appeal.⁴⁸ The claims sought damages for real and personal property destroyed during Hurricane Sandy.⁴⁹ LIPA was a public authority created by the New York State Legislature to provide a “safer, more efficient, reliable and economical supply of electric energy’ in the service area of LILCO.”⁵⁰ At the direction of the Legislature, LIPA acquired LILCO along with its electric transmission and distribution facilities.⁵¹ Among LIPA, LILCO, and National Grid’s responsibilities was to provide electricity to the Rockaway Peninsula.⁵²

The plaintiffs’ underlying claims were based on damages sustained to their real and personal property due to the defendants’ negligence in failing to shut down the flow of electricity to the Rockaway Peninsula during Hurricane Sandy.⁵³ According to the plaintiffs, the defendants knew that storm surges posed an unreasonable risk of fire.⁵⁴ That risk of fire turned into a reality as LIPA’s facilities short-circuited and caused a fire.⁵⁵ This fire damaged the plaintiffs’ properties.⁵⁶

“[The] [d]efendants moved to dismiss the amended complaints pursuant to CPLR 3211(a)(7) insofar as asserted against them on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, and that LILCO and National Grid were entitled to the same defense.”⁵⁷ Specifically, LIPA argued that the

911 (2018).

46. *Id.* (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

47. *Id.*

48. *Id.* at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

49. *Id.*

50. *Connolly II*, 30 N.Y.3d at 724, 94 N.E.3d at 473, 70 N.Y.S.3d at 911–12.

51. *Id.* at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912 (first citing N.Y. PUB. AUTH. LAW § 1020-h(1)(b) (McKinney 2014); and then citing *Suffolk Cty. v. Long Island Power Auth.*, 258 A.D.2d 226, 228, 694 N.Y.S.2d 91, 93 (2d Dep’t 1999)).

52. *Id.* at 724–25, 94 N.E.3d at 473–74, 70 N.Y.S.3d at 912 (citing N.Y. PUB. AUTH. LAW § 1020-a (McKinney 2014)).

53. *Id.* at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

54. *Id.* at 729, 94 N.E.3d at 477, 70 N.Y.S.3d at 915.

55. *Connolly II*, 30 N.Y.3d at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

56. *Id.*

57. *Id.* at 726, 94 N.E.3d at 474, 70 N.Y.S.3d at 913 (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

actions challenged were discretionary and taken in the exercise of its governmental capacity.⁵⁸ Alternatively, if they were not discretionary, LIPA argued that the “plaintiffs’ failure to allege a special duty in the complaints amounted to a failure to state viable claims.”⁵⁹ The supreme court denied the motions to dismiss in three substantially similar orders.⁶⁰

On appeal, the appellate division affirmed each order denying the defendants’ motions to dismiss, explaining that LIPA was not entitled to governmental function immunity “because the provision of electricity is properly categorized as a proprietary function and, in the [c]ourt’s view, the functions of both providing electricity in the ordinary course and in responding to a hurricane are part of the proprietary core functions of electric utilities.”⁶¹ The court further rejected National Grid’s immunity claim because “it presupposed that LIPA was entitled to governmental immunity.”⁶²

The Court of Appeals ultimately affirmed the decisions of the appellate division.⁶³ In doing so, it first addressed the issue of whether LIPA was acting in a governmental or proprietary capacity.⁶⁴ The Court explained that the plaintiffs would have to allege a special duty owed to them only if LIPA’s actions were deemed governmental.⁶⁵ Whether an entity’s conduct is governmental or proprietary “turns solely on the acts or omissions claimed to have caused the injury.”⁶⁶ On a motion to dismiss, the defendants bear the burden of establishing that the challenged act or omission was governmental.⁶⁷

According to the Court, the defendants failed to meet their burden

58. *Id.*

59. *Id.* at 726, 94 N.E.3d at 474–75, 70 N.Y.S.3d at 913.

60. *Connolly II*, 30 N.Y.3d at 726, 94 N.E.3d at 475, 70 N.Y.S.3d at 913.

61. *Id.* at 726, 94 N.E.3d at 475, 70 N.Y.S.3d at 913 (first citing *Connolly v. Long Island Power Auth. (Connolly I)*, 141 A.D.3d 555, 556, 34 N.Y.S.3d 902, 902 (2d Dep’t 2016); then citing *Baumann v. Long Island Power Auth.*, 141 A.D.3d 554, 554, 34 N.Y.S.3d 901, 901 (2d Dep’t 2016); and then citing *Heeran v. Long Island Power Auth.*, 141 A.D.3d 561, 566, 36 N.Y.S.3d 165, 172 (2d Dep’t 2016)).

62. *Id.*; see *Baumann*, 141 A.D.3d at 555, 34 N.Y.S.3d at 902; *Connolly I*, 141 A.D.3d at 556, 34 N.Y.S.3d at 903; *Heeran*, 141 A.D.3d at 566, 36 N.Y.S.3d at 172.

63. *Connolly II*, 30 N.Y.3d at 730, 94 N.E.3d at 478, 70 N.Y.S.3d at 916.

64. *Id.* at 727, 94 N.E.3d at 475, 70 N.Y.S.3d at 914 (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)).

65. *Id.* (citing *Lauer v. City of New York*, 95 N.Y.2d 95, 112, 733 N.E.2d 184, 195, 711 N.Y.S.2d 112, 123 (2000)).

66. *Id.* at 727, 94 N.E.3d at 476, 70 N.Y.S.3d at 914 (quoting *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 447, 957 N.E.2d 733, 745, 933 N.Y.S.2d 164, 176 (2011)).

67. *Id.* at 728, 94 N.E.3d at 476, 70 N.Y.S.3d at 915 (citing *Leon v. Martinez*, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994)).

on a motion to dismiss.⁶⁸ LIPA conceded that its services were proprietary, and that private enterprise traditionally provided electricity.⁶⁹ This was enough for the plaintiffs' claims to survive a motion to dismiss. While the Court did not dispute that this threshold issue is more appropriately determined after discovery, the Court "did not foreclose the possibility that the threshold issue concerning the governmental function immunity defense may be capable of resolution at the pre-answer, motion to dismiss [sic] stage."⁷⁰ Here, there were simply not enough facts that the defendants could rely on to carry their burden establishing that their actions were governmental and not proprietary.⁷¹

The Second Department's decision in *Santaiti v. Town of Ramapo*⁷² presents a situation discussing the interplay of the governmental function immunity defense, proximate cause, and criminal acts. In that case, the plaintiff estate's complaint survived a motion to dismiss because it sufficiently plead that the defendant town, by virtue of the actions of the police department, was negligent in returning a handgun to the decedent's husband.⁷³ According to the complaint, the police department did not have the legal authority to return the handgun to the husband, who ultimately shot and killed his wife, the plaintiff's decedent, since he was not licensed to possess it in New York State and the wife had relied upon the fact that the police department would comply with existing law.⁷⁴ The complaint also sufficiently pleaded the existence of a special relationship between the town and the wife because the complaint adequately alleged "direct contact" between the agents of the town and the wife, and the police department undertook "through promises or actions" an affirmative duty, on behalf of the wife, to safeguard the husband's handgun.⁷⁵

The Second Department rejected the Town of Ramapo's (the "Town's") assertion that the governmental function immunity defense applied.⁷⁶ According to the court, the allegations contained in the complaint did not, as a matter of law, establish

68. *Connolly II*, 30 N.Y.3d 730, 94 N.E.3d at 478, 70 N.Y.S.3d at 916.

69. *Id.* at 729, 94 N.E.3d at 477, 70 N.Y.S.3d at 915.

70. *Id.* at 730 n.2, 94 N.E.3d at 477 n.2, 70 N.Y.S.3d at 916 n.2.

71. *Id.* at 729–30, 94 N.E.3d at 477, 70 N.Y.S.3d at 915–16.

72. (*Santaiti II*), 162 A.D.3d 921, 80 N.Y.S.2d 288 (2d Dep't 2018).

73. *Santaiti v. Town of Ramapo, Inc. (Santaiti I)*, No. 31509/2016, 2017 N.Y. Slip Op. 50270(U), at 4 (Sup. Ct. Westchester Cty. Feb. 24, 2017), *appeal dismissed, decision reached on appeal by Santaiti II*, 162 A.D.3d 921, 80 N.Y.S.2d 288 (2d Dep't 2018).

