# SURVEY OF NEW YORK LAW: TORTS

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INTRODUCTION ..... 817
I. NEGLIGENCE ..... 818
*A. The Court of Appeals Issued Three Special Duty Decisions, Which Show Its Ongoing Interest In—And The Judges' Disagreements Over—Where A Special Duty Applies* ..... 818
*B. The Court of Appeals, Over A Dissent, Held An Employer Can Be Liable For Its Employee's Fraud Even Where Fraud Affects Potential Customer As Opposed To Current Customer.* ..... 831
*C. The Court of Appeals Addressed Assumption Of The Risk Doctrine As Applied To School Sports In Combined Decision On Two Cases* ..... 833
*D. Appellate Division Case Law* ..... 835
II. LABOR LAW ..... 840
III. DOG BITES ..... 843
IV. DEFAMATION ..... 845
CONCLUSION ..... 848

## INTRODUCTION

Between July 1, 2022, and June 30, 2023,[1] the Courts of the State of New York issued thousands of pages of decisions, including hundreds of decisions dealing with tort law. This Article highlights several cases decided during the *Survey* period from the thousands of pages of

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1. The "*Survey* period."

reported case law New York courts developed. The most interesting cases of the year have involved split decisions, which are reported here. By contrast to recent years, the Court of Appeals issued several decisions directly bearing on substantive tort law, including three cases—with spirited dissents—addressing the limits of governmental liability. Additionally, the appellate divisions issued several split decisions on substantive tort law issues, which have been surveyed here.

## I. NEGLIGENCE

### *A. The Court of Appeals Issued Three Special Duty Decisions, Which Show Its Ongoing Interest In—And The Judges' Disagreements Over—Where A Special Duty Applies*

The Court of Appeals provided three cases involving municipal liability in this *Survey* period. The Court's decisions illustrate the majority of the Court remaining faithful to the broad principles limiting municipal liability, but also shows some of the judges' willingness to look beyond the general doctrine and find more specific—and potentially expansive—tests that may be applicable to unique factual circumstances.

*Scurry v. New York City Housing Authority*[2] arose out of two wrongful death claims involving "targeted" criminal conduct at publicly-owned housing complexes.[3] Decedent Crushshon died "in the hallway of her" building by immolation.[4] Decedent Murphy died after being shot "at point-blank range as she begged for her life."[5] Both Decedents' respective assailants, "were intruders onto the premises" and "entered their buildings through exterior doors," which the Court of Appeals "assume[d] did not have functioning locks."[6]

The Court's analysis began from the principle that "[l]andlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct," which "includes . . . 'the most rudimentary security.'"[7] On appeal, the landlord, a public entity, "admit[ted] that it had a duty to provide a locking exterior door."[8] The landlord also apparently

2. *See* Scurry v. New York City Hous. Auth., 211 N.E.3d 1130 (N.Y. 2023).
3. *Id.* at 1133.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Scurry*, 211 N.E.3d at 1135 (citations omitted).
8. *Id.* at 1133.

conceded for appellate purposes, "plaintiffs at a minimum demonstrated questions of fact as to breach."[9] Apparently, at least for the purposes of the appeal, the landlord also did not focus on the general rule that criminal conduct is not always foreseeable.

At the Court of Appeals, the landlord argued the causal chain had been severed as a matter of law "because the assailants did not commit crimes of opportunity but instead had 'targeted' their victims."[10] The Court summarized the landlord's proposed rule as follows: "where a landlord offers evidence that an attack is 'targeted,' that landlord has demonstrated that the assailant would have gained access to the building even if the door had been properly secured" and the burden would then shift to the plaintiff to "rebut that demonstration by showing that a locked door would have in fact deterred the assailant."[11]

The appellate divisions agreed with the landlord, reasoning the assailants "were intent on gaining access to the building" regardless of the presence of a working lock.[12] As the Appellate Divisions noted, as a practical matter its holding meant it would "hardly ever [be] the case" that "minimal precautions would have actually prevented a determined assailant from gaining access" to perform a targeted attack.[13] Thus, the Appellate Division held, "it does not take a leap of the imagination to surmise" the killings would have happened regardless of the working lock at the door the assailants used to gain entry.[14]

The Court of Appeals rejected the holding below because the Court held the Appellate Division decision "mist[ook] a patently factual determination—whether a locked door would have prevented an attack—for a legal one—i.e, that an attacker's intent is a superseding cause as a matter of law."[15]

