ADMINISTRATIVE LAW

Rose Mary Bailly[†]

William P. Davies[††]

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INTRODUCTION

This Article reviews decisions announced by the New York Court of Appeals that reflect developments in administrative law and practice during 2022-2023. The topics covered in the decisions were wide ranging, including: due process, government liability, ex-post facto laws, administrative searches, and agency interpretation of statutes.

I. DUE PROCESS & SPEEDY TRIAL

The Court of Appeals reversed the appellate division holdings in *People v. Regan* and *People v. Johnson* because the time between the complaint by the victim and the indictment of the defendant violated defendant's right to a speedy trial, a due process violation.[1] In *Regan*,

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[†] Rose Mary Bailly, Esq. is on staff at the Government Law Center of Albany Law School, and an adjunct Professor of Law at Albany Law School where she has taught New York State Administrative Law, among other courses.

[††] William P. Davies is an attorney at Davies Law Firm, P.C. in Syracuse, New York. He received his J.D. from Albany Law School and his L.L.M. from the University of Miami.

1. People v. Regan, 212 N.E.3d 282, 295 (N.Y. 2023); People v. Johnson, 201 N.E.3d 778, 783 (N.Y. 2022).

thirty-eight months elapsed between the complaint and an initial warrant for DNA from the defendant.[2] The trial court and the appellate division did not find a speedy trial violation and defendant was convicted of first-degree rape.[3] The Court of Appeals reviewed the alleged violation using the *Taranovich*[4] factors: (1) extent of delay, (2) reason for delay, (3) nature of the criminal charge, (4) length of pretrial incarceration, and (5) impairment of defense due to the delay.[5]

The first and second factors, length of time and reason for delay, weighed heavily in favor of the defendant, because there was no reason for twenty-four months of the delay and the reason given for another seven months, obtaining the DNA warrant, was not sufficient.[6] Although the crime was of a serious nature, there was no pretrial incarceration and no prejudice to the defendant due to the lengthy period prior to conviction, so the last three factors did not favor the prosecution or the defendant.[7] Therefore, the Court found that the delay of over two years with little to no justification violated the defendant's right to speedy trial.[8] Judge Singas dissented, arguing that the majority did not factor the nature of the crime heavily enough, and discussed other violent criminal cases where much longer periods between beginning a case and conviction were affirmed on appeal.[9]

In a second speedy trial case, *People v. Johnson*, the Court of Appeals remanded because the appellate division did not properly apply the *Taranovich* factors, making assumptions not supported by analysis and misapplying one of the factors.[10]

II. DUE PROCESS & NOTICE OF PROPOSED PENALTY

In *People v. Worley*, the Court of Appeals reviewed the notice period required under the Sex Offender Registration Act (SORA), a due process requirement.[11] The SORA court imposed a higher sex offender classification than the government requested, changing the defendant's proposed classification from level two to level three without

2. *Regan*, 212 N.E.3d at 286.
3. *Id.* at 287.
4. *See* People v. Taranovich, 335 N.E.2d 303, 306 (N.Y. 1975).
5. *Regan*, 212 N.E.3d at 288.
6. *Id.* at 289.
7. *Id.* at 292.
8. *Id.* at 295.
9. *Id.* at 304–06 (Singas, J. dissenting).
10. People v. Johnson, 201 N.E.3d 779, 782–83 (N.Y. 2022).
11. People v. Worley, 215 N.E.3d 1184, 1185 (N.Y. 2023).

providing ten days' notice, as required under Correction Law section 168-n.[12] The Court of Appeals held that the SORA Court should have adjourned to allow the defendant the chance to put together a defense to the increased penalty, and therefore the SORA decision was reversed.[13]

III. DUE PROCESS & NOTICE OF FORECLOSURE

In *James B. Nutter & Co. v. County of Saratoga*, a property was sold at a tax sale in 2018, and the previous owner commenced an action against the County of Saratoga, claiming that the county failed to serve the owner with statutorily required notices of foreclosure.[14] In support, the plaintiff submitted evidence that the certified mail receipt was not postmarked, and the tracking history showed delivery to a post office box, not the plaintiff's address.[15] Pursuant to section 1125(1)(b) of Real Property Tax Law, the trial court dismissed the case and the appellate division affirmed because the county provided affidavits stating that the notices were mailed to the plaintiff and were not returned within forty-five days of mailing.[16]

The Court of Appeals reversed, finding that although section 1125(b)(1) sets out a presumption of receipt if mailings were not returned to the County within forty-five days, it does not prevent the property owner from submitting evidence that shows service was improper or lacking.[17] As the appellate division affirmed only based on evidence that the mailings were not returned, the case was remitted to consider if the plaintiff could prove failure of service.[18]

IV. GOVERNMENT LIABILITY

The issue of government liability was addressed in three cases decided by the Court of Appeals during this period; all of them raise significant issues for future consideration. *Henry v. New Jersey Transit Corporation* involved an interstate sovereign immunity

12. *Id.* at 1186; *see* N.Y. CORRECT. LAW § 168-n(3) (McKinney 2023).
13. *Id.* at 1188.
14. James B. Nutter & Co. v. County of Saratoga, 209 N.E.3d 1255, 1257 (N.Y. 2023)
15. *Id.* at 1257–58.
16. *See id.* at 1258; *see also* N.Y. REAL PROP. TAX LAW § 1125 (McKinney 2023).
17. *See id.* at 1256–57, 1259, 1261.
18. *Id.* at 1261–62.

defense.[19] The issue was whether, in light of the United States Supreme Court decision in *Franchise Tax Bd. of Cal. v. Hyatt,*[20] raising the defense for the first time on appeal deprived the New York state courts of jurisdiction to consider a personal injury action by a New York plaintiff against New Jersey.[21] *Howell v. City of New York*,[22] and *Maldovan v. County of Erie*,[23] each involved a related governmental immunity issue, whether the "special duty" rule immunized the City of New York and Erie County respectively against the negligence of municipal employees. The facts in "special duty" cases always tell riveting stories, making the issue of the availability of a remedy against a governmental unit for a third party's negligence a controversial topic in administrative law. Not surprisingly, the opinions in these cases, *Howell v. City of New York*,[24] and *Maldovan v. County of Erie*,[25] stirred strong dissents.

In *Henry v. New Jersey Transit Corporation*, the plaintiff was injured in an accident while traveling on a bus operated by the defendant. The accident took place when the bus on which she was traveling from New York to New Jersey collided with another vehicle in the Lincoln Tunnel.[26] The plaintiff suffered serious injuries to her shoulder which prevented her from working for two years and she continues to suffer pain from her injury.[27] She sued the State of New Jersey in New York Supreme Court.[28] A jury awarded her damages for her medical expenses, past pain and suffering, and future pain and suffering.[29] The defendant's motion for a new trial notwithstanding the verdict, or, alternatively, to reduce the damages was denied.[30] The defendant appealed.[31] On appeal, the defendant raised the defense of sovereign immunity for the first time, relying on the 2019 United States Supreme

19. Henry v. N. J. Transit Corp., 210 N.E.3d 451, 453 (N.Y. 2023).

20. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019).

21. *Henry*, 210 N.E.3d at 453.

22. *See* Howell v. City of New York, 202 N.E.3d 569, 571 (N.Y. 2022).

23. *See* Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 394 (N.Y. 2022).

24. *Howell*, 202 N.E.3d at 573 (Wilson, J., dissenting); *id.* at 590 (Rivera, J., dissenting).

25. *Maldovan*, 205 N.E.3d at 399 (Wilson, J., dissenting).

26. *Henry*, 210 N.E.3d at 454.

27. Brief for Plaintiff-Respondent at 2, Henry v. N.J. Transit Corp., 144 N.Y.S.3d 851 (App. Div. 1st Dep't 2021) (Mem.) (No. 2020-00380), 2020 WL 9048675.

28. *See Henry*, 210 N.E.3d at 454.

29. Henry v. N.J. Transit Corp., 144 N.Y.S.3d 851, 851 (App. Div. 1st Dep't 2021) (Mem.).

30. *Id.*

31. *Id.*

Court decision in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), which held that a state may assert its sovereign immunity when sued by a private citizen in another state,[32] overturning precedent to the contrary.[33] The appellate division in *Henry* affirmed the trial court decision and held that raising the defense of sovereign immunity on appeal was untimely as the *Hyatt III* decision was known to the defendant at the pleading stage of its case.[34] The defendant appealed to the Court of Appeals as of right, claiming that the matter "involved a substantial constitutional question and necessarily affected the final judgment."[35]

The Court of Appeals dismissed the defendant's appeal of the appellate division's decision[36] after examining both the defendant's timing in raising the defense and the substantive merits of the defense "to the extent necessary to determine the procedural question of whether [the defendant was] entitled to an appeal as of right."[37] The Court made swift work of the timing, noting that asserting this defense for the first time on appeal "merits little discussion" as the result in *Hyatt III* was known to the defendant well before trial.[38] Timing is important under CPLR 5601,[39] which among other things, requires that the constitutional question "be preserved as a question of law," meaning it must have been "properly raised in the courts below."[40] Otherwise, the Court of Appeals does not have jurisdiction to hear it.[41] Nor did the assertion of sovereign immunity, according to the Court, satisfy an exemption to the rule of preservation: that of subject matter jurisdiction.[42] Preservation plays a significant role in both this case and those

32. Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1492 (2019).

33. *Id.*

34. *Henry*, 144 N.Y.S.3d at 851.

35. Henry v. N.J. Transit Corp., 210 N.E.3d 451, 454 (N.Y. 2023) (citing N.Y. C.P.L.R. 5601(b)(1), (d) (McKinney 2023)).

36. *Id.* at 453.

37. *Id.* at 456.

38. *Id.* at 457.

39. N.Y. C.P.L.R. 5601(b)(1) ("An appeal may be taken to the court of appeals as of right . . . from an order of the appellate division which finally determines an action where there is *directly involved* the construction of the constitution of the state or of the United States." (emphasis added)).

40. *Henry,* 210 N.E.3d at 455 (first citing Schulz v. State, 615 N.E.2d 953, 954 (N.Y. 1993); then quoting ARTHUR KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 7:4 (3d ed., rev. 2005)).