74. *Id.* at 2.

75. *Id.*

76. *Santaiti II*, 162 A.D.3d at 927, 80 N.Y.S.3d at 295.

that the Town police department was engaged in a discretionary act when it returned the handgun to Groesbeck. Rather, the complaint alleges that Groesbeck's possession of the handgun was illegal and that, under the circumstances of this case, the Town police department lacked the legal authority to return it to him.⁷⁷

Other arguments advanced by the Town presented issues of fact that were not appropriate to address on a motion to dismiss.⁷⁸

III. PROXIMATE CAUSE

In *Brown v. State of New York*, the Court considered questions of proximate cause regarding the liability of the State in motor vehicle accidents, in an appeal from the Court of Claims.⁷⁹ Decedent Wayne Brown was driving his motorcycle with his wife, claimant Linda Brown, as a passenger.⁸⁰ As the Browns were moving through an intersection they collided with a pickup truck driven by Henry Friend.⁸¹ Wayne Brown was killed by the collision, while the claimant was injured.⁸² The claimant brought two separate claims against the State, one for her own injuries and one as executrix of her husband's estate, alleging "the accident occurred as a result of the improper design of the intersection, an excessive speed limit on [the road in question], and inadequate signage at the intersection."⁸³ The claimant also alleged that the State acted negligently by failing to take corrective action in response to complaints from the public about the intersection's danger.⁸⁴

After a trial, the Court of Claims held that the State had breached its duty but dismissed the claims for a lack of proximate cause, holding that the claimant "had failed to prove that a four-way stop sign was necessary and would have been installed in time to prevent the accident."⁸⁵ The claimant appealed, and the appellate division reversed, holding that the claimant merely needed to show that the dangerous condition was a proximate cause of the accident, not that the State would have installed a

77. *Id.* at 928, 80 N.Y.S.3d at 296 (first citing *Benway v. Watertown*, 1 A.D.2d 465, 467, 151 N.Y.S.2d 485, 487 (4th Dep't 1956); and then citing N.Y. PENAL LAW § 400.05(1) (McKinney 2008)).

78. *Id.* at 929, 80 N.Y.S.3d at 296–97 (citing *Villar v. Howard*, 28 N.Y.3d 74, 80–81, 64 N.E.3d 280, 283, 41 N.Y.S.3d 460, 463 (2016)).

79. (*Brown I*), 31 N.Y.3d 514, 519, 105 N.E.3d 1245, 1248, 80 N.Y.S.3d 665, 667 (2018).

80. *Id.* at 518, 105 N.E.3d at 1247, 80 N.Y.S.3d at 666–67.

81. *Id.* at 518, 105 N.E.3d at 1247, 80 N.Y.S.3d at 667.

82. *Id.*

83. *Id.*

84. *Brown*, 31 N.Y.3d at 518, 105 N.E.3d at 1247, 80 N.Y.S.3d at 667.

85. *Id.*

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four-way stop sign before the accident.⁸⁶

After remittal, the Court of Claims found that the dangerous condition was a proximate cause of the accident and held that the State was one hundred percent liable for the accident.⁸⁷ The State appealed, and the appellate division affirmed.⁸⁸ The State then appealed to the Court of Appeals.⁸⁹

The Court of Appeals affirmed.⁹⁰ First, the Court noted that the State has a non-delegable duty to keep the roads safe, and that the State proximately causes harm when the breach of the duty is a substantial factor in a claimant's injury.⁹¹ The Court noted that the record supported a finding that the State breached its duty.⁹² It was undisputed in the Court of Claims that there was a pattern of right-angle accidents at the intersection in question and that the State had notice of those accidents.⁹³ Thus, the State had a burden to take reasonable steps to mitigate the dangerous condition in a reasonable amount of time.⁹⁴ However, it was undisputed that the State did nothing: It "did not complete a traffic study, reduce the speed on [the road], change the design or signage at the intersection, or take any steps whatsoever to increase safety at the intersection."⁹⁵

Given that the accident in question was a foreseeable result of the State's failure to improve safety at the intersection even after it had actual notice of similar accidents occurring at the same spot, the Court upheld the Court of Claim's conclusion that the State's negligence proximately caused the accident.⁹⁶

The appellate divisions also considered several causes regarding the

86. *Brown v. State (Brown I)*, 79 A.D.3d 1579, 1584, 914 N.Y.S.2d 512, 516 (4th Dep't 2010).

87. *Brown V*, 31 N.Y.3d at 519, 105 N.E.3d at 1248, 80 N.Y.S.3d at 667.

88. *Brown v. State (Brown II)*, 144 A.D. 3d 1535, 1536, 41 N.Y.S.3d 628, 629 (4th Dep't 2016); *Brown v. State (Brown III)*, 144 A.D.3d 1539, 1539, 41 N.Y.S.3d 343, 343 (4th Dep't 2016).

89. *Brown v. State (Brown IV)*, 28 N.Y.3d 913, 913, 74 N.E.3d 675, 675, 52 N.Y.S.3d 290, 290 (2017).

90. *Brown V*, 31 N.Y.3d at 521, 105 N.E.3d at 1250, 80 N.Y.S.3d at 669.

91. *Id.* at 519, 105 N.E.3d at 1248, 80 N.Y.S.3d at 668 (quoting *Friedman v. State*, 67 N.Y.2d 271, 286, 492 N.E.2d 893, 900, 502 N.Y.S.2d 669, 676 (1986)) (first citing *Friedman*, 67 N.Y.2d at 283, 492 N.E.2d at 898, 502 N.Y.S.2d at 674; and then citing *Tuturro v. City of New York*, 28 N.Y.3d 469, 483, 68 N.E.3d 693, 704, 45 N.Y.S.3d 874, 885 (2016)).

92. *Id.* at 520, 105 N.E.3d at 1249, 80 N.Y.S.3d at 668.

93. *Id.*

94. *Brown V*, 31 N.Y.3d at 520, 105 N.E.3d at 1249, 80 N.Y.S.3d at 668.

95. *Id.*

96. *Id.*

extent and limits of proximate causation. In *Tennant v. Lascelle*, the Fourth Department considered the question of proximate cause in the tragic death of a small child.⁹⁷ The plaintiff was the parent of a five-year-old daughter who was left in the care of defendant Sharon Lascelle, her great-grandmother.⁹⁸ Lascelle went to bed and left the decedent in the care of her sixteen-year-old neighbor, John Freeman, Jr., who was not a defendant in this action.⁹⁹ Once the great-grandmother had fallen asleep, the sixteen-year-old murdered the child and later confessed to the crime to the police.¹⁰⁰ The plaintiff subsequently filed an action for wrongful death.¹⁰¹

In the court below, Lascelle moved for summary judgment dismissing the complaint on the grounds that Freeman's action in murdering constituted an intervening criminal act that broke the chain of proximate causation of her alleged negligent supervision of the child.¹⁰² The lower court granted the motion, and the plaintiff appealed.¹⁰³

The Fourth Department concluded that, as a matter of law, Freeman's intentional murder did, in fact, sever the chain of causation, noting "there is nothing in the record to indicate that a reasonable person could have foreseen the extraordinary, inexplicable, and spontaneous homicidal violence that Freeman unleashed upon [the child]."¹⁰⁴ Thus, because the result was not a foreseeable result of any negligence on the part of Lascelle, the grant of summary judgment was appropriate.¹⁰⁵

In a very similar case with a completely different result, the First Department decided a case with issues of proximate causation involving injuries to an infant in foster care allegedly caused by being shook by a

97. See 161 A.D.3d 1565, 1565, 75 N.Y.S.3d 411, 412 (4th Dep't 2018).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Tennant*, 161 A.D.3d at 1565–66, 75 N.Y.S.3d at 412–13.

103. *Id.* at 1565, 75 N.Y.S.3d at 412

104. *Id.* at 1566, 75 N.Y.S.3d at 413.