While the landlord framed the issue as a matter of whether the assailant's acts constituted a "superseding cause" of Decedents' deaths, the Court emphasized the label did not change the analysis.[16] The Court noted summary judgment is particularly tough to grant where "where the risk of harm created by a defendant's conduct corresponds to that which actually results, the determination of proximate

9. *Id.* at 1135.
10. *Id.* at 1133.
11. *Id.* at 1136.
12. *Scurry*, 211 N.E.3d at 1135.
13. *Id.* at 1136.
14. *Id.*
15. *Id.*
16. *Id.*

cause is best left for the factfinder."[17] As the Court explained, "[o]nly in 'rare cases' can the issue be decided as a matter of law."[18]

Applying these principles, the Court of Appeals explained, "the risk created by the nonfunctioning door locks—that intruders would gain access to the building and harm residents—is exactly the risk that came to fruition."[19] While the Court of Appeals noted "whether the intruders in *Scurry* or *Murphy* would have persevered in their attacks had the doors been securely locked" constituted a "fact-bound question," it also cautioned its holding did not mean "the sophistication and planning of an attack . . . could never rise to such a degree that it would sever the proximate causal link as a matter of law."[20] Instead, the Court held, "neither *Scurry* nor *Murphy* approaches that level."[21]

As to *Scurry*, the Court explained the landlord had not met its initial burden because "the manner in which the attack was committed [was] shocking" (i.e. immolation), and thus, did not sever the causal connection.[22] In a footnote, the Court rejected the landlord's request to adopt a rule where "to hold a landlord liable, a tenant must prove that an attacker would not have 'picked another spot to lie in wait, and just as easily have carried out his murderous act,'" reasoning, as a matter of public policy, "[v]ictims of targeted attacks should not be afforded less protection by their landlords simply because they are targeted."[23]

As to *Murphy*, the Court held the evidence belied the City's claim that the unlocked door did not constitute a potential proximate cause of the incident.[24] Indeed, the Court noted the attackers found a locked door and, instead of trying to bypass it directly, decided to "tr[y] the side door, which was unlocked" before attacking.[25] The Court

17. *Scurry*, 211 N.E.3d at 1136.

18. *Id.*

19. *Id.* at 1137 (citations omitted).

20. *Id.* And, of course, the Court noted such evidence would be relevant "to the factfinder's determination of proximate cause" even if it was insufficient to merit summary judgment in a defendant-landlord's favor. *Id.*

21. *Scurry*, 211 N.E.3d at 1137.

22. *Id.*

23. *Id.* at 1137, n.2. The Court noted, in particular, the net effect of the rule would disproportionately disallow claims by women, who are disproportionately victims of domestic violence as compared to men. *Id.* ("The fact that women are frequently the victims of violent acts carried out by obsessive abusers should not deprive them of a minimum measure of safety in their own homes and, sadly, can hardly be said to be unforeseeable.").

24. *Id.*

25. *Id. at* 1137–39.

specifically reasoned, "[t]his was hardly the type of sophisticated, meticulously planned and executed attack that might possibly sever the causal chain as a matter of law; instead, it was the heartbreaking result of a volatile situation that may or may not have cooled off with time," which it implied could have included the extra time needed to break through a locked door.[26] Addressing its rejection of the Appellate Division's assessment of the assailants' actions, the Court of Appeals noted, the Appellate Division "improperly drew conclusions as a matter of law about the level of determination and ability that Ms. Murphy's assailants had to enter the building and cause her harm."[27]

Earlier in the year, in *Maldovan v. County of Erie*,[28] the Court of Appeals also addressed municipal liability for alleged negligent supervision in another "tragic" case.[29] The *Maldovan* case arose out of sexual assault, abuse, and murder by Decedent's mother and brother who lived with Decedent.[30]

The Decedent was an adult "with developmental disabilities who lived with her mother."[31] In 2009, after her brother learned she had "sustained suspicious injuries," Decedent's other brother (who lived overseas) "[m]istakenly . . . contacted Child Protective Services," believing she was a minor.[32] Nevertheless, Child Protective Services "visited the home," interviewed the mother and Decedent.[33] "[W]hen interviewed alone, [Decedent] provided the same benign explanation for [the] injuries."[34] Therefore, Child Protective Services closed its case.[35] The brother then later contacted Adult Protective Services with similar claims.[36] Adult Protective Services again "visited the home."[37] Unlike the Child Protective Services visit, the mother refused to allow Adult Protective Services to speak with the Decedent alone.[38] During the chaperoned interview, Decedent provided Adult Protective

26. *Scurry*, 211 N.E.3d at 1138.