41. *Id.*

42. *See id.* at 459–60 (citing N.Y. C.P.L.R. 5601(b)(1)).

of *Howell* and *Maldovan*,[43] a role that may affect future decisions regarding the application of sovereign immunity and government liability.[44]

The court in *Henry* reviewed the law of sovereign immunity, the change wrought by *Hyatt III*, and the relationship of sovereign immunity as currently interpreted in *Hyatt III*, to the Court of Appeals' subject matter jurisdiction.[45]

At English common law, it was understood that the King could not be brought before the court.[46] Following the American Revolution, the states regarded themselves as "fully sovereign nations,"[47] adopting the English common law view of immunity, "[c]onsistent with pre-independence English common law and prevailing international law."[48] That immunity included being sued in another state's court.[49] In *Nevada v. Hall*, the United States Supreme Court "held that the Constitution did not grant states automatic immunity from suit in the courts of another state because the Constitution is silent on that issue."[50] Rather, according to *Hall*, a state's decision to recognize another state's immunity to the first state's court "was a matter of comity for the forum state to decide," consistent with the doctrine of full faith and credit and not violative of the forum state's public policy.[51] In its 2019 decision in *Hyatt III*, the United States Supreme Court overturned *Hall*, concluding that the United States Constitution limited the authority of one state to "hale another into its courts without the latter's consent."[52] However, *Hyatt III* did add that a state may waive its sovereign immunity based on "litigation conduct."[53]

New Jersey argued that its defense of sovereign immunity could be raised at any time because it would deprive the court of subject matter jurisdiction, a claim that cannot be waived and need not be

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43. *Id.*; Howell v. City of New York, 202 N.E.3d 569, 571 n.2 (N.Y. 2022); Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 396 (N.Y. 2022).

44. *See Henry*, 210 N.E.3d at 478 (Wilson, J., dissenting); *see also Maldovan*, 205 N.E.3d 393, 409 n.9
(Wilson, J., dissenting).

45. *Henry*, 210 N.E.3d at 456–59; *see* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1492 (2019).

46. *Henry*, 210 N.E.3d at 456.

47. *Id.* (quoting *Hyatt III*, 139 S. Ct. at 1493).

48. *Id.* (citing Alden v. Maine, 527 U.S. 706, 713 (1999)).

49. *Id.*

50. *Id.* (citing Nevada v. Hall, 440 U.S. 410, 426–27 (1979)).

51. *Henry*, 210 N.E.3d at 456–57 (citing *Hall*, 440 U.S. at 421, 425).

52. *Id.* at 457 (citing *Hyatt III*, 139 S. Ct. at 1497).

53. *Id.* at 458 (citing *Hyatt III*, 139 S. Ct. at 1491 n.1).

preserved.[54] As the Court observes, subject matter jurisdiction goes to the heart of the court's power.[55] It is not dependent of a particular set of facts, unlike personal jurisdiction which involves the court's power over the parties before it.[56] The assertion of a defense of personal jurisdiction requires the court to determine whether the parties, rather than the subject of the litigation, are properly before it, namely whether they are amenable to suit in the state because they are "essentially at home in the state"[57] or have contacts in the state that make it likely they could be sued there.[58] Unlike subject matter jurisdiction, personal jurisdiction can be waived or forfeited by untimely assertion of it.[59] The Court concluded that the Supreme Court's acknowledgment that the defense of sovereign immunity can be waived by litigation conduct undercut the defendant's argument that the Court of Appeals lacks subject matter jurisdiction in this case, and renders the defense subject to the preservation rule.[60]

Consequently, because "the sovereign immunity argument is unpreserved and does not qualify for any exception to the preservation requirement, an appeal as of right does not lie under CPLR 5601(b)(1)."[61] Thus, the Court dismissed the appeal.[62] The dissent argued that the question of whether New Jersey waived its sovereign immunity and consented to the jurisdiction of New York courts should not merely be focused on the litigation conduct of defendant, namely, only asserting sovereign immunity five years after the accident, and more than one year after the Supreme Court decision in *Hyatt III*, but on the regular, multi-million dollar operation of New Jersey Transit Corporation buses on the streets of New York.[63] The consequences of this conduct and the fact that the defendant is already subject to suit in New Jersey for this same conduct makes the question of the availability of New Jersey's or another state's defense of sovereign immunity in New York important for future litigants.[64] The dissent was

54. *See id.* at 459.
55. *Id.* at 458.
56. *See Henry*, 210 N.E.3d at 458.
57. *Id.* (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)).
58. *Id.*
59. *Id.*
60. *Id.* at 459.
61. *Henry*, 210 N.E.3d at 459-60.
62. *Id.* at 460.
63. *Id.* at 461 (Wilson, J., dissenting).
64. *Id.* at 478.

concerned that by using the docket management tool of preservation, the Court sidestepped that question.[65]

New York's waiver of sovereign immunity allows for negligence claims to be asserted against municipal actors where the elements of a cause of action have been established, namely "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom."[66] While this statement may sound straightforward, "[a] negligence claim against a municipality implicates a 'complex area of the law'"[67] involving whether the government was acting in a proprietary or governmental capacity, and if in a governmental capacity, did it owe a special duty of care to the victim.[68] The government is performing in a governmental capacity "when its acts are undertaken for the protection and safety of the public pursuant to the general police powers."[69] Described in its harshest terms, its duty to everyone is a duty to no one.[70]

To recover for negligence when the government is acting in a governmental capacity, plaintiff must show a special relationship with the victim—circumstances beyond the traditional activities of the government.[71] The Court of Appeals has stated that a special duty can arise in three instances, namely where: "(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition."[72]

In order to establish a breach of a statutory duty, the first category, the governing statute must authorize a private right of action.[73] Such a cause of action may be fairly implied when (1) the plaintiff is one of

65. *Id*.

66. Ferreira v. City of Binghamton, 194 N.E.3d 239, 245–46 (N.Y. 2022) (citing Solomon v. New York, 489 N.E.2d 1294, 1294 (N.Y. 1985)).

67. *Id.* at 246 (quoting Valdez v. City of New York, 960 N.E.3d 356, 363 (N.Y. 2011)).

68. *Id.* (citing Connolly v. Long Island Power Auth. 94 N.E.3d 471, 475 (N.Y. 2018)).

69. *Id.* (citing Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 134 (N.Y. 2013)).

70. Oskar Rey, *A Duty to All is a Duty to No One: Understanding the Public Duty Doctrine*, MRSC (Mar. 13, 2023), https://mrsc.org/stay-informed/mrsc-insight/march-2023/understanding-the-public-duty-doctrine.

71. *See Ferreira*, 194 N.E.3d at 247–48 (citing *Applewhite*, 995 N.E.2d at 135).

72. *Id.* (citing *Applewhite*, 995 N.E.2d at 135).

73. Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 410 (N.Y. 2022) (Wilson, J., dissenting in part).

the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme.[74]

In the absence of a statutory duty, a plaintiff may recover if they can show that the government owed them a special duty, established by four well-settled elements:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[75]

Even if a plaintiff can meet this burden, "a municipality acting in a discretionary governmental capacity may rely on the 'governmental function immunity defense,'" an affirmative defense that must be pleaded and proven by the municipality.[76] "The doctrine of governmental function immunity . . . 'is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts.'"[77]

Howell v. City of New York[78] and *Maldovan v. County of Erie*[79] demonstrate the complexity of such cases and the difficulty of establishing the elements of a claim.

Plaintiff Dora Howell suffered severe injuries when her ex-boyfriend threw her out of the window of her third-floor apartment.[80] Her "knee, pelvis, and hip were all broken, and her spine was fractured," requiring extensive surgeries and a lengthy hospital stay.[81] Plaintiff had eight orders of protection against the ex-boyfriend, the most recent one having been obtained "less than two months" prior to the last attack.[82] The facts tell a story of repeated efforts by the ex-boyfriend to

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74. *Id.* at 411.

75. *Ferreira*, 194 N.E.3d at 249 (citing Cuffy v. New York, 505 N.E.2d 937, 940 (N.Y. 1987)).

76. *See id.* at 248 (citing Turturro v. City of New York, 68 N.E.3d 693, 700 (N.Y. 2016)).

77. *Id.* (citing Conolly v. Long Island Power Auth., 94 N.E.3d 471, 475 (N.Y. 2018)).

78. Howell v. City of New York, 202 N.E.3d 569 (N.Y. 2021).

79. Maldovan v. Cnty. of Erie, 205 N.E.3d 393 (N.Y. 2022).

80. *Howell*, 202 N.E.3d at 571.

81. *Id.* at 573 (Wilson, J., dissenting).

82. *Id.*

assault her in violation of the numerous orders of protection.[83] On various occasions when the police responded to her calls for assistance, they told her it would be okay.[84] When they were called a third time, the police officers who had become familiar with his violence, asked Ms. Howell why she didn't move[85] and told her that it was up to her to get another order of protection.[86] The officers also threatened to arrest her if she called them again.[87] At no time did they arrest the ex-boyfriend, nor did they tell Ms. Howell that they were going to arrest him.[88]

The police finally arrested the ex-boyfriend after he threw her from the window.[89]

Ms. Howell then brought an action for damages against the City of New York and the individual officers, alleging the City was negligent in its hiring and training of the officers and the individual defendants failed to protect her.[90] The defendants moved to dismiss the complaint and for summary judgment.[91] The supreme court denied the motions based in large part on the defendants' failure to produce the officers for depositions.[92] The defendants appealed and the appellate division reversed.[93] The court alluded to the rule that a special duty could arise where, as in this case, the plaintiff came within a class of persons for whom a statute has been enacted, namely the Family Prevention and Domestic Violence Intervention Act[94] with its mandatory arrest provisions.[95] However, the court brushed over this statute, leaving it unnamed. Instead, it examined the facts in accordance with the

83. *See id.* at 573–74.

84. *Id.* at 574.

85. *Howell*, 202 N.E.3d at 591 (Rivera, J., dissenting).

86. *Id.* at 576 (Wilson, J., dissenting).

87. Howell v. City of New York, 142 N.Y.S.3d 81, 83 (App. Div. 2d Dep't 2021).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Howell*, 142 N.Y.S.3d at 83.

93. *Id.*

94. Family Protection and Domestic Violence Intervention Act, 1994 N.Y. Sess. Laws 786–802, 808–15 (McKinney) (codified at FAM. CT. ACT § 812 (McKinney 2023)).

95. N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2023); William C. Donnino, Supplementary Prac. Comments., N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2023) ("[A]n arrest is mandatory when there is reasonable cause to believe that . . . a person violated . . . a duly served 'order of protection.'" (quoting N.Y. CRIM PROC. LAW § 140.10(b))).

second circumstance—the voluntary assumption of a duty through the acts of the government agents—and concluded that the plaintiff failed to establish a special relationship because she could not have relied on their "vague assurances that 'she would be okay'" and the ex-boyfriend "would not be returning to the building where both he and the plaintiff lived."[96]

The Court of Appeals granted leave to appeal[97] and affirmed in a memorandum opinion.[98] While the Court acknowledged the three situations which can give rise to a special duty,[99] it observed that the only situation before it was "the voluntary assumption of a duty."[100] The Court concluded that in response to the defendant's motion for summary judgment, the plaintiff failed to raise a triable issue of fact as to the element of reliance, because "she had no contact with the police on the day of the incident prior to the attack, that her ex-boyfriend was in fact at liberty that day," the officers never told her they would arrest her boyfriend, and she "did not relax her vigilance based on any police promises that her ex-boyfriend would be arrested for violating the order of protection."[101] It noted that merely having such an order does not establish "justifiable reliance."[102] The Court further observed that while tempting though it might be to carve out an exception to the special duty rule, it is concerned "'for the consequential effects' of such a decision."[103] According to the Court, "[a] contrary rule would impermissibly expand government liability in violation of the policies supporting the special duty rule,"[104] a result the Legislature was unlikely to have intended with the enactment of "the Family Protection and Domestic Violence Intervention Act of 1994, and its mandatory arrest provisions."[105]

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96. *Howell*, 142 N.Y.S.3d at 84.