105. *Id.* at 1566–67, 75 N.Y.S.3d at 413 (quoting *Schrader by Schrader v. Bd. of Educ.*, 249 A.D.2d 741, 743, 671 N.Y.S.2d 785, 786 (3d Dep't 1998)) (first citing *Brandy B. v. Eden Cent. Sch. Dist.*, 15 N.Y.3d 297, 302, 934 N.E.2d 304, 306, 907 N.Y.S.2d 735, 737 (2010); then citing *Lillian C. v. Admin. for Children's Servs.*, 48 A.D.3d 316, 317, 852 N.Y.S.2d 86, 87 (1st Dep't 2008); then citing *Lisa P. v. Attica Cent. Sch. Dist.*, 27 A.D.3d 1080, 1080–82, 810 N.Y.S.2d 772, 772–74 (4th Dep't 2006); then citing *Schrader by Schrader*, 249 A.D.2d at 743, 671 N.Y.S.2d at 786; then citing *Belinda L. G. v. Fresh Air Fund*, 183 A.D.2d 430, 430–31, 583 N.Y.S.2d 378, 379 (1st Dep't 1992); then citing *Adolph E. v. Linda M.*, 170 A.D.2d 1011, 1011–12, 566 N.Y.S.2d 165, 166 (4th Dep't 1991); and then citing *Mary Ann "ZZ" v. Blasen*, 284 A.D.2d 773, 775, 726 N.Y.S.2d 767, 769 (3d Dep't 2001)).

seventeen-year-old babysitter.¹⁰⁶ In this case, a twenty-nine-week-old infant was placed in foster care.¹⁰⁷ There was evidence in the record that there were signs of neglect or abuse of the infant child and that the institutional defendants, including the placement agency and the City of New York, did not properly clear the foster mother's home for placement according to their own policies and procedures.¹⁰⁸ The child's foster mother left for work and left the child under the care of defendant Joseph S. ("Defendant S"), who was the father of one of the foster mother's grandchildren.¹⁰⁹ After the infant would not stop crying, Defendant S apparently shook the child, causing brain damage.¹¹⁰

Upon the subsequent litigation, the defendant care agency, Jewish Child Care Association (JCCA), moved for summary judgment on, *inter alia*, proximate cause grounds, and the court denied the motion.¹¹¹ JCCA appealed, and the First Department affirmed the denial, with a dissent by Justice Marcy Khan.¹¹²

JCCA had argued that the attack by Defendant S was a superseding cause that broke the chain of proximate causation.¹¹³ However, citing precedent, the appellate division noted that a superseding cause only relieves an actor of liability where the intervening act creates a new risk of injury that was unforeseeable from the original act of negligence.¹¹⁴ In the case at bar, the JCCA had procedures in place that were designed to protect the children for whom the agency was responsible.¹¹⁵ By failing to follow those procedures, harm was a foreseeable result.¹¹⁶ Because a shaken baby was of the same risk and character of injuries that JCCA's procedures were designed to prevent, the infant's injuries were a foreseeable consequence that could be proximately caused by the JCCA's negligence.¹¹⁷

106. *De'L. A. v. City of New York*, 158 A.D.3d 30, 34, 68 N.Y.S.3d 408, 412 (1st Dep't 2017).

107. *Id.* at 33, 68 N.Y.S.3d at 411.

108. *See id.* at 33–34, 68 N.Y.S.3d at 411.

109. *Id.* at 34, 68 N.Y.S.3d at 412.

110. *See id.*

111. *Angel v. City of New York*, No. 8056/2004, 2015 N.Y. Slip Op. 32788(U), at 8–10 (Sup. Ct. Bronx Cty. Oct. 9, 2015), *aff'd*, 158 A.D.3d 30, 68 N.Y.S.3d 408 (1st Dep't 2017).

112. *De'L. A.*, 158 A.D.3d at 41, 68 N.Y.S.3d at 417.

113. *See id.* at 40, 68 N.Y.S.3d at 416.

114. *Id.* at 36, 68 N.Y.S.3d at 413 (quoting *Maheshwari v. City of New York*, 2 N.Y.3d 288, 295, 810 N.E.2d 894, 898, 778 N.Y.S.2d 442, 446 (2004)).

115. *See id.* at 37, 68 N.Y.S.3d at 414.

116. *Id.*

117. *De'L. A.*, 158 A.D.3d at 37, 68 N.Y.S.3d at 414.

In her dissent, Justice Kahn argued primarily that Defendant S's attack on the infant was extraordinary given his past behavior, as well as unforeseeable, as the JCCA had no specific knowledge or notice of the conduct of the foster mother or Defendant S.¹¹⁸ Justice Kahn also found that, because the attack on the infant was committed unilaterally by a person "with whom JCCA had no relationship and over whom JCCA had no supervisory oversight or control,"¹¹⁹ the attack was sufficiently attenuated and removed from the JCCA's original acts of negligence so as to remove any proximate causation.¹²⁰

In *Gustke v. Nickerson*, the appellate division considered the liability of drivers in an auto accident when one of the drivers is struck by a vehicle while on foot in the immediate aftermath.¹²¹ The plaintiff in this case was involved in a chain-reaction motor vehicle accident.¹²² The plaintiff, who was driving the lead car in the chain-reaction accident, had exited his vehicle after the collision in order to check on the other drivers.¹²³ The plaintiff was subsequently struck by another vehicle traveling along the road that was not involved in the first accident.¹²⁴

Among other motion practice in the court below, the driver of the rearmost car in the chain-reaction accident moved for partial summary judgment dismissing the claim against her as it pertains to the injuries that the plaintiff incurred from the second accident.¹²⁵ The trial court denied the motion,¹²⁶ but the Fourth Department reversed, finding that the driver's alleged negligence in the first accident only created the condition that made the second accident possible.¹²⁷ Because the first, chain-reaction accident was a "static, completed occurrence," the second accident was caused by a new, intervening cause in the alleged negligence of the other driver who struck the plaintiff while he was on foot.¹²⁸ Thus,

118. *Id.* at 46–47, 68 N.Y.S.3d at 421 (Kahn, J., dissenting).

119. *Id.* at 50, 68 N.Y.S.3d at 423 (Kahn, J., dissenting).

120. *Id.* at 50–51, 68 N.Y.S.3d at 423–24 (Kahn, J., dissenting).

121. (*Gustke II*), 159 A.D.3d 1573, 1573, 72 N.Y.S.3d 733, 734 (4th Dep't 2018). Note that the appellate division in this case also concluded, based on clear and uncontroverted precedent, that the rearmost car in a multi-car accident bears a presumption of responsibility. However, that portion of the decision is not fully discussed here.

122. *Id.*

123. *Id.* at 1574, 72 N.Y.S.3d at 735.

124. *Id.*

125. *Gustke v. Nickerson (Gustke I)*, No. 810954/2015, 2018 N.Y. Misc. LEXIS 8713, at *1 (Sup. Ct. Erie Cty. Oct. 9, 2018), *rev'd*, *Gustke II*, 159 A.D.3d 1573, 72 N.Y.S.3d 733 (4th Dep't 2018).

126. *Id.* at *2.

127. *Gustke*, 159 A.D.3d at 1575, 72 N.Y.S.3d at 736.

128. *Id.* (quoting *Serrano v. Gilray*, 152 A.D.3d 1164, 1165, 58 N.Y.S.3d 817,

the drivers from the first accident were only liable for damages that occurred solely as a result of the first accident.¹²⁹

In a similar appeal before the Fourth Department, the court considered proximate causation of a passenger of a vehicle that was struck on foot on the roadway after the passenger had returned to the roadway from a position of safety.¹³⁰ The plaintiff was a passenger in a vehicle driven by defendant Marcy Sheehan.¹³¹ In April 2013, Sheehan lost control of the vehicle and struck a concrete barrier.¹³² After the accident, and after the plaintiff had moved to a place of safety, the plaintiff was injured after being struck by a vehicle driven by defendant Thomas Gilray, who was intoxicated at the time.¹³³

In the court below, Sheehan moved for summary judgment on the grounds that there was no proximate cause between her alleged negligence and the plaintiff's injuries.¹³⁴ The Fourth Department upheld the lower court's order, largely on the same reasoning, and citing the same precedent, as its decision in *Gustke*.¹³⁵

Justice Erin Peradotto dissented, finding that, under the facts of the case, a reasonable factfinder could conclude that the plaintiff's injuries were a foreseeable consequence of Sheehan's negligence.¹³⁶ Justice Peradotto noted that the majority failed to account for the fact that Sheehan's vehicle was not removed from the roadway and instead remained a peril obstructing the lane without its hazard lights activated.¹³⁷

818 (4th Dep't 2017)).

