SURVEY OF NEW YORK LAW: TORTS

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INTRODUCTION

Between July 1, 2021 and June 30, 2022,[1] the courts of the State of New York issued thousands of pages of decisions, including hundreds of decisions dealing with tort law. This article highlights several cases decided during the *Survey Year* from the thousands of pages of reported case law New York courts developed.

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1. The *Survey Year*.

I. LABOR LAW

In *Hensel v. Aviator FSC, Inc.*, the Second Department addressed the types of work that implicate Labor Law section 240(1) and what hazards fall within its ambit.[2] "At the time of the accident, the plaintiff was loading heavy . . . boards," which "had been used to form the walls for indoor soccer fields" into a box truck.[3] "The boards were all between 6 and 12 feet long and weighed more than 100 pounds each."[4] The boards were being loaded using a forklift, which plaintiff stood next to.[5] "The plaintiff alleged that while he stood on the ground next a forklift, one of the boards slid off the forklift and struck him in the head."[6]

The court found two bases for applying section 240(1) to plaintiff's activities. First, the court explained "the disassembly and removal of the boards from the soccer field was a partial dismantling of a structure, and constituted 'demolition' within the meaning of Labor Law § 240(1)."[7] Second, "the disassembly and removal of the boards was also a significant physical change to the configuration of the structure, and constituted 'altering' within the meaning of Labor Law § 240(1)."[8] Thus, the court held, "plaintiff's role in hauling away the boards after they had been removed by the defendant was an act 'ancillary' to the demolition and alteration of the field structure, and protected under Labor Law § 240(1)."[9]

The court also held Labor Law section 240(1) applied because plaintiff's accident involved an elevation-related risk.[10] As the court noted, "the forklift was being used to lift heavy soccer boards" into the box truck.[11] Plaintiff also testified, "a portion of the forklift had been removed so that it could fit through a certain doorway on the premises."[12] When the accident occurred, "plaintiff and his coworkers were attempting to slide one of the boards from a stack on the raised forklift

2. Hensel v. Aviator FSC, Inc., 156 N.Y.S.3d 98, 101 (App. Div. 2d Dep't 2021).
3. *Id.* at 100.
4. *Id.* at 100–01.
5. *Id.* at 101.
6. *Id.*
7. *Hensel*, 156 N.Y.S.3d at 101.
8. *Id*.
9. *Id*.
10. *Id.* at 102.
11. *Id.* at 103.
12. *Hensel*, 156 N.Y.S.3d at 103.

into the back of the truck" about eight to nine feet off the ground.[13] "The plaintiff was struck in the head by a board, weighing approximately 200 pounds, when it slid sideways off the stack and over the cab of the forklift while the plaintiff stood at ground level."[14] Plaintiff also established, through expert evidence, that load guides or guide rails could have helped avoid the accident.[15] Therefore, the Second Department affirmed supreme court's order granting plaintiff summary judgment.[16]

In *Venter v. Cherkasky*, the Second Department addressed the homeowner exemption in a Labor Law section 241(6) claim.[17] The homeowner exemption generally exempts owners of one or two family dwellings from liability pursuant to Labor Law section 241(6).[18] But the exemption does not apply where the homeowner "directed or controlled the work being performed."[19] The Second Department found the homeowners had not established their entitlement to the exemption because

> [A]t the time of the accident, the plaintiff was applying lacquer thinner to the kitchen island, as opposed to sanding off the paint as the plaintiff had done to kitchen cabinets on the days prior to the accident, because [one of the homeowners] told him to use that product, as she did not want any more dust.[20]

The court found the testimony sufficient to deny summary judgment because "defendants failed to eliminate all triable issues of fact as to whether they directed or controlled the injury-producing method of work" even though the principal of plaintiff's employer signed an affidavit denying the homeowners had directed or controlled the work.[21]

II. NEGLIGENCE

A. The Court of Appeals, in a Five-to-Two Decision, Clarifies the Special Duty Doctrine Applies to Injuries Caused by a Police Officer who Shot a Resident in the Execution of a No-Knock Search Warrant

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 100.
17. *Venter v. Cherkasky,* 159 N.Y.S.3d 487, 490 (App. Div. 2d Dep't 2021).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

Under New York law, a plaintiff claiming negligence against a municipality generally has to prove the municipality had a special relationship with the plaintiff in order to establish a legally-recognized duty.[22] In *Ferreira v. City of Binghamton*, the New York Court of Appeals, answering a certified question from the Second Circuit, addressed whether the special relationship doctrine applied to claims where the plaintiff alleged the municipality affirmatively caused the injuries as opposed to merely failing to protect the plaintiff from an injury caused by a third party.[23]

Ferreira arose out of a no-knock warrant executed by the Binghamton Police Department regarding an "alleged armed and dangerous felony suspect."[24] On August 24, 2011, police surveilled an apartment.[25] After an hour, police observed the suspect and, therefore, believed the suspect had a connection to the residence listed on the warrant.[26] The suspect then left the residence.[27] "The police never saw [the suspect] return to the apartment, and they did not conduct additional surveillance."[28]

The next morning, "a heavily-armed SWAT team conducted a dynamic entry into the residence early . . . to execute the search warrant."[29] After entering the residence, a police officer encountered Ferreira, who was not the suspect.[30] While it is unclear what happened during the interaction,[31] there was no dispute that the police officer shot Ferreira, "who was unarmed."[32]

Among other claims, Ferreira sued the City of Binghamton, among others, including the officer that shot him.[33] Ferreira claimed

22. Ferreira v. Binghamton, 194 N.E.3d 239, 243 (N.Y. 2022).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id*.

27. *Ferreira,* 194 N.E.3d at 243.