97. Howell v. City of New York, No. 2021-296, slip op. 71215 (Ct. App. Sept. 9, 2021).

98. Howell v. City of New York, 202 N.E.3d 569, 571 (N.Y. 2022) (Mem.).

99. *Id.* at 571 n.2.

100. *Id.* Plaintiff had not argued the third circumstance, Defendants had assumed control of a dangerous situation, and only Judge Wilson believed the first circumstance—a statutory duty—had not been preserved. *Id.*

101. *Id.* at 572.

102. *Id.* (quoting Mastroianni v. Cnty. of Suffolk, 691 N.E.2d 613, 616 (N.Y. 1997)).

103. *Howell*, 202 N.E.3d at 573 (quoting Lauer v. City of New York, 733 N.E.2d 184, 190 (N.Y. 2000)).

104. *Id.* at 572.

105. *Id.* This argument is perhaps more easily offered in an opinion that does not address the statutory duty.

Judges Wilson and Rivera dissented.[106] Judge Wilson opined that the issue of whether the Family Protection and Domestic Violence Intervention Act created a special duty was preserved and should have been addressed on appeal.[107] His dissent points out that the statutory duty was an issue of law, part of the City's argument below and was preserved on appeal[108] Describing the horrors faced by victims of intimate partner violence, and the litany of federal and state legislation intended to address the problem, Judge Rivera decried the majority decision as "incomprehensible," noting that the New York Legislature has provided a remedy for victims via legislation such as the Domestic Violence Protection Act.[109]

Maldovan v. Erie County, issued on the same day as *Howell*, addressed a similar issue of the applicability of the special duty rule: whether county officials can be held responsible for their actions when the victim on whose behalf help was sought is murdered.[110] *Maldovan* also involves a statute—section 473 of the Social Services Law which provides in pertinent part that:

> [Social services] officials shall provide protective services . . . to or for individuals without regard to income who, because of mental or physical impairments, are unable to . . . protect themselves from physical abuse, sexual abuse, [or] emotional abuse, . . . without assistance from others *and have no one available who is willing and able to assist them responsibly*.[111]

This section further provides that social services personnel are immune from civil liability in connection with the provision of services so long as "*such liability did not result from the willful act or gross negligence of such official or his designee*." [112]

A family friend, at the behest of Laura Cummings's brother who was "stationed overseas in the military,"[113] contacted Child Protective Services (CPS) in Erie County concerned that Laura, a 23 year-old woman with developmental disabilities, was being abused by family members with whom she lived because she appeared to have "suspicious injuries."[114] CPS staff visited Laura and her mother in their

106. *Id.* at 573 (Wilson, J., dissenting); *id.* at 590 (Rivera, J., dissenting).
107. *Id.* at 579–81.
108. *Id.*
109. *Id.* at 591–94, (Rivera, J., dissenting).
110. *See* Maldovan v. Cnty. of Erie, 205 N.E.3d 393, 395 (N.Y. 2022) (emphasis added).
111. N.Y. SOC. SERV. LAW § 473(1) (McKinney 2023).
112. *Id.* § 473(3) (emphasis added).
113. *Maldovan*, 205 N.E.3d at 414 (Wilson, J., dissenting).
114. *Id.* at 395. The family friend was unaware of Laura's exact age. *Id.*

home, and after interviewing them, concluded that the concerns were unfounded, reported their conclusion to the family friend, and closed the case.[115] A few months later the brother again raised concerns about Laura's well-being with the family friend who this time called Adult Protective Services (APS).[116] APS staff went to the home and interviewed Laura in her mother's presence, as the mother refused to let them meet with Laura alone.[117] APS received the same benign explanation given to CPS, saw no facial bruising, and closed the case, reporting to the brother that he should call if there were "new developments."[118] In 2009, Laura ran away from home and was discovered by sheriff's deputies at an abandoned camp.[119] They returned her to her mother, thinking that the two had argued and having no reason to believe otherwise.[120] Three months later, Laura was dead. She had been **r**aped, tortured and murdered by her mother and another brother who were convicted and imprisoned.[121] On behalf of Laura Cummings' estate, the public administrator commenced an action for negligence against Erie County alleging negligence of CPS and APS, as well as the sheriff's department, which resulted in Laura's death.[122] Both the plaintiff and the defendants moved for summary judgment.[123] The trial court denied them both.[124] The Fourth Department affirmed the denial of the plaintiff's motion but reversed the denial of the defendants' motion, and dismissed the case on the grounds that "that no special duty exist[ed] as a matter of law" because "the fourth element [necessary to show a special relationship with the municipality], justifiable reliance, [could not] be met in this case."[125]

The Court of Appeals granted leave to appeal and affirmed.[126] After dismissing the statutory duty claim as unpreserved on appeal, but one that the Legislature should make clear is available to injured parties,[127] the Court turned to the second method of establishing a

115. *Id.*
116. *Id.*
117. *Id.*
118. *Maldovan*, 205 N.E.3d at 395.
119. *Id.*
120. *Id.*
121. *Id.* at 395.
122. *Maldovan*, 205 N.E.3d at 395.
123. *Id.*
124. *Id.*
125. Maldovan v. Cnty. of Erie, 134 N.Y.S.3d 594, 596–97 (App. Div. 4th Dep't 2020).
126. *Maldovan*, 205 N.E.3d at 396.
127. *Id.*

claim—voluntary assumption of a duty to the individual.[128] It concluded, as had the appellate division, that the defendants had met their *prima facie* burden of demonstrating no special relationship was established between Laura Cummings and the defendants, and the plaintiff failed to raise a triable issue of fact to counteract that the defendants' showing as a matter of law that they did not induce reliance.[129] The Court declined to adopt a rule that would excuse the decedent's need to show reliance because of her developmental disability, a condition which Social Service Law section 473 envisions as a cause for APS's services.[130] The Court pointed to its earlier decisions extending the reliance factor to a competent adult where the injured party may be unable to satisfy the elements of contact and reliance[131] and observed that the brother who was in contact with APS filled that role but he failed to demonstrate the necessary reliance.[132] It declined to address the application of the special duty rule where "the injured party was a child or adult with developmental disabilities incapable of pursuing other avenues of protection and did not have a competent adult family member advocating on their behalf."[133]

The dissent responded to the court's holding as it affected APS. First, it reviewed the history of New York statutes, as well as cases where the court has modified the special duty rule permitting recovery for the government's negligence, noting that the results have not led to the financial collapse of government, much in the same way that recovery against Erie County would not bring it to ruin.[134] Then it argued that the statutory claim under Social Service Law section 473 was a viable claim, that it did not go unpreserved.[135] Finally, the dissent argued that whether the brother and the family friend justifiably relied on the statements of CPS and APS should be a question of fact for a jury.[136]

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128. *Id.*

129. *See id.*

130. *Id.* at 397–98.

131. *Maldovan*, 205 N.E.3d at 398 (first citing Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 138–39 (N.Y. 2013); then citing Sorichetti v. New York, 482 N.E.2d 70, 75–76 (N.Y. 1985)).

132. *Id.*

133. *Id. But see* N.Y. SOC. SERV. LAW § 473(1) (McKinney 2023) requiring APS to provide services to a vulnerable adult where no one else is willing and able to assist them responsibly.

134. *Maldovan*, 205 N.E.3d at 403–08 (Wilson, J., dissenting).

135. *Id.* at 409–10.

136. *Id.* at 416.

> By bypassing Laura in its analysis and imputing the responsibility to rely to [the friend and Laura's brother], the majority defeat[ed] the legislature's intent in enacting Social Services Law § 473—to create an agency, APS, which must help those adults who cannot help themselves and who have no one to assist them.[137]

V. EX-POST FACTO LAWS

The issue before the court in *People ex rel. Rivera v. Superintendent, Woodbourne Correctional Facility* was whether the application of school grounds limitations in the Sexual Assault Reform Act (SARA) to offenders whose convictions predate the amendments violated the Ex-Post Facto Clause of the U.S. Constitution.[138] The Court held that petitioner failed to meet his burden of showing that it does.[139] An ex-post facto challenge cannot be treated as an "as applied" challenge on behalf of an individual ,[140] rather, a showing of "carceral effect on the entire group of offenders" is required, and here it was not established.[141]

The petitioner cut an unsympathetic figure. In 1986, he had been convicted of "two counts of murder in the second degree, two counts of attempted murder in the second degree, and one count of rape in the first degree" and "sentenced to an aggregate prison term of 20 years to life."[142] Prior to his anticipated parole release, he was "adjudicated a level three sexually violent offender" at his Sex Offender Registration Act (SORA) hearing and because he was serving a sentence described in Executive Law section 259-c(14), he was subject to "SARA's school grounds condition, which effectively prohibits him from living within 1,000 feet of a school, or 'any other facility or institution primarily used for the care or treatment' of minors."[143] The petitioner could not find satisfactory housing so he remained in prison.[144] Thereafter, he applied for a writ of habeas corpus requesting immediate release on the grounds that applying the school grounds

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137. *Id.*

138. People *ex rel.* Rivera v. Superintendent, Woodbourne Corr. Facility, 221 N.E.3d 1, 5 (N.Y. 2023); N.Y. EXEC. LAW § 259-c(14) (McKinney 2023).

139. *Rivera*, 221 N.E.3d at 5.

140. *Id.* at 8.

141. *Id.*

142. *Id.* at 5.

143. *Id.* (quoting N.Y. EXEC. LAW § 259-c(14)).