129. *Id.*

130. *Serrano*, 152 A.D.3d at 1164, 58 N.Y.S.3d at 818.

131. *Id.* at 1164, 58 N.Y.S.3d at 817.

132. *Id.* at 1164, 58 N.Y.S.3d at 817–18.

133. *Id.* at 1164, 58 N.Y.S.3d at 818.

134. *Id.* at 1164, 58 N.Y.S.3d at 817.

135. *Serrano*, 152 A.D.3d at 1165, 58 N.Y.S.3d at 818 (quoting *Barnes v. Fix*, 63 A.D.3d 1515, 1516, 880 N.Y.S.2d 795, 796 (4th Dep't 2009)) (first citing *Gregware v. City of New York*, 94 A.D.3d 470, 470, 941 N.Y.S.2d 152, 153 (1st Dep't 2012); and then citing *Mikelinich v. Giovannetti*, 239 A.D.2d 471, 472, 658 N.Y.S.2d 47, 48 (2d Dep't 1997)); see *Gustke II*, 159 A.D.3d 1573, 1575, 72 N.Y.S.3d 733, 736 (4th Dep't 2018) (quoting *Serrano*, 152 A.D.3d at 1165, 58 N.Y.S.3d at 817).

136. *Serrano*, 152 A.D.3d at 1167, 58 N.Y.S.3d at 820 (Peradotto, J., dissenting) (first citing *Commisso v. Meeker*, 8 N.Y.2d 109, 117, 168 N.E.2d 365, 367, 202 N.Y.S.2d 287, 289–90 (1960); then citing *Gerse v. Neyjovich*, 9 A.D.3d 384, 385, 780 N.Y.S.2d 615, 616 (2d Dep't 2004); then citing *Bertrand v. Vingan*, 249 A.D.2d 13, 13, 671 N.Y.S.2d 226, 227 (1st Dep't 1998); and then citing *Weary v. Holmes*, 249 A.D.2d 957, 957–58, 672 N.Y.S.2d 565, 566 (4th Dep't 1998)).

137. *Id.* at 1167–68, 58 N.Y.S.3d at 820 (Peradotto, J., dissenting) (first citing *Graltton v. Oliver*, 277 A.D. 449, 452, 101 N.Y.S.2d 109, 112–13 (3d Dep't 1950); then citing *Barnes*, 63 A.D.3d at 1515–16, 880 N.Y.2d at 796; then citing *Hallett v. Akintola*, 178 A.D.2d 744, 744–45, 577 N.Y.S.2d 181, 182 (3d Dep't 1991); and

That the plaintiff would be in the vicinity of the disabled vehicle and that a vehicle coming down the road would have to avoid the hazard of the disabled vehicle were normal and foreseeable consequences of the situation created by Sheehan's alleged negligence.¹³⁸ Justice Peradotto would therefore have reversed the lower court and let a factfinder determine whether the predicate facts existed to establish proximate cause.¹³⁹

IV. DECISIONS REGARDING STATUTES OF LIMITATIONS

The Court of Appeals in *Contact Chiropractic, P.C. v New York City Transit Authority* was faced with deciding whether the three-year statute of limitations set forth in CPLR 214(2) applies to no-fault claims against a self-insurer.¹⁴⁰ The Court determined that it does.¹⁴¹

The plaintiff, Contact Chiropractic, treated Girtha Butler after she sustained personal injuries in a motor vehicle accident involving a New York City Transit Authority (the "Transit Authority") bus on which she was a passenger.¹⁴² The defendant did not have no-fault coverage.¹⁴³ Instead, it was self-insured with respect to that risk.¹⁴⁴ Ms. Butler assigned to Contact Chiropractic her right to recover first-party benefits from the Transit Authority.¹⁴⁵ In turn, the plaintiff submitted its claims, bills, and no-fault verification forms to the Transit Authority from March 14, 2001, to August 27, 2001.¹⁴⁶

Nearly six years later, the plaintiff commenced an action against the Transit Authority seeking reimbursement for allegedly outstanding invoices.¹⁴⁷ The defendant moved to dismiss the complaint based on the plaintiff's failure to commence the action within the three-year statute of limitations.¹⁴⁸ According to the defendant, the three-year statute of limitations under CPLR 214(2) governed this case because the defendant

then citing *Gardner v. Perrine*, 101 A.D.3d 1587, 1588, 957 N.Y.S.2d 776, 777 (4th Dep't 2012)).

138. *Id.* at 1168, 58 N.Y.S.3d at 820 (Peradotto, J., dissenting).

139. *Id.* at 1165–66, 58 N.Y.S.3d at 819 (Peradotto, J., dissenting).

140. 31 N.Y.3d 187, 192, 99 N.E.3d 867, 869, 75 N.Y.S.3d 474, 476 (2018) (citing N.Y. C.P.L.R. 214(2) (McKinney 2003)).

141. *Id.*

142. *Id.* at 192–93, 99 N.E.3d at 869, 75 N.Y.S.3d at 476.

143. *Id.* at 192, 99 N.E.3d at 869, 75 N.Y.S.3d at 476.

144. *Id.*

145. *Contact Chiropractic, P.C.*, 31 N.Y.3d at 193, 99 N.E.3d at 869, 75 N.Y.S.3d at 476.

146. *Id.*

147. *Id.*

148. *Id.*

was self-insured at the time of the accident and therefore had no contract for insurance with respect to that loss.¹⁴⁹ The plaintiff maintained that the six-year statute of limitations controlled because there was Second Department authority providing that an injured person's "claim for uninsured motorist benefits against a self-insured vehicle owner, while statutorily mandated, remains contractual rather than statutory in nature and, as such, is subject to the six-year statute of limitations."¹⁵⁰

The civil court denied the defendant's motion, "holding that a six-year statute of limitations applies to no-fault benefit claims against both insurers and self-insurers."¹⁵¹ The defendant later moved for leave to renew the motion.¹⁵² The court granted the renewal motion but stuck with the reasoning of its initial decision, acknowledging a split of authority in the appellate divisions, but determining that the Second Department case law controlled.¹⁵³

The Court of Appeals was tasked with resolving the split between the First and Second Departments.¹⁵⁴ The relevant First Department case law applied a three-year statute of limitations; the Second Department case law applied a six-year statute of limitations.¹⁵⁵ The Court of Appeals adopted the First Department's analysis, explaining that CPLR 214(2) applies if "liability would not exist but for a statute."¹⁵⁶ As such, the Court concluded that a claim for reimbursement of no-fault benefits is purely statute, and, therefore, subject to a three-year statute of limitations.¹⁵⁷

The decision in *B.F. v. Reproductive Medicine Ass'n of New York* that came from the Court of Appeals right before the beginning of 2018

149. *Id.* (first citing N.Y. C.P.L.R. 214(2) (McKinney 2003); and then citing N.Y. C.P.L.R. 213(2) (McKinney 2003)).

150. *Contact Chiropractic, P.C.*, 31 N.Y.3d at 193, 99 N.E.3d at 869–70, 75 N.Y.S.3d at 476–77 (quoting *ELRAC, Inc. v. Suero*, 38 A.D.3d 544, 545, 831 N.Y.S.2d 475, 476 (2d Dep't 2007)).

151. *Id.* at 193, 99 N.E.3d at 870, 75 N.Y.S.3d at 477.

152. *Id.* at 194, 99 N.E.3d at 870, 75 N.Y.S.3d at 477.

153. *Id.*

154. *See id.* at 193, 99 N.E.3d at 869–70, 75 N.Y.S.3d at 476–77 (first citing N.Y. C.P.L.R. 214(2); then citing *Minn. Dental Diagnostics, P.C. v. N.Y.C. Transit Auth.*, 82 A.D.3d 409, 410, 917 N.Y.S.2d 856, 856 (1st Dep't 2011); and then citing *ELRAC*, 38 A.D.3d at 545, 831 N.Y.S.2d at 476).