28. *Id*.

29. *Id.* at 243–44. ("A dynamic entry uses speed and surprise to gain an advantage before occupants have time to access weapons, destroy evidence, or resist the police.").

30. *Id*.

31. *Id.* at 244 ("Miller claimed that plaintiff advanced towards him, and he mistook an Xbox controller in plaintiff's hand for a handgun. Plaintiff maintained that he did not leave the couch, did not have the controller in his hand, and Miller shot him as soon as the door opened.").

32. *Ferreira,* 194 N.E.3d at 244.

33. *Id*.

the city owed him a special duty, which it breached, because "the City was liable under a respondeat superior theory for [the police officer's] negligence in shooting plaintiff and for the police department's negligence in planning the raid."[34] At trial, the jury found the police officer was not negligent.[35] The jury also found the City was negligent pursuant to the respondeat superior doctrine.[36] The jury awarded Ferreira $3,000,000.[37]

The parties filed competing post-trial motions.[38] Plaintiff claimed the jury should have found the police officer liable.[39] The city claimed plaintiff did not prove the city owed him a special duty.[40] The district court granted the city's motion.[41] The court reasoned, "New York law required that plaintiff demonstrate that the City owed him a special duty and no record evidence supported a special duty here."[42] On appeal, the Second Circuit found New York law conflicted internally as to whether the special duty requirement applied to

> [C]laims of injury inflicted through municipal negligence, or does it apply only when the municipality's negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee.[43]

Accordingly, the Second Circuit certified the question to the New York Court of Appeals.[44] The New York Court of Appeals accepted the question.[45]

New York courts created the special duty rule to limit the class of plaintiffs who could sue municipalities for negligence claims arising out of governmental functions.[46] Pursuant to the rule, while "a

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34. *Id.*

35. *Id.*

36. *Id.* at 244.

37. *Ferreira,* 194 N.E.3d at 244. The jury also apportioned 90% of the liability to the city. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 244.

41. *Id.*

42. *Id.*

43. *Id.* at 245 (quoting Ferreira v. Binghamton, 975 F.3d 255, 291 (2nd Cir. 2020)).

44. *Ferreira,* 194 N.E.3d at 245.

45. *Id.* at 245. The case also presented a related issue regarding the governmental immunity doctrine, but "the Second Circuit conducted its own analysis concerning governmental function immunity and has not asked us to opine on this aspect of their ruling." *Id.* at 249.That issue will not be addressed in this article.

46. *Id.* at 247 (citing Kircher v. Jamestown, 543 N.E.2d 443, 447 (N.Y. 1989)).

municipality owes a general duty to the public . . . it does not owe 'a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created.'"[47] While the special duty rule constricts municipal liability, it still allows a plaintiff to recover where a statute creates a duty of care and plaintiff is an intended beneficiary of the statute, where the government voluntarily assumes a special duty to the plaintiff, or where the municipality takes affirmative control of a known, dangerous condition.[48]

Plaintiff argued the special duty requirement should only apply where a third party caused the injury and the municipality failed to protect the plaintiff from the injury.[49] "As a result, plaintiff argues, the special duty rule does not apply where a municipal employee inflicts the injury in question."[50] The Court of Appeals roundly rejected plaintiff's argument, stating at the outset of its analysis, "[w]e have never limited the requirement to establish a special duty in the manner advanced by plaintiff, and we decline to do so now."[51] Indeed, the court held, "[a]ny suggestion that prior cases dispensed with the special duty rule when the municipality in question directly inflicted the alleged harm is incorrect."[52]

The court concluded plaintiff's argument was "belied by [its] precedent, unworkable, and contrary to the public policies upon which the special duty requirement is founded."[53] After a lengthy analysis of its prior precedent, the court explained plaintiff's proposed distinction in the special duty rule would be unworkable because it effectively merged duty and causation "by looking to the purported cause of the injury to determine whether the municipality owed a duty."[54] The court further explained, the proposed distinction "too closely resembles the misfeasance versus nonfeasance distinction we have

47. *Id.* at 247 (quoting Valdez v. N.Y.C., 960 N.E.2d 356 (N.Y. 2011)) (citing Florence v. Goldberg, 375 N.E.2d 763, 766 (N.Y. 1978)).

48. *Ferreira,* 194 N.E.3d at 247–48 (citing Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 135 (N.Y. 2013)).

49. *Id.* at 249.

50. *Id.*

51. *Id.*

52. *Id.* at 250.

53. *Ferreira,* 194 N.E.3d at 249.