144. *Rivera*, 221 N.E.3d at 5.

restrictions to him violated the Ex Post Facto Clause of the U.S. Constitution.[145] The New York Supreme Court granted the writ and ordered the petitioner released on parole, holding that the application of both SORA and SARA to the petitioner violated the Ex-Post Facto Clause because the effect of the residency restriction in prolonging petitioner's incarceration past his release date was punitive.[146] The order was stayed until March 2021 when he was released on parole with appropriate housing.[147] In the meantime DOCCS appealed, and the Third Department reversed, holding that applying the school conditions to the petitioner did not violate the Ex-Post Facto Clause.[148] To provide context for its decision, the court first observed "that the retroactive application of the registration and notice requirements of SORA [had already been held] not [to] violate the Ex Post Facto Clause."[149] Then it noted the challenges similar to that of the petitioner, namely the retroactive applicability of the school restrictions, failed in the First and Second Departments.[150] As the petitioner's complaint involved the retroactive application of the school limitations, the court invoked an "intent-effect analysis" to determine whether there was a violation of the Ex-Post Facto Clause, namely, whether the statute was intended to impose punishment, or a civil regulatory scheme, and if the latter, whether the scheme's effect was so punitive

145. *Id.*; U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder*, ex post facto Law*, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.") (emphasis added). "Separate provisions of the Constitution ban enactment of ex post facto laws by the Federal Government and the states, respectively. The Supreme Court has cited cases interpreting the federal Ex Post Facto Clause in challenges under the state clause, and vice versa, implying that the two clauses have the same scope." *Art I. S9.C3.3.1 Overview of Ex Post Facto Laws*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C3-3-1/ALDE_00013192/ (last visited Jan. 31, 2024) (citations omitted).

146. *Rivera,* 221 N.E.3d at 5–6.

147. *See* People *ex rel.* Rivera v. Superintendent, Woodbourne Corr. Facility, 160 N.Y.S.3d 411, 412 (App. Div. 3d Dep't 2021).

148. *Id.* at 413, 416. Noting that petitioner was no longer entitled to habeas relief as he had been released, the appellate court converted the matter to an application for a declaratory judgment in order that the matter could proceed, *Id.* at 413 (citing People *ex rel.* Johnson v. Superintendent, Adirondack Corr. Facility, 163 N.E.3d 1041, 1047–48 (N.Y. 2020)).

149. *Id,* at 413 (citing Doe v. Pataki, 120 F.3d 1263, 1284–85 (2d Cir. 1997)).

150. *Id.* (first citing Devine v. Annucci, 56 N.Y.S.3d 149, 152 (App. Div. 2d Dep't 2017); then citing Williams v. Dep't. of Corr. & Cmty. Supervision, 24 N.Y.S.3d 18, 22–23 (App. Div. 1st Dep't 2016), *appeal dismissed*, 75 N.E.3d 674–75 (N.Y. 2017)).

as to negate its non-punitive intent.[151] The court observed that SARA's intent was to protect children, not to further punish ex-offenders.[152] As to its effect, the court stated that a successful ex post facto challenge must show by the "clearest" of proof that a civil remedy has been transformed into a criminal penalty.[153] To do so, the analysis must consider several factors:

> (1) does the sanction involve an affirmative disability or restraint?; (2) has the sanction been historically regarded as punishment?; (3) is the sanction imposed only upon a finding of scienter?; (4) does the operation of the sanction promote retribution and deterrence?; (5) is the behavior to which it applies already a crime?; (6) is there an alternative purpose to which the sanction may rationally be connected?; and (7) is the sanction excessive in relation to the alternative purpose?[154]

After evaluating these factors, the court concluded that the application of the school restrictions was not a violation of the Ex-Post Facto Clause.[155] The Court of Appeals granted leave to appeal,[156] and affirmed.[157] The Court examined the applicable factors in detail. As to the first three factors, it found them favorable to the petitioner "but [were] not themselves dispositive": the petitioner clearly suffered a disability as a result of the school restrictions limiting available housing, but the "carceral effect on the entire group of offenders to whom it applies is unclear from the record."[158] While the Court acknowledged "'a dearth of SARA-compliant housing in New York City,' [petitioner here] failed to establish the extent to which Executive Law § 259-c (14) affect[ed] all of the sex offenders to whom it applies."[159] The Court criticized the record's lack of relevant information to support a generalized claim.[160] The Court also observed that the restriction was only applicable while the individuals are serving parole, a condition like others to which an individual on parole is subjected.

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151. *Id.* at 414 (first citing Smith v. Doe, 538 U.S. 84, 92 (2003); then citing *Williams*, 24 N.Y.S.3d at 22–23).

152. *Rivera*, 160 N.Y.S.3d at 414 (citing *Williams*, 24 N.Y.S.3d at 23).

153. *Id.* (citing *Smith*, 538 U.S. 84 at 92).

154. *Id.* at 414–15 (quoting People v. Parilla, 970 N.Y.S.2d 497, 501–02 (App. Div. 1st Dep't 2013)).

155. *Id.* at 416.

156. People *ex rel.* Rivera v. Superintendent, Woodbourne Corr. Facility, 189 N.E.3d 354, 354 (N.Y. 2022).

157. People *ex rel.* Rivera v. Superintendent, Woodbourne Corr. Facility, 221 N.E.3d 1, 14 (N.Y. 2023).

158. *Id.* at 8.

159. *Id.* (quoting Gonzalez v. Annucci, 117 N.E.3d 795, 800 (N.Y. 2018)).

160. *Id.* at 9.

[161] While some offenders may be temporarily prohibited from seeking employment or housing in the restricted area, they are generally not precluded from "living and traveling within their communities and throughout the state."[162] The Court acknowledged that the restriction does have a deterrent effect but just because it does, it is not rendered automatically a punitive statute.[163] It also served a legitimate governmental purpose of protecting children.[164] While the Court acknowledged that the data on the effectiveness of such restrictions in reducing recidivism was troubling, it concluded that notwithstanding those concerns, the policy choice reflected in the restrictions "falls squarely" in the discretion of the legislature.[165]

The Court was:

> [U]nable to conclude from this record that prolonged incarceration is a common result of Executive Law § 259–c (14), rather than an idiosyncratic effect, and the Supreme Court has "expressly disapproved of evaluating the civil nature of [a statute] by reference to the effect that [statute] has on a single individual."[166]

The dissenting opinion argued that where empirical studies of the effect of the housing restrictions raise concerns about the assumptions on which they were enacted, namely legislative intent and the means and effect of that intent which are the core of the constitutional ex post facto analysis, the housing limitations violated the Ex-Post Facto Clause.[167]

VI. ADMINISTRATIVE SEARCH

For many years, the Federal Motor Carrier Safety Administration has regulated commercial motor vehicles (CMVs), and encouraged states to adopt the federal safety rules, providing financial grants as incentives.[168] New York through its Department of Transportation had adopted the federal rules.[169] The rules required among other things,

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161. *Id.*

162. *Rivera,* 221 N.E.3d at 10.

163. *See id.*

164. *Id.* at 12.

165. *Id.* at 11–12.

166. *Id.* at 13–14 (quoting Seling v. Young, 531 U.S. 250, 262 (2001)) (alterations in original).

167. *Rivera*, 221 N.E.2d at 14–15, 29 (Rivera, J., dissenting).

168. *See* Owner Operator Indep. Drivers Ass'n, Inc. v. N.Y. State Dep't of Transp., 214 N.E. 482, 486 (N.Y. 2023).

169. *Id.*

that drivers keep track of their hours of services, tracking which was done through keeping paper records or "automatic on-board recording devices" and making the records available for inspection by police and other authorities.[170]

In 2012, federal legislation was enacted requiring the promulgation of federal rules "requiring CMVs, involved in interstate commerce and operated by drivers subject to the hours-of-service and record-of-duty-status requirements, to be equipped with electronic logging devices (ELDs)."[171] "An ELD integrates with the vehicle's engine and uses global positioning system (GPS) technology to record, among other things, geographic location, engine hours, and mileage of CMVs, along with the date and time."[172] Information about the driver's off-duty activities is recorded on the device by hand, and the ELDs have to "be programmed to leave blank the engine hours and vehicle miles and to degrade the geographic location information captured by the device."[173] If ELD information is sought during a roadside safety inspection, the information is conveyed electronically without having the law enforcement officer enter the cab of the truck or the driver leave it.[174] The purpose of tracking the road hours of drivers is to reduce accidents caused by driver fatigue and thus increase driver safety.[175] The final rule was promulgated in 2015[176] and thereafter states were encouraged to adopt the ELD rule, with an incentive of federal funds for doing so.[177] By the time New York adopted the ELD rule in 2019,[178] it was the forty-eighth state to do so.[179]

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Owner Operator*, 214 N.E. at 486.

174. *Id.*

175. *See Electronic Logging Devices and Hours of Service Supporting Documents*, 80 Fed. Reg. 78292, 78306 (Dec. 16, 2015) (to be codified at 49 C.F.R. pts. 385, 386, 390, 395). Online literature suggests a lack of consensus on the effectiveness of the ELD rule. *See, e.g.,* Rachel Premack, *Federal Law Designed to Make Trucking Safer May Have Aggravated Worst Issues*, FREIGHTWAVES (Mar. 27, 2023), https://www.freightwaves.com/news/federal-law-designed-to-make-trucking-safer-may-have-aggravated-worst-issues; *The Legal Challenges of Modern Truck Drivers: An Overview*, LEGAL DESIRE (Feb. 2, 2022), https://legaldesire.com/the-legal-challenges-of-modern-truck-drivers-an-overview/.

176. *Owner Operator*, 214 N.E. at 486.

177. *See id.*

178. *Id.* at 487 (citing 41 N.Y. Reg. 39 (Apr. 24, 2019)).

179. *Id.*

Previously, Owner Operator Independent Drivers Association, Inc., a non-profit organized to protect truckers' rights, sought review of the promulgated rule in federal court, asserting a facial challenge to the ELD rule as an unwarranted intrusion on drivers' privacy and a violation of the Fourth Amendment of the Constitution as a warrantless search in federal court.[180] The United States Court of Appeals for the Seventh Circuit denied the petition.[181] Undeterred, "the Association then commenced a class action in New York state court" based on rumors that New York was enforcing the ELD rule prior to its adoption in the state.[182] Those rumors turned out to be false and the action's dismissal was affirmed on appeal.[183] The association commenced its second action in New York after the state's adoption of the ELD rule in 2019,[184] claiming that the rule violated the state's constitutional protection against unreasonable searches and seizures and the state's due process protections, and that the Department of Transportation's adoption of the rule was arbitrary and capricious.[185] It named the DOT as well as individual defendants.[186] The trial court dismissed the complaint, finding that the ELD Rule constituted a permissible administrative search.[187]

The appellate division affirmed,[188] and the association appealed as of right.[189]

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180. *See Id.*

181. *Owner Operator*, 214 N.E.3d at 487 (citing Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp., 840 F.3d 879, 892–93 (7th Cir. 2016)).

182. *Id.*; *see* Owner Operator Indep. Drivers Ass'n, Inc. v. N.Y. State Dep't of Transp., 2020 N.Y. Slip Op. 34831(U), at 3 (Sup. Ct. Albany Cnty. May 1, 2020).