155. *Contact Chiropractic, P.C.*, 31 N.Y.3d at 193, 99 N.E.3d at 869–70, 75 N.Y.S.3d at 476–77 (first citing N.Y. C.P.L.R. 214(2); then citing *Minn. Dental Diagnostics*, 82 A.D.3d at 410, 917 N.Y.S.2d at 856; and then citing *In re ELRAC*, 38 A.D.3d at 545, 831 N.Y.S.2d at 476).

156. *Id.* at 196, 99 N.E.3d at 871–72, 75 N.Y.S.3d at 478 (quoting *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 208, 750 N.E.2d 1078, 1082, 727 N.Y.S.2d 30, 34 (2001)) (citing N.Y. C.P.L.R. 214(2)).

157. *Id.* at 196–97, 99 N.E.3d at 872, 75 N.Y.S.3d at 479 (citing N.Y. C.P.L.R. 214(2)).

set the statute of limitations for the cause of action permitting parents to recover expenses incurred to care for a disabled infant who, but for a physician's negligent failure to detect or advise on the risks of impairment, would not have been born (a so-called "wrongful birth" action).¹⁵⁸ The Court determined that the statute of limitations for such a claim runs from the date of birth.¹⁵⁹

This case involves two sets of parents who sought in vitro fertilization (IVF) from the defendants.¹⁶⁰ The defendants matched the parents with an anonymous egg donor and implanted each mother with a fertilized embryo using the donor's eggs.¹⁶¹ After birth, both mothers learned the egg donor had tested positive for the Fragile X trait.¹⁶² The Fragile X trait is a chromosomal abnormality that can result in intellectual disabilities and other deficits.¹⁶³ Testing later confirmed that both mothers had given birth to children with the Fragile X trait.¹⁶⁴

The parents commenced separate lawsuits, alleging that the defendants failed to timely screen the egg donor for the Fragile X mutation or to notify the plaintiffs that they did not screen for this trait.¹⁶⁵ The parents argued that the "negligent acts or omissions caused them to consent to the IVF procedure and go forward with pregnancy, resulting in the parents incurring extraordinary expenses to care for and treat a child with a disability."¹⁶⁶ The defendants moved to dismiss both complaints, contending that the extraordinary expenses claim was time-barred by CPLR 214-a, which provides that a two-and-one-half-year statute of limitations for medical malpractice claims runs from the date of the malpractice.¹⁶⁷ In this case, the defendants argued that the date of accrual was when the embryo was implanted in the mother.¹⁶⁸ The

158. (*B.F. III*), 30 N.Y.3d 608, 612, 92 N.E.3d 766, 768, 69 N.Y.S.3d 543, 545 (2017) (citing *Becker v. Schwartz*, 46 N.Y.2d 401, 410, 386 N.E.2d 807, 811, 413 N.Y.S.2d 895, 899 (1978)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *B.F. III*, 30 N.Y.3d at 612, 92 N.E.3d at 768, 69 N.Y.S.3d at 545.

164. *Id.*

165. *B.F. v. Reproductive Medicine Ass'n of N.Y., LLP (B.F. I)*, No. 800405/11, 2013 N.Y. Slip Op. 33232(U), at 2 (Sup. Ct. N.Y. Cty. Dec. 12, 2013); *Dennehy v. Copperman (Dennehy I)*, No. 800349/11, 2013 N.Y. Slip Op. 33289(U), at 4 (Sup. Ct. N.Y. Cty. Dec. 12, 2013).

166. *B.F. III*, 30 N.Y.3d at 612–13, 92 N.E.3d at 769, 69 N.Y.S.3d at 546.

167. *Dennehy I*, 2013 N.Y. Slip Op. 33289(U), at 5–6 (first citing N.Y. C.P.L.R. 3211(a)(5) (McKinney 2016); and then citing N.Y. C.P.L.R. 214-a (McKinney 2003)).

168. *Id.* at 5.

plaintiffs argued in opposition that the statute of limitations for their claims started at birth.¹⁶⁹ Both the supreme court and the appellate division agreed that the plaintiffs' claims started running on the date of birth.¹⁷⁰

The Court of Appeals also agreed with the plaintiffs' application of the statute of limitations.¹⁷¹ Given the nature of the allegations at issue, the Court concluded that "until the alleged misconduct results in the birth of a child, there can be no extraordinary expenses claim."¹⁷² The Court also explained that the nature of the claim itself dealt with financial harm that arises as a consequence of the birth, not just the conception.¹⁷³ Therefore, the Court rejected the application of the typical statute of limitations for medical malpractice claims and instead held that the "extraordinary expenses" claim begins to run when the child is born.¹⁷⁴ Otherwise, outside of the "extraordinary expenses" claim, the statute of limitations contained in CPLR 214-a for medical malpractice will apply.¹⁷⁵

V. OTHER TORT DECISIONS OF NOTE

The Court of Appeal's decision in *Dormitory Authority of the State of New York v. Samson Construction Co.*¹⁷⁶ presents a number of unique rulings when dealing with contract claims, tort claims, and the rights of parties to claim third-party beneficiary status. Most notably, the Court of Appeals looked to distinguish contract claims and tort claims and reaffirmed the notion that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.¹⁷⁷

Here, the dispute arose between the parties on a construction project

169. *Id.*

170. *See* *B.F. v. Reprod. Med. Ass'n of N.Y. (B.F. II)*, 136 A.D.3d 73, 79, 22 N.Y.S.3d 190, 194 (1st Dep't 2015); *Dennehy v. Copperman (Dennehy II)*, 134 A.D.3d 543, 543, 20 N.Y.S.3d 885, 885 (1st Dep't 2015); *B.F. I*, 2013 N.Y. Slip Op. 33232(U), at 2; *Dennehy I*, 2013 N.Y. Slip Op. 33289(U), at 4.

171. *B.F. III*, 30 N.Y.3d at 615, 92 N.E.3d at 770, 69 N.Y.S.3d at 547.

172. *Id.* at 615, 92 N.E.3d at 771, 69 N.Y.S.3d at 548.

173. *Id.* (quoting *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 813, 413 N.Y.S.2d 895, 901 (1978)).

174. *Id.*

175. *Id.* at 616, 92 N.E.3d at 771–72, 69 N.Y.S.3d at 548–49 (citing N.Y. C.P.L.R. 214-a (McKinney 2003)).

176. (*Dormitory Auth. III*), 30 N.Y.3d 704, 94 N.E.3d 456, 70 N.Y.S.3d 893 (2018).

177. *Id.* at 711, 94 N.E.3d at 460, 70 N.Y.S.3d at 898 (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987)).

for the Office of the Chief Medical Examiner of the City of New York.¹⁷⁸ More specifically, the parties sought to construct a forensic biology laboratory.¹⁷⁹ The project ran into various complications, including eighteen months of delay due to the adjacent building settling eight inches, damages to sidewalks, utility concerns, and emergency repairs.¹⁸⁰ The alleged cost of these delays were thirty-seven million dollars.¹⁸¹

The plaintiffs commenced an action against Samson Construction Co. (“Samson”) and Perkins Eastman Architects, P.C. (“Perkins”).¹⁸² The allegations against Perkins were that Perkins breached the architecture contract with the plaintiffs and that it was negligent in the performance of its professional duties.¹⁸³ Upon review of the complaint against Perkins, the Court of Appeals noted that the allegations set forth in the negligence cause of action were virtually identical in every respect to the breach of contract action.¹⁸⁴ Perkins moved for summary judgment to dismiss the plaintiffs’ claims on various grounds, including that the negligence claim was duplicative of the breach of contract action.¹⁸⁵ The supreme court denied Perkins’ motion as to the negligence claim brought by the Dormitory Authority¹⁸⁶ and the appellate division affirmed, holding that there was an issue of fact as to “whether Perkins assumed a duty of care to perform in accordance with professional standards that was independent of its contractual obligations.”¹⁸⁷

The Court of Appeals reversed the appellate division and held that the plaintiffs’ claim against Perkins for professional negligence should have been dismissed as duplicative of the plaintiffs’ claim for breach of contract.¹⁸⁸ According to the majority, the professional negligence claim was identical in nearly every respect to the contract claim.¹⁸⁹ Furthermore, the complaint did not allege an injury that was not already

178. *Id.* at 707, 94 N.E.3d at 458, 70 N.Y.S.3d at 895.

179. *Id.*

180. *Id.* at 708, 94 N.E.3d at 458, 70 N.Y.S.3d at 896.