54. *Id.* at 251. ("Given that there are often multiple causes of an injury, a rule tying the special duty pleading requirement to who caused the injury in question is untenable.").

rejected."[55] The court also noted the special duty rule serves two purposes: (1) limiting municipal liability for the acts of third parties; and (2) "a recognition that executive agencies, not the courts and juries, have the primary responsibility to determine the proper allocation of government resources and services."[56] The court concluded ensuring the special duty rule applied across the board to limit a municipality's liability in negligence "account[s] for the unique considerations that are at play when the defendants are municipal actors undertaking governmental functions."[57]

After answering the question broadly and abstractly, the Court of Appeals added a coda to its decision related specifically to no-knock warrants.[58] Indeed, the decision dispelled the idea "that a special duty could not be established in a scenario like the one presented."[59] While the court noted it had never applied the rule to a case involving police officers executing a no-knock search warrant, the court specifically stated, "a special duty may be established where the police plan and execute a no-knock search warrant on a targeted residence."[60] The court placed the execution of a no-knock warrant into its prior precedent regarding special duties, analogizing executing a no-knock warrant to taking affirmative control over a known, dangerous condition.[61] In the court's view, executing a no-knock search warrant is tantamount to taking control of a premises and, more interestingly, the court explained it is tantamount to "knowingly creating an unpredictable and potentially dangerous condition at a particular premises."[62] Thus, the court unambiguously held, "[a] special duty . . . arises when the police

55. *Id.* at 251–52. ("Adopting plaintiff's rule would produce inconsistent applications of the special duty requirement and a muddied pleading standard, leading to confusion and arbitrary outcomes.").

56. *Id.* at 252 (citing O'Connor v. N.Y., 447 N.E.2d 33, 36 (N.Y. 1983)).

57. *Id*. (citing Florence v. Goldberg, 375 N.E.2d 763, 765 (N.Y. 1978)).

58. *Ferreira,* 194 N.E.3d at 252–53.

59. *Id.* at 252.

60. *Id.*

61. *Id.* at 253.

62. *Id*. ("The execution of a no-knock warrant is a charged and volatile situation undertaken at the direction and supervision of municipal actors, who plan and execute the warrant and who can reasonably foresee and take steps to avoid many of the risks occasioned by uncertain reactions to chaotic events when the police forcefully cross the threshold of someone's home. In a no-knock warrant situation, the police exercise extraordinary governmental power to intrude upon the sanctity of the home and take temporary control of the premises and its occupants. In such circumstances, the police direct and control a known and dangerous condition, effectively taking command of the premises and temporarily detaining occupants of the targeted location.").

plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed."[63]

Two judges dissented.[64] According to the dissent, the special duty rule would not apply.[65] Instead, the dissenting judges would have held, "such officers have a duty—not a special duty—to plan and execute the no-knock search warrant in a manner reasonable under the circumstances to avoid foreseeable harm."[66] In short, the dissent would have held the common-law imposes a duty on a municipality to act reasonably when executing a no-knock search warrant.[67] According to the dissent, municipal liability for negligence claims should follow a two-part analysis: (1) does the common-law impose a duty; and (2) if not, does the special duty rule impose a duty.[68] On the dissent's theory, "[t]he 'special duty' doctrine expands the circumstances in which governmental entities can be held liable in negligence even when the government owes no ordinary duty of care to the plaintiff."[69]

The dissent would conceptualize a municipality's common-law duty in the context of its representatives.[70] Turning to prior case law, the dissent noted several examples of what it called "ordinary duty" cases involving municipal employees.[71] Some examples even pertained specifically to police conduct, including

> [W]here a police officer shot and paralyzed a person who was unarmed and running away from a robbery[,] . . . where police allegedly shot and killed someone who was intoxicated and not posing any harm to the officers[,] . . . where a runaway police

63. *Ferreira,* 194 N.E.3d at 253.

64. *Id.* at 266 (Wilson, J., dissenting).

65. *Id.* at 254.

66. *Id.*

67. *See id.*

68. *Ferreira,* 194 N.E.3d at 254 ("Our numerous precedents—spanning well over a century—establish that municipalities can owe an ordinary duty of care to individual members of the public. It is only when a plaintiff cannot demonstrate the existence of an ordinary duty breached by a governmental actor that the 'special duty' doctrine comes into play. That is, the 'special duty' doctrine is not a contraction of the circumstances under which a plaintiff could establish a claim for negligence; it is, as its name suggests, an expansion that allows a claim of negligence to proceed even when no ordinary duty exists.").

69. *Id.* at 256 (Wilson, J., dissenting).

70. *Id.* at 256.

71. *See Id.* at 255.