183. *Owner Operator*, 214 N.E.3d at 487 (citing Owner Operator Indep. Drivers Ass'n, Inc. v. Calhoun, 93 N.Y.S.3d 802, 810–13 (Sup. Ct. Albany Cnty. 2018), *appeal dismissed sub nom*. Owner Operator Indep. Drivers Ass'n, Inc. v. Karas, 133 N.Y.S.3d 681, 684 (App. Div. 3d Dep't 2020)). During the pendency of that appeal, DOT adopted the ELD rule, rendering the association claims moot, and the appeal was dismissed, *see id. See also Owner Operator*, 2020 N.Y. Slip Op. 34831(U), at 3.

184. *See Owner Operator*, 214 N.E.3d at 487. The procedural format was a combined Article 78 proceeding and a declaratory judgment. *Id.*

185. *Id.*; *see Owner Operator*, 2020 N.Y. Slip Op. 34831(U), at 3.

186. *See Owner Operator*, 2020 N.Y. Slip Op. 34831(U), at 1.

187. *Owner Operator*, 214 N.E.3d at 487 (citing *Owner Operator*, 2020 N.Y. Slip Op. 34831(U), at 11).

188. *Id.* at 487–88; *see* Owner Operator Indep. Drivers Ass'n, Inc. v. N.Y. State Dep't of Transp., 166 N.Y.S.3d 337, 349 (App. Div. 3d Dep't 2020).

189. *Owner Operator*, 214 N.E.3d at 488 (citing N.Y. C.P.L.R. 5601(b)(1) (McKinney 2023)).

The Court of Appeals affirmed, concluding that the ELD rule's warrantless search falls within the "administrative search exception to the warrant requirement," and modified the appellate division order only insofar as "to declare the ELD rule facially constitutional inasmuch as it does not violate article I, § 12 of the State Constitution."[190] The Court acknowledged that generally searches of private and commercial premises require a warrant, and that requirement generally extends to "administrative inspections designed to enforce a regulatory scheme because such searches are 'significant intrusions upon the interests protected'" by the State and Federal Constitutions."[191] The Court then turned to an examination of the two factors which when present will sustain a warrantless administrative search or inspection under New York's Constitution: 1) "the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation" that is not a mere pretext to uncover criminality , and 2) "the regulatory scheme authorizing the search must 'delineate rules to guarantee the certainty and regularity of . . . application necessary to provide a constitutionally adequate substitute for a warrant.'"[192] The Court concluded that ELD rule satisfies both factors.[193] The state has a long history of pervasive regulation of commercial vehicles to ensure public safety,[194] and the inspections occur "in accordance with nonarbitrary, nondiscriminatory, uniform procedures, such as at roadblocks, checkpoints and weighing stations."[195] Moreover, because the inspections are limited in purpose, namely to ascertain whether drovers are observing the "hours-of-service" requirements, there is no pretext for uncovering criminal activity.[196]

VII. AGENCY INTERPRETATION OF THE LAW

A well-established principle of administrative law is the deference accorded to an agency's interpretation of the laws it is charged

190. *Id.*

191. *Id*. at 489 (citing Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 534 (1967)).

192. *Id.* (first quoting People v. Quackenbush, 670 N.E.2d 434, 438 (N.Y. 1996); then quoting People v. Scott (Keta), 593 N.E.2d 1328, 1344 (N.Y. 1992)).

193. *Id.* at 490.

194. *Owner Operator*, 214 N.E.3d at 490.

195. *Id.* at 492–93 (quoting People v. Singleton, 361 N.E.2d 1003, 1005 (N.Y. 1977)).

196. *Id.* at 494.

with regulating.[197] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation.[198]

The Court addressed several statutory interpretation cases, including whether having a heavy steel door slam on a woman's fingers was an "accident,"[199] what forms of compensation should be included in "regular salary and wages,"[200] what is "mining,"[201] and whether exempt class of public employees can be the subject of a collective bargaining agreement.[202]

On a dark and stormy night, the petitioner police officer who worked for the Port Authority of New York and New Jersey helped a woman who had been injured in the Lincoln Tunnel.[203] After the ambulance arrived, the petitioner returned to her heated booth at the toll plaza[204] to write up her report of the incident. As she attempted to enter the booth by squeezing into it, "a violent gust of wind blew the 80 to 100 pound door shut, crushing her right index finger and permanently disabling her from returning to her [sic] to a full duty position."[205] Petitioner sought and was denied through the administrative process "accidental disability retirement benefits,"[206] based on the determination "that the incident did not constitute an accident within the meaning of Retirement and Social Security Law § 363."[207] Section 363 provides that the individual is entitled to benefits if they are:

> [p]hysically or mentally incapacitated for performance of duty as the natural and proximate result of *an accident not caused by his or her own willful negligence* sustained in such service and

197. *See* PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 8.3 (2d ed. 1998).

198. *Id.*

199. Rizzo v. DiNapoli, 202 N.E.3d 559, 559 (N.Y. 2022) (mem.).

200. Borelli v. City of Yonkers, 204 N.E.3d 1042, 1044 (N.Y. 2022).

201. Town of Southampton v. N.Y State Dep't of Env't Conservation, 205 N.E.3d 426, 428 (N.Y. 2023).

202. Teamsters Loc. 445 v. Town of Monroe, 213 N.E.3d 105, 107 (N.Y. 2023).

203. *Rizzo*, 202 N.E.3d at 560 (Wilson, J., dissenting).

204. *See* Rizzo v. DiNapoli, 162 N.Y.S.3d 164, 166 (3d Dep't 2022).

205. *Rizzo*, 202 N.E.3d at 560 (Wilson, J., dissenting).

206. *Rizzo*, 162 N.Y.S.3d at 165. She did recover performance of duty retirement benefits. *Id.* at 165 n.1.

207. *Id.*

> while actually a member of the New York state and local police and fire retirement system.[208]

The term "accident" is not defined by statute; it has been defined by case law as "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact."[209] Rather it is interpreted by a development of the facts through the administrative and judicial processes.[210] The Comptroller determined that petitioner did not show that "her injuries resulted from an accident within the meaning of the Retirement and Social Security Law because the risk of the door not closing properly could have reasonably been anticipated."[211]

Following her exhaustion of her administrative remedies, petitioner commenced an Article 78 proceeding.[212] The appellate division affirmed the Comptroller's determination relying on the fact that petitioner observed the wind gusting and as she "entered the doorway, she felt a gust of wind and, concerned that the door was going to hit her as it closed, she put her right hand out behind her for protection. The wind blew the door shut behind her, slamming her right hand in the doorjamb."[213] It held that there was substantial evidence to support the determination.[214] The Court of Appeals affirmed in a memorandum decision, noting that petitioner perceived the risk of the door closing on her and acted to avert that possibility.[215] She knew of the risk, so her injuries were not the result of an accident.[216] The dissent suggested that the word "accident" has been "contorted beyond recognition by courts' efforts to apply a 'commonsense definition of a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.'"[217] The dissent offered a two part analysis as a way to achieve more consistency: "(i) whether the nature of the hazard is part of the

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208. N.Y. RETIRE. & SOC. SEC. LAW § 363-bb(1) (McKinney 2023) (emphasis added).

209. *Rizzo*, 162 N.Y.S.3d at 165 (quoting *Lichtenstein v. Bd. of Trs. of the Police Pension Fund of Police Dep't of City of N.Y., Art. II,* 443 N.E.2d 946, 947 (N.Y. 1982)).

210. *See id.*

211. *Id.*

212. *See id.*

213. *Id.* at 166.

214. *Rizzo*, 162 N.Y.S.3d at 166.

215. Rizzo v. DiNapoli, 202 N.E.3d 559, 559 (N.Y. 2022) (mem.)

216. *See id.*

217. *Id.* at 560 (Wilson, J., dissenting) (quoting *Lichtenstein v. Bd. of Trs. of the Police Pension Fund of Police Dep't of City of N.Y., Art. II,* 443 N.E.2d 946, 947 (N.Y. 1982)).

bargained-for risks of the job and (ii) whether it is truly unexpected and out of the ordinary, or rather is part of the ordinary risks of daily life."[218] Despite the offer, the dissent recognized that the majority was not disposed to accept his invitation.[219]

The issue before the court in *Borelli v. City of Yonkers* also related to disability benefits: whether certain City of Yonkers payments, "holiday pay, check-in pay, and night differential pay," described in a collective bargaining agreement (CBA) could be included within the term "regular salary or wages" under General Municipal Law section 207-a (2) in calculating the compensation for permanently disabled firefighters.[220]

Under section 207-a, a permanently disabled firefighter is entitled to a supplement to any accidental disability retirement allowance or pension they receive.[221] That supplement is "the difference between the amounts received under such allowance or pension and the amount of his or her regular salary or wages."[222] The CBA governing firefighters' compensation in Yonkers included holiday pay, check-in pay, and night differential pay since 1995, and the City had included these payments in its calculation of section 207-a(2) supplements.[223] In 2015, it notified retirees that it had mistakenly included holiday pay, check-in pay, and night differential pay in the supplement, and that it intended to discontinue that practice and seek recovery of past payments.[224]

After unsuccessfully challenging the City's decision administratively,[225] the petitioners commenced an Article 78 proceeding in supreme court, arguing that the decision was "arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence."[226] The supreme court denied the petition as to the calculation of future benefits but enjoined the City from recovering past payments.[227] The Second Department affirmed the decision.[228] The Court of Appeals

218. *Id.* at 560–61 (quoting Kelly v. DiNapoli, 94 N.E.3d 444, 452 (N.Y. 2018) (Wilson, J., dissenting in part)).

219. *Id.* at 561.

220. Borelli v. City of Yonkers, 204 N.E.3d 1042, 1044 (N.Y. 2022).

221. N.Y. GEN. MUN. LAW § 207-a(2) (McKinney 2023).

222. *Id.*

223. *Borelli*, 204 N.E.3d at 1044.

224. *Id.* at 1044–45.

225. *See* Borelli v. City of Yonkers, 134 N.Y.S.3d 41, 43 (App. Div. 2d Dep't 2020).

226. *Borelli*, 204 N.E.3d at 1045.