181. *Dormitory Auth. III*, 30 N.Y.3d at 708, 94 N.E.3d at 458, 70 N.Y.S.3d at 896.

182. *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co. (Dormitory Auth. I)*, No. 403436/06, 2013 N.Y. Slip Op. 34183(U), at 3 (Sup. Ct. N.Y. Cty. Feb. 27, 2013).

183. *Id.* at 8.

184. *Dormitory Auth. III*, 30 N.Y.3d at 709, 94 N.E.3d at 459, 70 N.Y.S.3d at 896.

185. *Dormitory Auth. I*, 2013 N.Y. Slip Op. 34183(U), at 24–25.

186. *Id.* at 47.

187. *Dormitory Auth. III*, 30 N.Y.3d at 709, 94 N.E.3d at 459, 70 N.Y.S.3d at 897; *Dormitory Auth. of New York v. Samson Constr. Co. (Dormitory Auth. II)*, 137 A.D.3d 433, 433–35, 27 N.Y.S.3d 114, 116–17 (1st Dep’t 2016).

188. *Dormitory Auth. III*, at 713, 94 N.E.3d at 462, 70 N.Y.S.3d at 900.

189. *Id.* at 711–12, 94 N.E.3d at 461, 70 N.Y.S.3d at 899.

encompassed in the contract claim.¹⁹⁰

The Court recognized that a professional negligence claim can exist with a contract claim when there is a breach of a legal duty independent of the contract, like where the harm alleged is an abrupt, cataclysmic occurrence not contemplated by the contracting parties.¹⁹¹ However, when applying those principles to the facts of this case, the Court found that the plaintiffs' damages in both actions sought the cost to complete the project and the costs to repair the damage to adjacent structures.¹⁹² These damages were within the contemplation of the parties under the contract.¹⁹³ These damages were also expressly addressed in the contract.¹⁹⁴ Therefore, the plaintiffs could not maintain both causes of action.¹⁹⁵

The Courts of Appeals, when deciding *In re World Trade Center Lower Manhattan Disaster Site Litigation*, had an opportunity to respond to certified questions from the U.S. Court of Appeals for the Second Circuit interpreting several provisions of the State Tort Claims Act.¹⁹⁶ Those questions were as follows:

(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation "should be treated like the State," [(*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987])], based on a "particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it," [(*John Grace & Co. v. State Univ. Constr. Fund*, 44 N.Y.2d 84, 375 N.E.2d 377, 404 N.Y.S.2d 316 [1978])], and if so, what considerations are relevant to that inquiry?; and

(2) Does the "serious injustice" standard articulated in [*Gallewski v Hentz & Co.* (301 NY 164, 93 NE2d 620 [1950])], or the less stringent "reasonableness" standard articulated in [*Robinson v. Robins Dry Dock & Repair Co.* (238 N.Y. 271, 144 N.E. 579 [1924])], govern the merits of a due process challenge under the New York State Constitution to a

190. *Id.* at 712, 94 N.E.3d at 461, 70 N.Y.S.3d at 899.

191. *Id.* at 711, 713, 94 N.E.3d at 460, 462, 70 N.Y.S.3d at 898, 899 (quoting *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551–52, 593 N.E.2d 1365, 1369, 583 N.Y.S.2d 957, 961 (1992)).

192. *Id.* at 712, 94 N.E.3d at 461, 70 N.Y.S.3d at 899.

193. *Dormitory Auth. III*, at 712, 94 N.E.3d at 461, 70 N.Y.S.3d at 899.

194. *Id.*

195. *Id.* at 713, 94 N.E.3d at 462, 70 N.Y.S.3d at 900.

196. *See (In re World Trade Ctr. III)*, 30 N.Y.3d 377, 381, 89 N.E.3d 1227, 1229, 67 N.Y.S.3d 547, 549 (2017) (quoting *Faltynowicz v. Battery Park City Auth. (In re World Trade Ctr. II)*, 846 F.3d 58, 60–61 (2d Cir. 2017)).

claim-revival statute?¹⁹⁷

The Court answered the first certified question in the negative and the second question in accordance with its opinion.¹⁹⁸

The plaintiffs in this case were workers who participated in the cleanup operations in New York City after the September 11, 2001 terrorist attacks.¹⁹⁹ The defendant was Battery Park City Authority (BPCA).²⁰⁰ BPCA is a public benefit corporation tasked to redevelop areas of lower Manhattan and “expand the supply of safe and sanitary housing for low-income families.”²⁰¹ The claims against BPCA were initially based on the plaintiffs developing a number of illnesses due to their exposure to toxins from BPCA-owned properties in the course of their cleanup duties.²⁰² The plaintiffs’ claims were dismissed on the grounds that the plaintiffs did not serve BPCA with timely notices of claim.²⁰³

The Legislature responded by enacting “Jimmy Nolan’s Law.”²⁰⁴ This law amended New York’s General Municipal Law to provide that claims that were barred under the previous iteration of the General Municipal Law were revived and could be prosecuted provided that a claim is filed and served within one year of the law’s effective date.²⁰⁵ Many plaintiffs revived their claims within the one-year revival period only to find that the district court dismissed their claims again because “Jimmy Nolan’s Law” was unconstitutional as applied.²⁰⁶ The district court also noted that BPCA was an entity independent of New York State that had capacity to challenge the Legislature’s acts.²⁰⁷ The plaintiffs appealed to the Second Circuit.²⁰⁸ In certifying a question to the Court of Appeals, the Second Circuit noted an “absence of authoritative guidance”

197. *Id.* (alterations in original) (emphasis omitted) (quoting *In re World Trade Ctr. II*, 846 F.3d at 60–61).

198. *Id.* at 383, 394, 89 N.E.3d at 1231, 1239, 67 N.Y.S.3d at 550, 558.

199. *Id.* at 382, 89 N.S.3d at 1229, 67 N.Y.S.3d at 549.

200. *Id.*

201. *In re World Trade Ctr. III*, 30 N.Y.3d at 382, 89 N.S.3d at 1229, 67 N.Y.S.3d at 549 (citing N.Y. PUB. AUTH. LAW §§ 1971, 1973(1) (McKinney 2011)).

202. *In re World Trade Ctr. Lower Manhattan Site Litig.* (*In re World Trade Ctr. I*), 66 F. Supp. 3d 466, 468 (S.D.N.Y. 2014).

203. *Id.* at 469 (first citing N.Y. GEN. MUN. LAW § 50-e (McKinney 2016); and then citing N.Y. PUB. AUTH. LAW § 1984 (McKinney 2011)).

204. *Id.*; see Act of Sept. 16, 2009, 2009 McKinney’s Sess. Laws of N.Y., ch. 440, at 1175 (codified at N.Y. GEN. MUN. LAW § 50-i (4)(a) (McKinney 2016)).

205. *In re World Trade Ctr. I*, 66 F. Supp. 3d at 469 (quoting N.Y. GEN. MUN. LAW § 50-i (4)(a) (McKinney 2016)).

206. *Id.* at 468, 476.

207. *Id.* at 473.

208. *In re World Trade Ctr. II*, 846 F.3d 58, 61 (2d Cir. 2017).

on a number of issues, especially the “capacity” issue and the standard of review in evaluating the constitutionality of claim-revival statutes.²⁰⁹

With respect to the “capacity” issue, the Court of Appeals explained that there was “‘manifest improbability’ that the Legislature would breathe constitutional rights into a public entity and then equip it with authority to police state legislation on the basis of those rights.”²¹⁰ With few exceptions, “this capacity bar closes the courthouse doors to internal political disputes between the State and its subdivisions.”²¹¹ Ultimately, the mere fact that BPCA was a public benefit corporation did not bring it out of the scope of the general capacity rule.²¹² As such, “public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities.”²¹³

With respect to the second certified question, the Court examined a number of previous cases that dealt with claim-revival statutes and noted “there is no principled way for a court to test whether a particular injustice is ‘serious’ or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government.”²¹⁴ To that end, the Court held that the decision in *Robinson v. Robins Dry Dock & Repair Co.*²¹⁵ was an appropriate standard to apply, and *Robinson* was on solid footing even after subsequent decisions arguably attempted to overrule or narrow *Robinson*.²¹⁶ According to the Court of Appeals, “a claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice.”²¹⁷

In *E.J. Brooks, Co. v. Cambridge Security Seals*, the Court considered what the proper measure of damages would be for a claim for misappropriation of a trade secret.²¹⁸ The plaintiff in this case had a

209. *Id.* at 69.