> horse injured a bystander,[and] where police shot and killed an innocent bystander being held up by someone in a store.[72]

The dissent then proceeded on a lengthy, case-by-case rebuttal of the majority's recitation of the prior case law interpreting the special duty doctrine.[73]

Ultimately, the dissent arose out of a concern that "the majority's articulation comes not in the likely result in this case, but in future cases in which the majority's decision may be interpreted to bar any negligence claims against a governmental actor unless a 'special duty' is proved."[74] While acknowledging the difference between the majority opinion and the dissenting opinion "may seem semantic," the dissenting judges would have declared, at common law, that a municipality "can owe ordinary duties of care to those within [its] borders."[75]

B. General Negligence

In *Knaszak v. Hamburg Central School District*, the Fourth Department issued a split decision regarding whether a school district should have been granted summary judgment where plaintiff alleged the district negligently supervised another student in "an incident in which plaintiff was sexually assaulted by another student while they were alone in a classroom."[76]

The majority held supreme court should have granted the school district summary judgment.[77] The majority reasoned, "defendant met its initial burden on the motion by establishing that the 'sexual assault against [plaintiff by the student] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated,' and plaintiff failed to raise a triable issue of fact."[78] The majority's decision turned, in part, on "the undisputed fact that plaintiff and the student did not know each other and did not have any prior interactions before the sexual assault."[79] According to the

72. *Id.* at 255–56 (citing McCummings v. N.Y.C. Transit Auth., 613 N.E.2d 559, 560 (N.Y. 1993)).

73. *Ferreira,* 194 N.E.3d at 256–57 (Wilson, J., dissenting).

74. *Id.* 3d at 258.

75. *Id.* at 264.

76. Knaszak v. Hamburg Cent. Sch. Dist., 152 N.Y.S.3d 199, 201 (App. Div. 4th Dep't 2021).

77. *Id.* at 201–02 ("In sum, 'without evidence of any prior conduct similar to the unanticipated injury-causing act, this claim for negligent supervision must fail.'" Brandy B. v. Eden Cent. Sch. Dist., 934 N.E.2d 304, 307 (N.Y. 2010)).

78. *Id.* (quoting *Brandy B.*, 934 N.E.2d at 307).

79. *Id.* at 201 (citing Francis v. Mount Vernon Bd. of Educ., 83 N.Y.S3d 637, 639 (App. Div. 2d Dep't 2018).

majority, the assailant's "extensive and troubling disciplinary history that resulted in several detentions and suspensions" did not raise a question of fact because the "history did not contain any infractions for physically aggressive conduct directed at other people, sexually inappropriate behavior, or threats of physical or sexual violence."[80] The majority also refused to find a question of fact based on the assailant's "disclosure to a school social worker about being a victim of sexual abuse during his childhood, coupled with his substance abuse," should have put the school district on notice of the assailant's potential "propensity to commit sexual assault," finding it was an "unsubstantiated and speculative inference."[81]

The dissenting justice would have held "defendant failed to meet its initial burden" based on disciplinary records and deposition testimony "describing the offending student as 'troubled,' a 'behavior concern,' 'vengeful,' 'angry,' 'a problem,' and 'disrespectful'" and establishing his behaviors "often occurred when he was under the influence" of drugs.[82] Further, the dissenting justice noted the school failed to ensure the assailant fulfilled several conditions of returning to school after a suspension, including counseling.[83] Finally, the dissenting justice pointed to evidence that the assailant was under the influence of drugs when the incident occurred, which the school knew caused him to commit sundry acts of misconduct.[84] For the dissenting justice, the assault arose "out of the [assailant's] drug abuse, a behavior that was well-documented and continuous throughout his school tenure," which the school district knew or should have known had not ceased.[85]

In *McDevitt v. New York*, the Fourth Department reversed a Court of Claims judgment in favor of the State in a three-to-two decision.[86]

80. *Id.* at 202 (citing Emmanuel B. v. N.Y.C., 15 N.Y.S.3d 790, 792 (N.Y. App. Div. 1st Dep't 2015) ("Contrary to the court's determination, while the student's history involved attendance issues, insubordination toward school staff, inappropriate verbal outbursts, being under the influence of drugs or alcohol, possession and sale of drugs, and academic problems, that history did not raise a triable issue of fact whether defendant had sufficiently specific knowledge or notice of the injury-causing conduct inasmuch as it was not similar to the student's physically and sexually aggressive behavior that injured plaintiff." (citing McBride v. N.Y.C., 70 N.Y.S.3d 836, 837 (App. Div. 1st Dep't 2018))).

81. *Id.* (citing Zuckerman v. N.Y., 404 N.E.2d 718, 720–21 (N.Y. 1980).

82. *Id.* at 203 (Bannister, J., dissenting) (citing Charles D.J. v. Buffalo, 128 N.Y.S.3d 394, 396 (App. Div. 4th Dep't 2020).

83. *Id.*

84. *Id.*

85. *Knaszak*, 152 N.Y.S.3d at 203 (Bannister, J., dissenting).

86. McDevitt v. N.Y. 153 N.Y.S.3d 235, 237–38 (App. Div. 4th Dep't 2021).

"While serving a prison term at Groveland Correctional Facility for a non-violent offense, claimant—who had an unblemished disciplinary record—cooperated with an investigation by the Department of Corrections and Community Supervision (DOCCS) into an illegal sexual relationship between a female correction officer (Parkinson) and several male inmates," including a gang leader.[87] The gang leader found out claimant was cooperating in the investigation.[88] DOCCS did not move claimant to protect him even after he was exposed.[89] "The gang leader then collaborated with other inmates to instigate a brutal assault on claimant."[90] Parkinson knew about the assault but did nothing.[91] She "was the only officer stationed in claimant's dormitory at the time of the attack."[92] After a bench trial on liability, the Court of Claims rendered judgment in the State's favor.[93]