227. *Id.*

228. *Borelli,* 134 N.Y.S.3d at 43.

granted leave to appeal.[229] It affirmed and modified the appellate court decision, concluding that holiday pay and check-in pay should be included in "regular salary," but not night differential pay.[230]

The court first discussed the history behind treatment of compensation for injured firefighters.[231] The treatment was initially inconsistent across municipalities, and legislation was later enacted to provide guidance as to which municipalities with paid fire departments were required to pay disabled firefighters "the full amount of [their] regular salary or wages" as well as medical expenses until their disability ended.[232] Amendments to section 207-a never altered the understanding that firefighters were entitled to "regular salary or wages," even as the costs associated with the benefits were shifted from municipalities to the state pension system.[233] The Court concluded that holiday pay and check-in pay were part of the regular salary to which all retirees are entitled under the CBA.[234] These payments were distinguishable from the night differential because, unlike holiday and check-in pay, which are paid automatically, not all firefighters are entitled to night differential pay.[235] To receive such pay, the firefighter must actually work "the night tour."[236] According to the Court, the city's determination to exclude holiday and check-in pay to which all firefighters were entitled was "based on an error of law."[237] The determination as to the night differential pay was supported by "substantial evidence."[238]

The dissent argued that the majority ignored the distinction between active-duty firefighters and retired disabled firefighters contained in two CBAs and reached their result by focusing solely and incorrectly on active firefighters' compensation.[239]

In 2018, the Independent Insurance Agents and Brokers of New York, Inc. and Testa Brothers, Ltd. commenced an Article 78

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229. *Borelli*, 204 N.E.3d at 1045; Borelli v. City of Yonkers, 167 N.E.3d 1291, 1291 (N.Y. 2021).

230. *Borelli*, 204 N.E.3d at 1048.

231. *Id.* at 1045–46.

232. *See id.* at 1046 (citing N.Y. GEN. MUN. LAW § 207-a(1) (McKinney 2023)) (alteration in original).

233. *See id.*

234. *Id.* at 1048.

235. *Borelli*, 204 N.E.3d at 1049–50.

236. *Id.*

237. *Id.* at 1050.

238. *Id.*

239. *See id.* at 1052–54 (Garcia, J., dissenting).

proceeding challenging a final regulation issued by the New York State Department of Financial Services as a consumer protection rule.[240] The regulation was first issued as an emergency regulation, and then in 2013 as a final regulation.[241] Ultimately after public comments and a revised proposal, DFS amended its proposal and issued a final regulation titled "Suitability and Best Interests in Life Insurance and Annuity Transactions."[242] The regulation became effective as to annuity transactions in 2019, and in relation to life insurance policies in 2020.[243] The regulation sets out in detail the obligations of those licensed to sell such products to ensure that the best interests of the consumer are paramount.[244] These obligations include making:

> "reasonable efforts" to obtain the consumer's "suitability information"; base any recommendation "on an evaluation of the relevant suitability information" that "reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing"; "[o]nly [consider] the interests of the consumer . . . in making the recommendation" and not be influenced by compensation or other incentives; recommend only "suitable" transactions; and have a "reasonable basis" to believe that the consumer has been reasonably informed of the features of the policy, the potential consequences of the transactions, both favorable and unfavorable, and that the consumer would benefit from certain features of the policy and the particular policy as a whole.[245]

Petitioners challenged the regulation on several grounds: the Department of Financial Services had exceeded its authority in promulgating this regulation in violation of the underlying statutory scheme; the terms of the regulation were unconstitutionally vague; its promulgation violated the State Administrative Procedure Act (SAPA); and

240. Indep. Ins. Agents & Brokers of N.Y. v. N.Y. State Dep't of Fin. Servs., 200 N.E.3d 537, 544 (N.Y. 2022). That proceeding was consolidated by the Supreme Court with a proceeding by The National Association of Insurance and Financial Advisers-New York State, Inc. (NAIFA). *Id.* at 544 n. 4. The parties to the NAIFA proceeding did not appeal the dismissal of their petition. *Id*.

241. *Id.* at 542.

242. *See id*. at 542–43; *see* 11 N.Y.C.R.R. § 224 (2024).

243. *Indep. Ins. Agents*, 200 N.E.3d at 544 (citing 11 N.Y.C.R.R. § 224.9).

244. *See* 11 N.Y.C.R.R. § 224.4.

245. *Indep. Ins. Agents*, 200 N.E.3d at 544 (quoting 11 N.Y.C.R.R. § 224.4(b)) (alterations in original).

the regulation was arbitrary and capricious and lacked a rational basis.[246]

The supreme court granted the department's motion to dismiss, finding that the department did not exceed its authority, the rule was not arbitrary and capricious, and rather than vague, it clearly defined the obligations of the regulated parties, namely to put consumers' best interests first.[247] The petitioners appealed and the appellate division reversed.[248] The appellate division declared the regulation unconstitutionally vague because although its goals were laudatory, it failed to provide specific guidance for achieving them.[249] The department appealed as of right.[250]

The Court of Appeals examined the regulation under a two part standard for vagueness: (1) whether the regulation is "sufficiently definite to give a person of ordinary intelligence fair notice that [the person's] contemplated conduct is forbidden," and (2) whether it provides "clear 'standards for enforcement' so as to avoid 'resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'"[251] The Court went on to say that because this a facial challenge, without any enforcement having been taken against petitioners, their burden is to show that the regulation is "vague in *all* of its applications," meaning that no standard of conduct could be discerned from its language.[252] The Court examined each of the terms challenged by petitioners: "recommendation," "suitability information," and "best interest,"[253] and found them each to give sufficient notice of the conduct required.[254] It found the remaining arguments unavailing.[255]

The question in *Green v. Dutchess County BOCES* involved the Workers Compensation Board's determination regarding the correct benefits to be paid to the surviving child of decedent employee who dies from a cause unrelated to the injury.[256] Section 15(3) of the

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Indep. Ins. Agents*, 200 N.E.3d at 544.
251. *Id.* at 545 (first quoting People v. Stuart, 797 N.E.2d 28, 34 (N.Y. 2003); then quoting People v. Stephens, 66 N.E.3d 1070, 1074 (N.Y. 2016)).
252. *Id.* (quoting *Stuart*, 797 N.E.2d at 35) (emphasis in original).
253. *Id.* at 546.
254. *Id.* at 546–48.
255. *Indep. Ins. Agents*, 200 N.E.3d at 548.
256. *See* Green v. Dutchess Cnty. BOCES, 198 N.E.3d 776, 777 (N.Y. 2022).

Workers Compensation Law provides that for a "permanent partial disability" an employee may receive a "schedule loss of use" (SLU) award to "compensate for loss of earning power, rather than the time that an employee actually loses from work or the injury itself"[257] or a "nonschedule award" which reimburses the employee for "earnings lost due to injury."[258] The Workers Compensation Board determined that the decedent suffered a permanent partial disability as a result of an injury to his leg and was awarded non schedule wage-loss benefits "not to exceed 350 weeks."[259] The decedent died for reasons unrelated to his work injury prior to receiving the entire amount of the award.[260] The Board determined that his minor child, pursuant to section 15(4)(c) of the Workers Compensation Law, was entitled to "any [accrued but] unpaid amounts owed for the 311.2 weeks from the time of decedent's classification to his death, . . . [but not] to a posthumous award for the remaining 38.8 weeks of the nonschedule award because the claim abated upon decedent's death."[261] It concluded that "[w]ith a claimant's death, there are no future earnings to lose, so no posthumous award is warranted."[262] Petitioner appealed.[263] The appellate division reversed in part, modifying the decision to provide that the minor child was entitled to a posthumous award for the remaining 38.8 weeks on the grounds that section 15(4) does not distinguish between the type of awards in describing benefits awarded to a minor child or

257. *Id*. at 778 (quoting Johnson v. City of New York, 195 N.E.3d 1, 6 (N.Y. 2022)). "SLU awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily enumerated body members." Green v Dutchess County BOCES, 121 N.Y.S.3d 362, 365 (App. Div. 3d Dep't 2020) (quoting Taher v. Yiota Taxi, Inc., 78 N.Y.S.3d 500, 502 (App. Div. 3d Dep't 2018)).

258. *Green*, 198 N.E.3d at 778. "A nonschedule injury, i.e., an injury to a body member not specifically enumerated in subsections (a)-(u) [of Workers' Compensation Law § 15(3)], is based on a factual determination of the effect that the disability has on the [worker's] future wage-earning capacity." *Green*, 121 N.Y.S.3d at 366. Such an award "requires a calculation of a worker's weekly rate of compensation using the worker's average weekly wages and wage-earning capacity and 'specifies the [duration or maximum] number of weeks the worker will receive that weekly sum . . . based upon the [worker's] percentage of lost wage-earning capacity.'" *Id.* (quoting Mancini v. Off. of Children & Family Servs., 118 N.E.3d 191, 194 (N.Y. 2018)) (alterations in original).

259. *Green*, 121 N.Y.S.3d at 364.

260. *Green*, 198 N.E.3d at 777.

261. *Green*, 121 N.Y.S.3d at 364.

262. *Green*, 198 N.E.3d at 777 (internal quotations omitted).

263. *Id.*

spouse in the event of the claimant's death other than from a work related injury.[264] The Court of Appeals granted leave to appeal and reversed the appellate division, reinstating the original determination of the Board.[265] It held that the decedent's child was entitled only to "that portion accrued but unpaid at the time of death."[266] The decision is based on the type of decedent's award. Two types of workers compensation awards are possible. One is a "schedule loss of use" award, which compensates for "loss of earning power."[267] "A nonschedule award, in contrast, seeks to reimburse a claimant for earnings lost due to injury."[268] The awards are calculated differently.[269] A schedule award is set at a fixed percentage of the employee's wages and are paid out over a fixed statutory period.[270] A nonscheduled award is paid for the period of the disability but is subject to reconsideration and suspension. [271] The nonschedule award may, as the court notes, change over time.[272] Pointing to the legislative history of the statute, as well as the Court's over 100-year history of recognizing the difference between the types of awards, posthumous benefits have never been awarded for nonschedule awards.[273] According to the court, any changes to the current treatment are for the Legislature.[274]

The issue in *Town of Southampton v. New York State Department of Environmental Conservation* was whether the Department of Environmental Conservation (DEC) correctly interpreted Environmental Conservation Law 23-2703(3) to apply only to new permits for mining, which led to its regularly renewing a mining permit for Sand Land, which had for many years owned and operated "a sand and gravel mine on a 50-acre parcel of property" in Southampton on Long Island.[275]

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264. *Id.* at 777–78.

265. *See id.* at 780; *see also* Green v. Dutchess Cnty. BOCES, 174 N.E.3d 703, 703 (N.Y. 2021).

266. *See Green*, 198 N.E.3d at 777.

267. *Id.* at 778 (quoting Johnson v. City of New York, 195 N.E.3d 1, 6 (N.Y. 2022)).

268. *Id.*

269. *Id.*

270. *See id.*

271. *See Green*, 198 N.E.3d at 778.

272. *See id.*

273. *Id.* at 779–80.

274. *Id.* at 780.