210. *In re World Trade Ctr. III*, 30 N.Y.3d at 385, 89 N.E.3d at 1232, 67 N.Y.S.3d at 552 (quoting *City of New York v. State*, 86 N.Y.2d 286, 293, 655 N.E.2d 649, 653, 631 N.Y.S.2d 553, 557 (1995)).

211. *Id.* at 385, 89 N.E.3d at 1233, 67 N.Y.S.3d at 552.

212. *Id.* at 388, 89 N.E.3d at 1234, 67 N.Y.S.3d at 554.

213. *Id.* at 393, 89 N.E.3d at 1238, 67 N.Y.S.3d at 558.

214. *Id.* at 400, 89 N.E.3d at 1243, 67 N.Y.S.3d at 562–63.

215. 238 N.Y. 271, 280, 144 N.E. 579, 582 (1924).

216. *In re World Trade Ctr. III*, 30 N.Y.3d at 399, 89 N.E.3d at 1242, 67 N.Y.S.3d at 562 (citing *Gallewski v. H. Hentz & Co.*, 301 N.Y. 164, 175, 93 N.E.2d 620, 625 (1950)).

217. *Id.* at 400, 89 N.E.3d at 1243, 67 N.Y.S.3d at 563.

218. (*E.J. Brooks II*), 31 N.Y.3d 441, 448, 105 N.E.3d 301, 307, 80 N.Y.S.3d 162, 168 (2018) (quoting *E.J. Brooks Co. v. Cambridge Sec. Seals (E.J. Brooks I)*, 858

proprietary and confidential fully automated process for manufacturing plastic indicative security seals.²¹⁹ Several of the plaintiff's employees left to work for the defendant and brought the confidential manufacturing process with them.²²⁰ The plaintiff brought an action in the U.S. District Court for the Southern District of New York for, inter alia, common law misappropriation of trade secrets, unfair competition, and unjust enrichment.²²¹ Following a jury trial, the defendant was found liable on each of these three claims.²²²

On the issue of damages, the plaintiff sought to measure the damages by the costs the defendant would have incurred to develop a similar manufacturing process without making use of its knowledge of the plaintiff's proprietary process.²²³ Importantly, the plaintiff did not present any evidence that this damage model accurately reflected the plaintiff's own losses, instead arguing that the defendant's saved costs were a per se measure of damages.²²⁴

After the verdict, both parties made post-judgment motions and cross-appeals to the Second Circuit.²²⁵ The defendant's motions and appeals raised the issue that the plaintiff's damage model was an improper measure of damages.²²⁶

In considering the appeal, the Second Circuit certified the following question to the Court of Appeals: "[W]hether, under New York law, a plaintiff asserting claims of misappropriation of a trade secret, unfair competition, and unjust enrichment can recover damages that are measured by the costs the defendant avoided due to its unlawful activity."²²⁷

The Court of Appeals considered each of the different causes of action in turn. In considering the measure of damages for a theory of unfair competition, the Court noted that the damages for the tort of unfair competition is compensatory damages; that is, the damages must be

F.3d 744, 752 (2d Cir. 2017)).

219. *See id.* at 444, 105 N.E.3d at 304, 80 N.Y.S.3d at 165.

220. *Id.*

221. *Id.* at 444–45, 105 N.E.3d at 304, 80 N.Y.S.3d at 165.

222. *Id.* at 445, 105 N.E.3d at 304–05, 80 N.Y.S.3d at 165–66.

223. *E.J. Brooks II*, 31 N.Y.3d at 445, 105 N.E.3d at 305, 80 N.Y.S.3d at 166.

224. *Id.*

225. *E.J. Brooks I*, 858 F.3d 744, 745–46 (2d Cir. 2017).

226. *Id.*

227. *Id.* at 746. There was a second certified question regarding whether prejudgment interest is mandatory using such a damage model, but because the Court of Appeals ultimately decided the question in the negative, it did not address the second certified question. *E.J. Brooks II*, 31 N.Y.3d at 457, 105 N.E.3d at 313, 80 N.Y.S.3d at 174; *see E.J. Brooks I*, 858 F.3d at 746.

awarded that make the victim whole and must derive as a proximate result of the defendant's unlawful conduct.²²⁸

The injury to the plaintiff in the case at bar, however, was the loss of commercial advantage due to unfair competition.²²⁹ The loss of the plaintiff's commercial advantage "may not correspond to what the defendant has wrongfully gained."²³⁰ Thus, the Court concluded the plaintiff must measure its own losses due to unfair competition and may not elect to measure its losses by the defendant's avoided costs.²³¹

Similarly, the Court examined the relevant precedents and concluded that the proper measure of damages in trade secret actions is lost profit as a result of a defendant's conduct.²³² Therefore, the Court held the avoided cost method of damage calculation is inapplicable to an action for misappropriation of a trade secret.²³³

The Court finally turned to the question of whether avoided costs is a proper measure of damages for unjust enrichment. Again, the Court noted that costs a defendant may save through unlawful activities do not constitute funds held by the defendant at the expense of a plaintiff and thus are not a proper measure of damages for an action for unjust enrichment under New York law.²³⁴ The Court therefore answered the certified question in the negative, as none of the three theories of liability may use avoided costs of a defendant as a measure of damages for a plaintiff.²³⁵

In *Vega v. Crane*, the Fourth Department considered the novel question of whether a person owes a common law duty to motorists to refrain from sending text messages to a person whom he or she reasonably should know is operating a motor vehicle.²³⁶ The plaintiff was struck by a vehicle that crossed the center line into her lane on a dark and

228. *E.J. Brooks II*, 31 N.Y.3d at 448–49, 105 N.E.3d at 307, 80 N.Y.S.3d at 168 (first quoting *McDougald v. Garber*, 73 N.Y.2d 246, 254, 536 N.E.2d 372, 374, 538 N.Y.S.2d 937, 939 (1989); and then quoting *Steitz v. Gifford*, 280 N.Y. 15, 20, 19 N.E.2d 661, 664 (1939)).

229. *Id.* at 449, 105 N.E.3d at 308, 80 N.Y.S.3d at 169.

230. *Id.* (first citing *Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 571–72, 161 N.E.2d 197, 206, 190 N.Y.S.2d 977, 990 (1959); and then citing *Victor G. Reilling Assocs. v. Fisher-Price, Inc.*, No. 3:03-CV-222, 2006 U.S. Dist. LEXIS 22813, *7 (D. Conn. Apr. 25, 2006)).

231. *Id.* at 452, 105 N.E.3d at 310, 80 N.Y.S.3d at 171.

232. *E.J. Brooks*, 31 N.Y.3d at 454, 105 N.E.3d at 311, 80 N.Y.S.3d at 172.

233. *Id.*

234. *Id.* at 457, 105 N.E.3d at 314, 80 N.Y.S.3d at 174.

235. *Id.*

236. (*Vega II*), 162 A.D.3d 167, 168, 75 N.Y.S.3d 760, 762 (4th Dep't 2018).

rainy evening.²³⁷ The subsequent police investigation of the accident determined that the driver of the vehicle that crossed the center line (who was killed in the subsequent accident) was exchanging text messages with his girlfriend, the defendant, while driving.²³⁸ The plaintiff commenced an action against the defendant alleging the collision was caused in part by her negligent act of engaging in a text message conversation despite knowing, or having special reason to know, that her boyfriend was driving at the time.²³⁹

The defendant moved for and was granted summary judgment dismissing the claim against her.²⁴⁰ The appellate division affirmed.²⁴¹ The court noted that a defendant generally has no duty to control the conduct of third persons to prevent harm.²⁴² Although the plaintiff had relied on a line of cases that stood for the proposition that a passenger in a vehicle may be liable if the passenger distracts the driver immediately prior to an accident, the court noted there was a distinct difference between a passenger in a vehicle and a remote sender of text messages.²⁴³ Although a driver may be unable to prevent a passenger actually present in the vehicle from creating a distraction, the driver has complete control whether to allow a remote sender to create a distraction by simply refraining from using a cell phone while operating the vehicle.²⁴⁴ In fact, the court noted that a driver has several means for avoiding distractions from a phone, including using a hands-free device, turning off alerts, or pulling off to the side of the road.²⁴⁵ The remote sender, in contrast, is not generally in a position to know how a driver will handle incoming messages.²⁴⁶

The court also noted that the Legislature, crafting legislation to

237. *Id.*

238. *Id.*

239. *Vega v. Crane (Vega I)*, 55 Misc. 3d 811, 812, 49 N.Y.S.3d 264, 264 (Sup. Ct. Genesee Cty. Feb. 14, 2017), *aff'd*, *Vega II*, 162 A.D.3d 167, 75 N.Y.S.3d 760 (4th Dep't 2018).