The Fourth Department reversed.[94] In this context, the court explained the State owes a duty to protect its inmates from reasonably foreseeable harm, even where a specific threat is not identified.[95] The majority found, "the trial evidence proves decisively that defendant either knew or should have known that claimant was at serious risk of being attacked as a result of his cooperation."[96] The State's own witnesses admitted "the risk to an inmate in claimant's position under these circumstances would have been obvious and well-known," but yet "defendant failed to take any steps to protect him."[97] The majority found ample evidence that it was negligent to leave claimant in his housing unit:

> In short, given Parkinson's prior retaliation, the gang leader's influence, motive, and ability to instigate an attack, and defendant's failure to safeguard the facility's investigatory file, we conclude that defendant's decision to simply leave claimant in his dormitory, surrounded by associates of the gang

87. *Id.* at 237.
88. *Id.*
89. *Id.*
90. *Id.*
91. *McDevitt*, 153 N.Y.S.3d at 237.
92. *Id.*
93. *Id.*
94. *Id.* at 238.
95. *Id.*
96. *McDevitt*, 153 N.Y.S.3d at 238 ("[D]efendant knew that claimant had just reported an illegal sexual relationship between Parkinson and an inmate gang leader, and defendant's failure to safeguard the investigatory file allowed that fact to spread through the inmate population.").
97. *Id.*

> leader and guarded only by Parkinson, constituted a grave breach of its duty to use "reasonable care under the circumstances" to protect an inmate in its custody.[98]

The majority further found the intentional act of orchestrating the beating did not sever the causal chain under the circumstances because "claimant's assault was occasioned by the confluence of the negligent acts of defendant and the intentional conduct of Parkinson and the other inmates."[99] Likewise, the majority explained the State was not relieved of liability because claimant did not request a transfer: "an inmate's own braggadocio about his or her safety at a state prison simply cannot be the barometer of defendant's duty to protect him or her while confined."[100] Finally, the court found transferring other "inmates implicated in the investigation" did not sufficiently protect claimant as a matter of law, especially given the gang leader's well-known status and "defendant's incomprehensible decision to station Parkinson—who DOCCS knew had already retaliated against claimant by filing a false misbehavior report—as the only officer in the dormitory."[101]

The dissenting justices would have deferred to the Court of Claims judge who heard the evidence.[102] According to the dissent, the State acted reasonably by removing "inmates who were involved in the illegal sexual relationship with [Parkinson] from claimant's dormitory."[103] Further, the dissent found it persuasive that "no specific threat had been made against claimant" and that "claimant himself told investigators that he was not concerned with returning to his dormitory after speaking with them" and, indeed, "claimant did not request protective custody."[104]

In *Briggs v. PF HV Management, Inc.*, the Third Department held a puddle of water that formed outside a shower did not constitute a dangerous condition.[105] The plaintiff "allegedly slipped and fell in a puddle of water that had accumulated near the shower in the men's

98. *Id.* (quoting Sanchez v. N.Y., 784 N.E.2d 675, 680 (N.Y. 2002)).

99. *Id.*

100. *Id.* at 239.

101. *McDevitt*, 197 N.Y.S.3d at 239. ("By defendant's own characterization, DOCCS transferred those specific inmates because they were deemed to be victims of statutory sodomy, not because they might retaliate against claimant.").

102. *Id*. at 239, (Peradotto, J.P., and Carni, J., dissenting).

103. *Id*. at 239–40.

104. *Id*. at 240.

105. Briggs v. PF HV Mgmt., Inc., 155 N.Y.S.3d 643, 645 (App. Div. 3d Dep't 2021).

locker room" at a Planet Fitness facility.[106] Supreme court granted defendant summary judgment.[107] The Third Department affirmed, noting, "plaintiff slipped and fell in an accumulation of water just outside of the shower stall" that he claimed he had not seen while "walking barefoot towards the shower."[108] As the court noted, "[i]t is soundly established in this state's jurisprudence that a wet floor beside a shower is insufficient in and of itself to impart liability."[109] The court then held plaintiff failed to establish the water "was anything other than an amount of water incidental to the use of the showers."[110]

In *Wright v. O'Leary*, the Third Department affirmed a verdict in favor of defendants arising out of a utility vehicle accident.[111] Plaintiff, a 16-year-old passenger, sued defendant, the 14-year-old driver, and his parents after the utility vehicle tipped over.[112] At trial, "the jury returned a verdict finding that defendant was not negligent in operating the Gator and that [his father] was not negligent in allowing him to do so."[113] Even though the manufacturer issued warnings stating 14-year-olds should not operate the vehicle, the court noted, "there is no question that defendant was an experienced driver of the Gator on the day in question."[114] After plaintiff drove the Gator for some time (and performed donuts), defendant tried to perform some donuts as well.[115] Defendant "performed those donuts at low speed."[116] Plaintiff and defendant were headed to defendant's home.[117] Defendant "turned left and attempted to do another donut on a slight grade while plaintiff sat, unbelted, in the passenger seat."[118] Testimony conflicted as to the speed at which defendant attempted the donut, but no one disputed the Gator tipped over and "pinned plaintiff's ankle underneath it."[119] Given the conflicting testimony as to how the accident occurred, the