275. Town of Southampton v. N.Y. State Dep't of Env't Conservation, 205 N.E.3d 426, 428–29 (N.Y. 2023).

> Environmental Conservation Law 23-2703(3) provides in relevant part:
> No agency of this state shall consider an application for a permit to mine as complete or process such application for a permit to mine pursuant to this title, within [certain] counties . . ., if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined.[276]

The statute further provides both that "applications for new mining permits contain a 'statement that mining is not prohibited at the location,'" and that the DEC ask "the relevant political subdivision whether mining is prohibited 'at that location.'"[277] Sand Land's predecessors had been mining at the location since the 1960s, prior to any prohibition on mining in the Town of Southampton.[278] The town rezoned the area in which the mine was located as residential and prohibited mining in 1972.[279] Subsequent to that time, Sand Land obtained certificates of occupancy from the town stating that the use of the land for mining was a "prior nonconforming use," and received several renewals of its mining permit from DEC.[280] In 2014, Sand Land applied to DEC to modify its permit to increase the depth of mining to 120 feet amsl, and to add an additional number of acres not covered by the prior permits.[281] DEC denied the application,[282] and an Administrative Law Judge affirmed the denial, holding that "Sand Land's proposed expansion of its mine constituted a material change in permitted activities and was therefore a new application, which triggered the required inquiry into whether the Town's zoning laws prohibit[ed] mining at the site."[283]

Sand Land and DEC subsequently arrived at a settlement agreement whereby "DEC agreed to, among other things, renew Sand Land's permit and allow Sand Land to increase the extent of its current mining activity by three acres, . . . and to timely process a modification permit application for mining to be conducted to a depth of 120 feet

276. N.Y. ENV'T CONSERV. LAW § 23-2703(3) (McKinney 2023).

277. *Southampton*, 205 N.E.3d at 431 (citing ENV'T CONSERV. LAW §§ 23-2711(2)(c), (3)(a)(v)).

278. *See id.* at 429.

279. *Id.*

280. *Id.*

281. *Id.* AMSL is an abbreviation for "above mean sea level." *Id.*

282. *Southampton*, 205 N.E.3d at 429.

283. *Id.*

amsl."[284] In 2019, DEC issued another renewal permit to Sand Land and approved an increase in the depth of permissible mining.[285]

The town, as well as several neighbors and organizations, commenced an Article 78 proceeding seeking to annul the 2019 permit, the declaration permitting the increased depth of mining, and the settlement agreement, as well as to enjoin the processing of the modification permit application.[286] The supreme court denied the petition, finding that neither the increase in acreage, "a mere ministerial correction" to the original permit, nor the request to increase the depth of the mining "within an existing footprint where mining is otherwise authorized" were not subject to the Environmental Conservation Law (ECL).[287] The appellate division modified the result, finding that issuing the permits "in contravention of ECL 23-2703(3) was arbitrary and capricious" where the town ordinance prohibiting mining was unchallenged.[288] The dissent argued that the statute did not apply in this case because the town had recognized the mining as a prior nonconforming use.[289] The Court of Appeals agreed that given the question before it was one of "pure statutory interpretation" it need not defer to DEC's expertise as to the statute's meaning; its plain language applied without limitation to new permits as well as modifications and renewals.[290] And that interpretation was confirmed by the fact that the term "permit" is defined in section 70-0105(4) to mean any "'department approval,' 'modification' or 'renewal' [so that] the phrase "permit to mine" in ECL 23-2703 encompasses all applications to mine, including applications for renewal and modification."[291] As to the prior nonconforming use granted by the Town, the Court held that the statute does not eliminate any prior non-conforming use, but that the scope of

284. *Id.*

285. *Id.*

286. *Id.* at 429–30. DEC subsequently issued the modification permit increasing the mining depth, so petitioner amended their application to include that permit. *Id.* at 430.

287. *Southampton*, 205 N.E.3d at 430.

288. *Id.* (quoting Town of Southampton v. N.Y. State Dep't of Env't Conservation, 149 N.Y.S.3d 589, 594–95 (App. Div. 3d Dep't 2021)).

289. *See id.* (citing *Southampton*, 149 N.Y.S.3d at 596–96 (Pritzker, J., dissenting)).

290. *Id.* at 431.

291. *Id.* at 431–32 (quoting N.Y. ENV'T CONSERV. LAW §§ 70-0105(4), 23-2703 (McKinney 2023)).

Sand Land's prior non-conforming use needed to be addressed by DEC as the issue had not been relevant to the proceedings thus far.[292]

The issue in *Teamsters Local 445 v. Town of Monroe* was whether the termination of the secretary to the town's planning board, an exempt position, was properly included in the collective bargaining unit of the town employees' union, thus subjecting the employee's termination to arbitration.[293] The Court held that including the position, exempt under the civil service classifications, in the collective bargaining agreement (CBA) between the public employees' union and the town violated provisions of Civil Service Law and public policy.[294] Subsequent to the appointment of a new secretary to the planning board, the town and the union entered into a CBA, which, among other terms, provided that the secretary could only be terminated for just cause and termination would be subject to arbitration.[295] The secretary was fired several years later, and the union filed a grievance with the town.[296] The town did not address the grievance so the union commenced an Article 75 proceeding[297] seeking to compel the Town to arbitrate the termination.[298] The supreme court denied the town's motion to dismiss.[299] The town appealed, and the appellate division affirmed, concluding that "there is no statutory, constitutional, or public policy prohibition against arbitrating this dispute regarding the termination of an employee in an 'exempt class' under the Civil Service Law."[300] The Court of Appeals granted the town leave to appeal,[301] and reversed the appellate court.[302] According to the Court**,** exempt positions, one of a class of civil service positions under the Civil Service Law, are subject to its own criteria.[303] An exempt position is

292. *See Southampton*, 205 N.E.3d at 435.

293. Teamsters Loc. 445 v. Town of Monroe, 213 N.E.3d 105, 107 (N.Y. 2023).

294. *Id.* at 110.

295. *Id.* at 107.

296. *Id.*

297. CPLR Article 75 governs the rules of arbitration. *See* N.Y. C.P.L.R. 7501–7516 (McKinney 2023).

298. *See Teamsters Loc.*, 213 N.E.3d at 107.

299. Teamsters Loc. 445 v. Town of Monroe, 136 N.Y.S.3d 338, 339 (App. Div. 2d Dep't 2020).

300. *Id.* (quoting N.Y. CIV. SERV. LAW § 41(1) (McKinney 2023)).

301. Teamsters Loc. 445 v. Town of Monroe, 195 N.E.3d 528, 528 (N.Y. 2022).

302. *Teamsters Loc.*, 213 N.E.3d at 107.

303. *See id.* at 108

"based on 'the confidential nature of the position, the performance of duties which require the exercise of authority or discretion at a high level . . . or the need for the appointee to have some expertise or personal qualities which cannot be measured by a competitive examination.'"[304] A position is "exempt" from the requirements and protections of the Civil Service Law so that it may be filled at the discretion of the employing official.[305] Likewise the position is one that is terminable at will.[306] It is understood to be a position filled by "mostly deputies and secretaries to political officers [and] requires that the officer exercising the appointment and removal power possess largely 'unrestricted authority and . . . unlimited responsibility for appointments to positions in that class.'"[307] This framework and the policy underlying exempt positions led the Court to conclude that the terms and conditions of the position could not be subject to arbitration under a CBA.[308]

In *State v. New York State Public Employment Relations Board*, the issue was whether civil service examination application fees adopted by the Department of Civil Service (DCS) constituted "terms and conditions" of employment subject to collective bargaining. [309]

After not requiring applicants for certain civil service exams to pay a processing fee for several years, DCS implemented such fees in 2009.[310] The collective bargaining units for various state employees filed a complaint with the Public Employees Relations Board (PERB) challenging the adoption of the fees in the absence of mandatory negotiation as an improper practice in violation of Civil Service Law section 209-a(1)(d).[311] An Administrative Law Judge (ALJ) held that the adoption of the fees was not improper and, in any event, DCS was acting within its discretion.[312] PERB reversed in an administrative appeal, concluding that employees had "a reasonable expectation of a

304. *Id.* (quoting Spence v. N.Y. State Dep't of Civ. Serv., 138 N.Y.S.3d 222, 224 (App. Div. 3d Dep't 2020)) (alterations in original).

305. *See id.* (citing CIV. SERV. LAW § 41(1)).

306. *Id.*

307. *Teamsters Loc.*, 213 N.E.3d at 108 (first citing CIV. SERV. LAW § 41(1); then citing People *ex rel.* Garvey v. Prendergast, 132 N.Y.S. 115, 119 (App. Div. 1st Dep't 1911)).

308. *See id.* at 109–10.

309. *See* State v. N.Y. State Pub. Emp. Rels. Bd., 204 N.E.3d 1062, 1063 (N.Y. 2023); *see also* N.Y. CIV. SERV. LAW § 201(4) (McKinney 2023).

310. State v. N.Y. State Pub. Emp. Rels. Bd., 183 A.D.3d 1061, 1061(N.Y. App. Div. 3d Dep't. 2020).

311. *Id.*

312. *See id.*

past practice and remanded" for reconsideration.[313] A second ALJ determined that the "practice of not charging a fee was an economic benefit and, therefore, was a subject of mandatory negotiation."[314] PERB affirmed that decision.[315] The State filed an Article 78 proceeding which was transferred to the appellate division.[316] That court affirmed the finding of PERB, holding that not having to pay a fee was an economic benefit that constituted "a term and condition of employment" subject to mandatory bargaining.[317] The Court of Appeals granted leave to appeal,[318] and reversed, holding that the application fee was not a "term and condition of employment" requiring collective bargaining.[319] The statutory definition of a term and condition of employment is "salaries, wages, hours and other terms and conditions of employment."[320] The court rejected PERB's argument that the court had adopted "a per se rule that *any* economic benefit is a term and condition of employment."[321] While "'form[s] of compensation' . . . qualify" as an economic benefit, there must be a nexus between the benefit and the employment.[322] The fees in this case are unrelated to employment, not a term and condition of employment, and thus not subject to negotiation.[323]

In *ACE Sec. Corp v. DB Structured Products, Inc.*, the Court of Appeals interpreted a New York "savings statute," N.Y. C.P.L.R. 205(a), determining that the ability to refile a lawsuit after the statute of limitations has run is only available to the same plaintiff, or if the plaintiff died, to his or her executor.[324]

HSBC, the plaintiff, sought to continue a lawsuit in its capacity as trustee of a mortgage backed securities trust because the lawsuit was initially begun by certificate holders—entities with a financial

313. *Id.*

314. *Id.* at 1061–62.

315. *N.Y. State Pub. Emp. Rel. Bd.*, 183 A.D.3d at 1062.

316. *Id.*

317. *Id.* at 1062–63.

318. State v. N.Y. State Pub. Emp. Rels. Bd., 175 N.E.3d 1258, 1258 (N.Y. 2021).

319. *See N.Y. State Pub. Emp. Rels. Bd*., 204 N.E.3d at 1063.