240. *Id.* at 822, 49 N.Y.S.3d at 272.

241. *Vega II*, 162 A.D.3d at 168, 75 N.Y.S.3d at 762.

242. *Id.* at 169, 75 N.Y.S.3d at 763 (quoting *D'Amico v. Christie*, 71 N.Y.2d 76, 88, 518 N.E.2d 896, 901, 524 N.Y.S.2d 1, 6 (1987)) (citing *Oddo v. Queens Vill. Comm. for Mental Health for Jamaica Cmty. Adolescent Program, Inc.*, 28 N.Y.3d 731, 735–36, 71 N.E.3d 946, 948, 49 N.Y.S.3d 358, 360 (2017)).

243. *Id.* (quoting *Sartori v. Gregorie*, 259 A.D.2d 1004, 1004, 688 N.Y.S.2d 295, 296 (4th Dep't 1999)) (citing *Dziedzic v. Thayer*, 292 A.D.2d 845, 845–46, 739 N.Y.S.2d 802, 803 (4th Dep't 2002)).

244. *Id.* at 170, 75 N.Y.S.3d at 763.

245. *Id.* at 170, 75 N.Y.S.3d at 763–64 (citing N.Y. VEH. & TRAF. LAW § 1225-c(1)(e) (McKinney 2011)).

246. *Vega II*, 162 A.D.3d at 170, 75 N.Y.S.3d at 763.

regulate the use of electronic devices while operating motor vehicles, did not create a duty on the part of others who might attempt to communicate with the driver.²⁴⁷ Thus, the court concluded, there is no statutory or common law duty to refrain from sending text messages to a driver, and the court below had correctly granted summary judgment.²⁴⁸

In *Estate of Bell v. WSNCHS North Inc.*, the Second Department reiterated and applied the test to distinguish between medical malpractice and ordinary negligence for alleged torts committed against hospital patients.²⁴⁹ The plaintiff was admitted to New Island Hospital with a history of dementia.²⁵⁰ After the plaintiff was found standing at her bedside attempting to remove her Foley catheter, her physician ordered her to be restrained in bed, but the staff never fully restrained her.²⁵¹ The plaintiff subsequently fell out of bed and broke her arm.²⁵²

The defendants successfully moved to have the case dismissed as barred by the two-and-one-half-year statute of limitations applicable to medical malpractice under CPLR 214-a.²⁵³ The plaintiff argued, on the motion below and on appeal, that the case sounds in ordinary negligence not medical malpractice, arguing that the allegations at issue challenged the defendants' assessment of the plaintiff's supervisory and treatment needs, not the provision of medical care.²⁵⁴ The appellate division rejected that argument, however, noting that the duty owed to the plaintiff was created as a result of the physician-patient relationship and was substantially related to her medical treatment in the hospital.²⁵⁵ Therefore, the Second Department affirmed the lower court.²⁵⁶

247. *Id.* at 170, 75 N.Y.S.3d at 763.

248. *Id.* at 171, 75 N.Y.S.3d at 764.

249. 153 A.D.3d 498, 499, 59 N.Y.S.3d 475, 477 (2d Dep't 2017) (quoting *Miller v. Albany Med. Ctr. Hosp.*, 95 A.D.2d 977, 978, 464 N.Y.S.2d 297, 298–99 (3d Dep't 1983)) (citing *Halas v. Parkway Hosp.*, 158 A.D.2d 516, 516–17, 551 N.Y.S.2d 279, 280 (2d Dep't 1990)) (this case was brought by the decedent's estate, the decedent will be referred to as the plaintiff for clarity's sake).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 498, 59 N.Y.S. 3d at 476; see N.Y. C.P.L.R. 214-a (McKinney 2003).

254. *Estate of Bell*, 153 A.D.3d at 499–500, 59 N.Y.S. 3d at 477 (first citing *Collins v. N.Y. Hosp.*, 49 N.Y.2d 965, 967, 406 N.E.2d 743, 744, 428 N.Y.S.2d 885, 886 (1980); then citing *Toth v. Cmty. Hosp. at Glen Cove*, 22 N.Y.2d 255, 265, 239 N.E.2d 368, 374, 292 N.Y.S.2d 440, 449 (1968); then citing *Caso v. St. Francis Hosp.*, 34 A.D.3d 714, 715, 825 N.Y.S.2d 127, 128 (2d Dep't 2006); and then citing *Kless v. Lee*, 19 A.D.3d 1083, 1084, 796 N.Y.S.2d 502, 502–03 (4th Dep't 2005)).

255. *Id.* at 500, 59 N.Y.S. 3d at 478 (citing *Caso*, 34 A.D. 3d at 715, 825 N.Y.S. 2d at 128).

256. *Id.* at 498, 59 N.Y.S. 3d at 476.

Another interesting decision can be found in *Freitag v. Village of Potsdam*, where the Third Department held that a municipal parking lot where a pedestrian was injured by a front-end loader operated by a village employee was a “highway” for purposes of Vehicle and Traffic Law (VHL) § 1103 because the lot was publicly maintained and the traveling public had a general rite of passage through it at the time the accident occurred.²⁵⁷ The Third Department reversed the granting of the village’s motion for summary judgment.²⁵⁸ The appellate division reasoned that the village chose not to implement the safety zone policy in place during the daytime and also during nighttime operations, an employee testified that a flag person would have been helpful and possibly able to stop the pedestrian before she crossed behind the loader, and there was no admissible expert opinion dispositive of the village’s claim that it did not act with recklessness.²⁵⁹ This case could serve as a spring board for more litigation relating to parking lot accidents.

CONCLUSION

As suggested in last year’s *Survey*, the governmental immunity defense is something that the Court of Appeals will continue to shape. Some decisions this *Survey* year suggest that courts are reigning in the expansion, especially as indicated in *Connolly v. Long Island Power Authority*. Additionally, the Court’s reasoning in *Rodriguez v. City of New York* will possibly serve as a means to empower more plaintiffs to consider filing motions for summary judgment under CPLR 3212.

257. 155 A.D.3d 1227, 1228–29, 64 N.Y.S.3d 396, 398 (3d Dep’t 2017) (first citing N.Y. VEH. & TRAF. LAW § 118 (McKinney 2005); then citing *Groninger v. Vill. of Mamaroneck*, 17 N.Y.3d 125, 129, 950 N.E.2d 908, 910, 927 N.Y.S.2d 304, 306 (2011); then citing *Gawron v. Town of Cheektowaga* 117 A.D.3d 1410, 1411, 984 N.Y.S.2d 715, 717 (4th Dep’t 2014); then citing *Lauria v. City of New Rochelle*, 225 A.D.2d 1013, 1014, 639 N.Y.S. 867, 869 (3d Dep’t 1996); then citing *Seelinger v. Town of Middletown*, 79 A.D.3d 1227, 1229, 913 N.Y.S.2d 376, 378–79 (3d Dep’t 2010); and then citing *Smith v. Vill. Of Hancock*, 25 A.D.3d 975, 976, 809 N.Y.S.2d 589, 592 (3d Dep’t 2006)).

258. *Id.* at 1230–31, 64 N.Y.S.3d at 399–400 (citing N.Y. VEH. & TRAF. LAW § 1103(b) (McKinney 2011)).

259. *Id.* at 1231, 64 N.Y.S.3d at 400 (citing *Bliss v. State*, 95 N.Y.2d 911, 913, 742 N.E.2d 106, 106, 719 N.Y.S.2d 631, 631 (2000)).