106. *Id*. at 644.
107. *Id*.
108. *Id*. at 644–45.
109. *Id.* at 645 (citing Keller v. Keller, 61 N.Y.S.3d 765, 766 (App. Div. 4th Dep't 2017)).
110. *Briggs*, 155 N.Y.S.3d at 645 (citing *Keller*, 61 N.Y.S.3d at 766).
111. Wright v. O'Leary, 161 N.Y.S.3d 508, 510 (App. Div. 3d Dep't 2022), *appeal dismissed,* 38 N.Y.3d 972 (N.Y. 2022).
112. *Id*. at 509.
113. *Id*. at 510.
114. *Id*.
115. *Id*.
116. *Wright*, 161 N.Y.S.3d at 510.
117. *Id.*
118. *Id.*
119. *Id.* at 510–11.

court affirmed the jury's verdict.[120] The court then quickly noted the seatbelt law does not apply to utility vehicles, but still noted the common law allowed defendant to discuss plaintiff's failure to wear a seatbelt as a potential cause of the tipping.[121]

In *Bouchard v. New York*, the Third Department dealt with the scope of the State's liability for allegedly failing to properly handle harness horse racing in a personal injury action.[122] A harness racing jockey suffered injuries "when he was ejected from his sulky after his horse, Sporty Big Boy, collided with another horse, Mister Miami, that had fallen during the race."[123] The claimant alleged "the New York State Gaming Commission (the Commission) created a dangerous condition when its officials negligently performed their prerace safety inspections, which would have alerted them to the potential danger in allowing Mister Miami to participate in the race."[124] The Court of Claims granted the State summary judgment "determining that the Commission was exercising a governmental function in regulating the harness race in which Bouchard was injured and, accordingly, claimants were required to show that defendant owed a special duty to claimants, which they failed to do."[125]

On appeal, the Third Department reversed.[126] The court explained, "the regulations that govern the conduct of the Commission are indicative of its dual role in the sport of harness racing, with aspects of its duties touching upon both proprietary and governmental functions."[127] However, as to safety inspections related to the race horses, the court held, "these responsibilities in relation to the omissions that allegedly contributed to [Claimant's] injury were proprietary and, accordingly, those officials were subject to an ordinary negligence standard when performing those functions."[128] The court explained "the duties of those officials are fundamentally intertwined with the operation of each and every race and . . . are more specifically directed to the goal of ensuring the safety of the participants in those

120. *Id.* at 511 (citing Havas v. Victory Paper Stock Co., 402 N.E.2d 1136, 1138 (N.Y. 1980).

121. *Wright*, 161 N.Y.S.3d at 511 (first citing N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 2022); then citing Spier v. Barker, 323 N.E.2d 164, 168 (N.Y. 1974)).

122. Bouchard v. N.Y., 171 N.Y.S.3d 250, 252 (App. Div. 3d Dep't 2022).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 257.

127. *Bouchard*, 171 N.Y.S.3d at 254 (citing Matter of World Trade Ctr. Bombing Litig., 957 N.E.2d 733, 744 (N.Y. 2011).

128. *Id.* (citing Wittorf v. N.Y.C., 15 N.E.3d 333, 337 (N.Y. 2014)).

races."[129] Further, while the court found the State had met its initial burden on its assumption of the risk defense, the court also found claimant raised a question of fact "as to whether Commission officials unreasonably increased the risk of injury by failing to supervise the necessary safety inspections and, consequently, allowing Mister Miami to participate in the race."[130]

C. Medical Malpractice

In *Townsend v. Vaisman*, the Second Department affirmed summary judgment in defendants' favor in a medical malpractice case over a dissent.[131] While plaintiff had felt dizzy and had been experiencing symptoms since 5:00 a.m. on June 21, 2014, she did not seek medical attention until approximately 8:00 p.m. that day and did not arrive at an emergency room until 9:47 p.m.[132] The triage nurse assigned plaintiff an urgency score of three out of five.[133] The next nurse to see plaintiff evaluated her but "had no concern that the plaintiff was exhibiting any sign or symptom of a stroke."[134] Two hours later, a physician saw plaintiff.[135] He testified "he had no concern about possible neurological problems, did not consider requesting a neurological consultation, and did not consider prescribing radiological studies, because the plaintiff 'did not have any neurologic deficit on physical examination.'"[136] He also testified "plaintiff did not present with 'any symptoms of a stroke.'"[137] He discharged plaintiff with instructions to rest.[138] Plaintiff then reported to a different hospital after a day of rest

129. *Id.* at 255. (citing P.R.B. v. N.Y., 162 N.Y.S.3d 196, 199 (App. Div. 3d Dep't 2022)).

130. *Id.* at 257 (citing Valencia v. Diamond F. Livestock, 973 N.Y.S.2d 446, 447–48 (App. Div. 3d Dep't 2013) ("Given the evidence of a failure to supervise the inspection of Mister Miami for health- or equipment-related concerns, together with the various accounts of Mister Miami exhibiting signs of lameness during the prerace warmups, and the uncertainty as to whether there was a noticeable issue with Mister Miami's horseshoes, we find that there are triable issues as to whether Commission officials adequately performed their duties and whether their alleged failures unreasonably increased the risk beyond a level generally inherent in harness track racing." (citing Zayat Stables, LCC v. NYRA, Inc., 929 N.Y.S.2d 749, 750 (N.Y. App. Div. 2d Dep't 2011))).