320. *Id.* at 1065 (quoting N.Y. CIV. SERV. LAW § 201(4) (McKinney 2023)).

321. *Id.* (emphasis in original).

322. *See id.* (quoting Aeneas McDonald Police Benevolent Ass'n, Inc. v. City of Geneva, 703 N.E.2d 745, (N.Y. 1998)) (alteration in original).

323. *See id.* at 1066.

324. *See* ACE Sec. Corp. v. DB Structured Prods., Inc., 197 N.E. 3d 978, 979, 982 (N.Y. 2022).

interest in the trust.[325] The original lawsuit was dismissed because the certificate holders lacked standing.[326] HSBC claimed that the savings statute applied, allowing HSBC to continue the lawsuit even though the statute of limitations would otherwise block a new lawsuit because HSBC sought to enforce the rights of the trust, the same interests as the certificate holders.[327]

The Court of Appeals reviewed the text of the savings statute, holding that there is a single exception to the same plaintiff requirement of the statute, available only to the estate fiduciary of a deceased plaintiff.[328] In all other cases, the savings statute is only available to the same plaintiff, not a successor in interest or party with the same interest in an entity.[329] Judge Wilson dissented, arguing that a trustee holds rights on behalf of the beneficiaries of the trust; and here, the certificate holders who had brought the suit, meaning the trust fiduciary, should be allowed to substitute as plaintiff under the savings statute.[330]

In *Delgado v. State of New York*, New York taxpayers commenced an action for declaratory and injunctive relief, arguing that the 2018 enabling act, allowing the legislature to appoint a committee to institute state legislator and judiciary pay raises, was unconstitutional.[331] The Court found that assignment of a legislative duty is allowable where (1) the committee is temporary and has a "discrete purpose," (2) the power to make laws has not been delegated, (3) the executive branch has not lost the ability to supervise the laws, and (4) the committee has no law making authority that would intrude on the Legislature's law-making function based on guidance set by the Legislature.[332] As the Legislature directed the committee to recommend adequate compensation for legislators and state officers according to the enabling act, there was no unconstitutional delegation of powers.[333] Further, the Committee was required to consider eight nonexclusive factors regarding salary increases, which satisfied the guidance

325. *Id.* at 979.

326. *Id.* at 981.

327. *See id.* at 981–82.

328. *Id.* at 983 ("[T]he savings statute 'applies *only* where the second action is brought by the same plaintiff' or an estate representative." (quoting Streeter v. Graham & Norton Co., 188 N.E. 150, 151 (N.Y. 1933))).

329. *See* AEC Sec. Corp., 197 N.E.3d at 983.

330. *Id.* at 989–91 (Wilson, J., dissenting).

331. *See* Delgado v. New York, 206 N.E.3d 598, 601, 605 (N.Y. 2022).

332. *Id.* at 607.

333. *See id*.

requirement and ensured the committee was working for the Legislature, not usurping lawmaking authority.[334]

After reviewing cases that assigned legislative powers to committees,[335] the Court turned to the argument that the enabling act failed to "fix by law" the Comptroller and Attorney General salaries, a constitutional requirement.[336] Rather than interpreting fixed by law to mean set by statute, as urged by the petitioners, the Court found that the "fixed by law" language allows assignment of authority to a committee to make the determination.[337] Finally, the Court held that the Committee did not exceed its authority by recommending salary increases and reducing the number of salary tiers because these are both items the enabling act granted authority to review.[338]

Judge Wilson concurred with the plurality, although he cautioned that the enabling act reduced the executive authority close to the limits of constitutionality.[339] Judge Singas dissented because the committee recommendations became law if the legislature did not veto the committee recommendation.[340] In her view, this granted the committee the power to pass and repeal statutes, a non-delegable legislature power that renders the enabling act unconstitutional.[341]

After a vehicle collision between a volunteer firefighter and a civilian driver, the driver sued Commack Fire District, who owned the firetruck involved in the crash.[342] In *Anderson v. Commack Fire District*, the trial court found that the firefighter, who was responding to a fire, could not be held responsible under an ordinary negligence standard due to Vehicle and Traffic Law section 1104(e), but the defendant district could be held vicariously liable for the firefighters actions pursuant to General Municipal Law section 205-b if it was found that the firefighter was negligent.[343] The district appealed, and the appellate division agreed with the trial court decision.[344]

The Court of Appeals reversed, holding that Vehicle and Traffic Law section1104(e) must be read in concert with General Municipal

334. *Id.* at 608.
335. *See id*. at 609–611.
336. *Delgado*, 206 N.E.3d. at 611 (quoting N.Y. CONST. art. III, §§ 6, 7).
337. *Id.* at 612–14.
338. *Id.* at 614–15.
339. *Id.* at 616 (Wilson, J. concurring).
340. *See id.* at 631, 632–33 (Singas, J. dissenting).
341. *Delgado,* 206 N.E.3d. at 632–33.
342. Anderson v. Commack, 212 N.E.3d 309, 311 (N.Y. 2023).
343. *Id.*
344. *Id.*

Law section 205-b, meaning that ordinary negligence by the firefighter driving the firetruck was not sufficient to hold the district vicariously liable.[345] A plaintiff must show the firefighter acted with reckless disregard, a higher standard.[346] In support, the majority reviewed sections 1104 and 205-b, finding that section 1104 applies a higher standard when a firefighter is on the way to a fire, and because vicarious liability is based on the agent's actions and duties, the district, vicariously liable for the firefighter's action pursuant to section 205-b, may also be liable only under this higher standard.[347]

Judge Rivera dissented, reviewing the history of section 205-b and vicarious liability at common law.[348] She concluded that the two laws existed separately, and the legislature intended districts to be liable for the ordinary negligence of volunteer firefighters, but the individual will only be liable if his or her actions exceed the higher reckless disregard standard.[349]

The New York City Police Benevolent Association brought a declaratory judgment action against the City of New York in *Matter of Lynch v. City of New York*, because the City refused to allow tier 3 police officers to treat time worked in non-police prior service as credit for retirement eligibility based on a 2002 agreement.[350] After conversion to an Article 78 proceeding, the trial court and appellate division agreed that the 2002 agreement did not allow tier 3 officers to treat time worked in non-police service towards retirement eligibility; the appellate division reviewed the statutory basis underpinning the decision, finding that neither the 2002 agreement nor the relevant statutes directed that non-police work should count toward retirement eligibility for tier 3 police officers.[351]

The Court of Appeals reviewed Retirement and Social Security Law section 513 to determine if tier 3 police officers could credit non-police work towards retirement eligibility.[352] section 513(c)(2) restricts tier 3 officers by allowing credit of non-police work only if tier 2 officers were entitled to credit the same work toward retirement eligibility prior to July 1, 1976.[353] The Court then reviewed the

345. *See id.* at 314.
346. *Id.*
347. *See Anderson*, 212 N.E.3d, at 314–15.
348. *Id.* at 319–21 (Rivera, J., dissenting).
349. *See id.* at 324.
350. Lynch v. City of New York, 213 N.E.3d 110, 112 (N.Y. 2023).
351. *See id.* at 112–13.
352. *Id.* at 113.
353. *See id.* at 114.

Administrative Code, finding that on and before July 1, 1976, tier 2 officers could not count work of any kind other than police work towards retirement eligibility.[354] PBA's arguments for their position based on post-1976 laws and agreements were dismissed because the Court of Appeals's interpretation of section 513(c)(2) precluded the application of provisions occurring after July 1, 1976.[355] Further, laws in effect prior to July 1, 1976, dealt with benefit levels granted to retirees for prior non-police work, not retirement eligibility.[356] As the relevant statutes restricted credit towards retirement to police work only, the Court affirmed the trial court and appellate division decisions.[357]

VIII. RELATION BACK DOCTRINE

In *34-0673, LLC v. Seneca Insurance Company*, the plaintiff, 34-06 73, LLC, held an insurance policy administered by Seneca Insurance Company, the defendant, on multiple vacant commercial properties.[358] A month into the policy term, an inspector for the defendant insurance company notified the plaintiff that an operating sprinkler system was required to satisfy the terms of the insurance policy, and the plaintiff's sprinkler system was not in working order.[359] This requirement was based on a protective safeguards endorsement (PSE) requiring protective safeguards in the property, such as a sprinkler system, to function properly.[360] During the policy term the building caught fire, and the defendant denied coverage because the sprinkler system should have been functioning pursuant to the PSE.[361] A jury trial followed.[362]

At trial, the plaintiff introduced evidence that inclusion of the PSE was a mutual mistake and moved to amend the pleadings to include a claim for reformation of the contract striking the PSE after the statute of limitations for the claim expired.[363] The trial court allowed

354. *See id.* at 115.
355. *Lynch*, 213 N.E.3d at 115.
356. *See id.*
357. *Id.* at 116.
358. 34-06 73, LLC v. Seneca Ins. Co., 198 N.E.3d 1282, 1283–84 (N.Y. 2022).
359. *Id.* at 1284.
360. *Id.*
361. *Id.*
362. *See id.* at 1284–85.
363. *See Seneca Ins. Co.*, 198 N.E.3d at 1284–85.

the amendment, finding that because the original complaint dealt with the PSE provision, the reformation claim related back to the complaint and the jury could decide if reformation was an appropriate remedy.[364] The jury sided with the plaintiff as to the reformation claim, finding that inclusion of the PSE was a mutual mistake, and reformation to remove the PSE was appropriate.[365] The defendant moved to set aside the verdict, arguing that reformation was inappropriate because the original complaint contained no indication that the contract did not reflect the intent of the parties (mutual mistake), and therefore the reformation claim did not relate back to the original complaint.[366] Additionally, the defendant argued that the reformation claim was barred by the statute of limitations, a defense that could be avoided only through application of the relation back doctrine.[367] The trial court denied the motion, and the appellate division affirmed, finding that reformation was not barred by the statute of limitations because it related back to the complaint.[368]

The Court of Appeals reversed, holding that the relation back doctrine did not apply.[369] Reformation may only relate back where "the complaint placed defendant on 'notice of the transactions, occurrences, or series of transactions or occurrences, to be proved' in support of that claim."[370] Here, the pleadings regarding breach of contract (failure to pay out the insurance claim) provided the defendant with no notice of intent to argue inclusion of the PSE was a mutual mistake, and the basis for reformation was trial court testimony and discovery, neither of which are proper bases for amendment of the pleadings.[371]

364. *Id.* at 1285.
365. *Id.*
366. *See id.*
367. *Id.*
368. *Seneca Ins. Co.*, 198 N.E.3d at 1285–86.
369. *Id.* at 1289.
370. *Id.* at 1286 (citing N.Y. C.P.L.R. 203(f) (McKinney 2023)).
371. *Id.* at 1287–88.