131. Townsend v. Vaisman, 166 N.Y.S.3d 221, 222 (App. Div. 2d Dep't 2022).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Townsend*, 166 N.Y.S.3d at 222.

137. *Id.*

138. *Id.*

did not resolve her symptoms.[139] Testing revealed plaintiff had a stroke.[140] Plaintiff claimed the doctors at the second hospital told her the stroke occurred the day before.[141]

The majority held supreme court properly granted defendants' motion for summary judgment.[142] The majority relied on defendants' expert affidavit, which contained an opinion that plaintiff's delay in seeking treatment meant the first hospital could not have provided intervention to help obtain "a good neurological outcome."[143] The expert concluded any failure to diagnose the stroke did not affect plaintiff's outcome.[144] "The defendants' expert stopped short of expressly refuting the plaintiff's allegation that the defendants departed from the acceptable standard of care by failing to diagnose the plaintiff's stroke on June 21, 2014."[145] Thus, the defense was solely based on a lack of proximate cause:

> [T]he expert's opinion established, prima facie, that any alleged departure in failing to diagnose the plaintiff's stroke . . . was not a proximate cause of the plaintiff's injuries, and that the failure to administer [therapy] was not a departure from the accepted standard of care since such therapy could not have safely been administered by the time the plaintiff presented at [the hospital].[146]

Because these were the theories plaintiff pled, and because plaintiff's expert did not dispute defendants' expert opinions, the majority affirmed summary judgment in defendants' favor.[147]

The dissenting justice would have found questions of fact.[148] Specifically, the dissent would have found defendants did not meet their initial burden because "defendants' expert failed to provide an actual or specific opinion as to whether the right-sided paralysis and other injuries which the plaintiff suffered in the afternoon on June 22, 2014,

139. *Id.* at 222–23.
140. *Id.* at 223.
141. *Townsend*, 166 N.Y.S.3d at 223.
142. *Id.* at 225.
143. *Id.* at 223–24.
144. *Id.* at 224.
145. *Id.*
146. *Townsend*, 166 N.Y.S.3d at 224.
147. *Id.* at 225 (citing DiLorenzo v. Zaso, 50 N.Y.S.3d 503, 507–08 (App. Div. 2d Dep't 2017)).
148. *See id.* at 225 (Dowling, J., dissenting).

could have been prevented had the plaintiff's stroke been properly diagnosed on June 21, 2014."[149] According to the dissent,

> The general opinion of the defendants' expert that there was no loss of treatment which may have improved the plaintiff's 'neurological outcome,' and that 'nothing that was done or not done caused or contributed to the plaintiff's alleged injuries,' is not sufficiently specific to support a finding that the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint.[150]

III. INTENTIONAL TORTS

In *Waterbury v. New York City Ballet, Inc.*, the First Department dealt with "the scope and pleading standard" of New York City Administrative Code section 10-180, which "prohibits the disclosure of intimate images without consent."[151] The plaintiff "is a former student at defendant School of American Ballet (SAB), the official school of [the New York City Ballet,] NYCB."[152] She had an "intimate relationship" with a principal dancer (Finlay) at NYCB.[153] "On or about May 15, 2018, Waterbury allegedly discovered that Finlay had secretly taken and shared photographs and videos of her, naked and often engaged in intimate activity."[154] Further, "Finlay shared the images of Waterbury with other NYCB employees, in particular other male principal dancers, during work hours and on work premises," which often "were accompanied by degrading commentary."[155] Defendants filed motions to dismiss, which supreme court granted in large part.[156] However, supreme court allowed plaintiff to proceed under section 10-180 against Finlay.[157]

On appeal, the First Department rejected Finlay's argument that section 10-180 "applies only to images, unlike those at issue, that were taken with consent before being disclosed without it."[158] The court found "no support for this argument in the statutory text."[159] The First

149. *Id.* at 227.
150. *Id.* at 227.
151. Waterbury v. N.Y.C. Ballet, Inc., 168 N.Y.S.3d 417, 420 (App. Div. 1st Dep't 2022).
152. *Id.*
153. *Id.*
154. *Id.* at 421.
155. *Id.*
156. *Waterbury*, 168 N.Y.S.3d at 421.
157. *Id.* at 421.
158. *Id.*
159. *Id*.

Department then reinstated Waterbury's negligent hiring and retention claim against NYCB.[160] The court found she adequately pled the claim insofar as "Waterbury alleges that NYCB dancers and others affiliated with NYCB shared images and commentary regarding other women and that NYCB knew that Finlay and other dancers were degrading and exploiting young women" and that "NYCB implicitly encouraged this behavior."[161] Further, Waterbury noted NYCB knew about parties where underage girls were "plied . . . with drugs and alcohol," which NYCB failed to prohibit.[162] Further, at least one set of text messages allegedly included a board member of an affiliated NYCB entity.[163]

One justice dissented in part.[164] The dissenting opinion related solely to the negligent hiring and supervision claim against NYCB.[165] According to the dissenter, the claim should not have been reinstated because "[t]he sole reason the majority gives for modifying Supreme Court's order to reinstate the complaint as against NYCB is that the individual defendants electronically shared the images while they were physically present on NYCB's premises for work or other legitimate organizational activities."[166] But, the dissent noted, "there is no allegation that the wrongdoing was perpetrated using NYCB's equipment or resources, whether computers, mobile phones, corporate email accounts, messaging networks or any other institutional asset."[167] Moreover, the dissent found the complaint lacking in that it did not allege NYCB put its dancers in a position to cause the harm that materialized.

> Unless the employer placed the employee in a position to cause the harm—which is an element distinct from the foreseeability of the employee's conduct causing the harm—the negligence of the employer (if any) in hiring, supervising or retaining the employee cannot have been a proximate cause of the harm.[168]

160. *Id.* at 423.
161. *Waterbury*, 168 N.Y.S.3d at 423.
162. *Id.*
163. *Id.*
164. *Id.* at 428 (Friedman, J., dissenting in part).
165. *Id.*
166. *Waterbury*, 168 N.Y.S.3d at 428 (Friedman, J., dissenting in part).
167. *Id.* at 428–29.
168. *Id.* at 430.

IV. DOG BITES

In *Price v. Sarasene*, the Third Department dealt with a dog-bite case.[169] Defendant's boyfriend (and not defendant) owned the dog, Sampson.[170] But "[d]efendant was holding Sampson by the collar when Price, who was familiar with Sampson, walked up and put his right hand out, prompting Sampson to jump up and bite Price on the left arm."[171] Defendant argued she could not be held liable "because she did not own or harbor Sampson at any time and had no prior knowledge of any vicious propensities."[172] Supreme court agreed, "finding that she lacked actual or constructive knowledge that Sampson had any vicious propensities."[173] The Third Department affirmed."[174] The court noted defendant met her initial burden through an admission from plaintiff "that he did not believe that Sampson was a vicious dog."[175] Further, the court explained that, though Sampson had two prior incidents with dogs and one prior incident with a human, there was no evidence that *defendant* knew of those incidents.[176] In response, plaintiffs failed to raise a question of fact.[177] The court explained evidence of barking at passersby is 'normal canine behavior'[178] and the mere fact that Sampson was "restrained with a chain while outside" was not alone sufficient to imbue defendant with notice as to any dangerous propensity.[179]

V. LEGISLATIVE/EXECUTIVE DEVELOPMENTS

A. The Adult Survivor's Act

On May 24, 2022, Governor Hochul signed the Adult Survivors Act into law.[180] The Adult Survivors Act is similar to the Child Victims Act in that it acts to open a period for those claiming sexual abuse

169. Price v. Sarasene, 156 N.Y.S.3d 518, 519 (App. Div. 3d Dep't 2021).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Price*, 156 N.Y.S.3d at 519.
175. *Id.* at 520.
176. *Id.*
177. *Id.*
178. *Id.* (quoting Clark v. Heaps, 995 N.Y.S.2d 356, 357 (App. Div. 3d Dep't 2014)).
179. *Price*, 156 N.Y.S.3d at 520 (citing Collier v. Zambito, 807 N.E.2d 254, 256 (N.Y. 2004)).
180. Adult Survivors Act, 2022 McKinney's Sess. Laws of N.Y., ch. 203 (codified at N.Y. C.P.L.R. 214-j (McKinney 2022)).

occurred to them.[181] However, unlike the Child Victims Act, the Adult Survivors Act applies to claims where the plaintiff was above the age of eighteen at the time of the alleged conduct.[182]

B. The Grieving Families Act

As of the end of the *Survey* period, the legislature was in the process of considering Senate Bill S74A, commonly known as the Grieving Families Act.[183] The act has a number of provisions that would vastly expand the scope of New York's wrongful death statute and also the damages available under the statute.[184] While, at the end of the *Survey Year*, both houses of the legislature passed the bill, the Senate had not sent it to the Governor for signature.[185]

CONCLUSION

The law of torts is ever-changing. As with other areas of law, decisions abound with greater and greater frequency. But the underlying principles remain. This Article has presented doctrinal developments from the last twelve-month *Survey* period. By the time the *Survey* is published, hundreds more cases will have been decided.

Stay tuned.

181. *Id.*; *Governor Hochul Signs Adult Survivors Act*, N.Y. STATE (May 24, 2022), https://www.governor.ny.gov/news/governor-hochul-signs-adult-survivors-act.

182. Adult Survivors Act, N.Y. C.P.L.R. § 214-j; N.Y. STATE, *supra* note 181.

183. N.Y. Senate Bill No. 74A, 244th Sess. (2021).

184. *See* N.Y. Senate Bill No. 74-A, 245th Sess. (2022).

185. Larry Rulison, *Hochul Hasn't Signed Grieving Families Act Meant to Help Schoharie Crash Victim Families, Others*, TIMES UNION (July 8, 2022), https://www.timesunion.com/business/article/Hochul-hasn-t-signed-Grieving-Families-Act-that-17292581.php.