27. *Id.* ("The mental state of an assailant and his ability to circumvent security measures at a given property and time are not susceptible to determinations as a matter of law on summary judgment.").

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

29. *Id.* at 394.

30. *Id.* at 395.

31. *Id.*

32. *Id.*

33. *Maldovan*, 205 N.E.3d at 395.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Maldovan*, 205 N.E.3d at 395.

Services a benign explanation.[39] Adult Protective Services did not observe the bruising and therefore "closed the case."[40] Decedent ran away a few months later.[41] She "was found at an abandoned Girl Scout camp by two Erie County Sheriff's deputies."[42] The deputies believed Decedent and her mother had an argument, which caused Decedent to run away.[43] "[L]earning nothing to suggest that [Decedent] should not be brought home, the deputies returned [Decedent] to [her mother's] care."[44] A few months later, Decedent's mother and brother "tortured and murdered Laura in her home."[45] Decedent's mother and brother have been convicted for their crimes.[46]

The case proceeded to the Court of Appeals after competing summary judgment motions.[47] At issue in the appeal was whether the municipality and its agencies had assumed a special duty to the Decedent and, more specifically, whether a special relationship had arisen between the municipality and the Decedent.[48] The Court of Appeals agreed with the Appellate Division and held no special duty had arisen.[49]

The Court began by reciting the four elements of a special relationship claim: first, "an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured"; second, "knowledge on the part of the municipality's agents that inaction could lead to harm"; third, "some form of direct contact between the municipality's agents and the injured

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Maldovan*, 205 N.E.3d at 395.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*at 396. As a background principle, the Court noted, "When a negligence claim is asserted against a municipality acting in a governmental capacity, as here, the plaintiff must prove the existence of a special duty." Proof giving rise to a special duty comes in one of three forms: 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." *Id.* (citations omitted). The Court did not address Plaintiff's argument on the first form of special duty, finding it had not been preserved for review. The Court also did not address the third form of special duty.
49. *Maldovan*, 205 N.E.3d at 396 ("We conclude, however, that defendants met their prima facie burden to demonstrate that they did not voluntarily assume a duty to Laura, and plaintiff failed to raise a triable issue of material fact in opposition.").

party"; and fourth, "that party's justifiable reliance on the municipality's affirmative undertaking."[50]

The Court's decision focused on the fourth element: justifiable reliance.[51] Quoting an earlier case,[52] the Court noted justifiable reliance "provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury."[53] Again, quoting from an earlier case, the Court reminded the reader that the special relationship analysis is grounded in "the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced the injured party either to relax their own vigilance or to forego other available avenues of protection."[54]

Turning back to the proof in the case, the Court noted, "[m]onths before her death, both CPS and APS investigated the reports that [Decedent] was being abused, concluded that those reports were unfounded, closed their investigations, and advised [the relative] that the investigations were closed and would not be reopened without new information."[55] According to the Court, however, Plaintiff failed to establish the relative "did not in fact relax his own vigilance inasmuch as he made two follow-up calls to the APS caseworker asking her to reopen the investigation, and he was not induced to forego other avenues of relief" and "[s]imilarly, the Sheriff's deputies took no action that could have induced reliance."[56]

The Court next declined Plaintiff's invitation to establish unique factors to establish whether a special relationship exists outside of the cases where "the injured person is a competent adult who is reasonably capable of pursuing other avenues of protection if government has failed to do its job."[57] More specifically, Plaintiff (and the dissent) asked the Court to adopt the standards used in Child Protective Services cases for infant plaintiffs to the Adult Protective Services context for adults with developmental disabilities.[58] The Court, however, noted its prior case law allowed for recovery for adults with developmental disabilities to recover by "relax[ing] the requirements of the

50. *Id.*
51. *Id.* at 397.
52. *See* Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987).
53. *Id.*
54. *Maldovan*, 205 N.E.3d at 397 (citing *Cuffy*, 505 N.E.2d at 940).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

special duty rule to allow a competent family member of the injured party to satisfy the elements of direct contact and justifiable reliance."[59] As a layer of further protection for adults with developmental disabilities, the Court noted its case law "requires the courts to construe the special relationship analysis in the plaintiff's favor."[60] Therefore, the Court reasoned the current regime, "provides a pathway for vulnerable victims to satisfy the special duty requirements where they may otherwise be unable to do so."[61] The Court was, however, careful to note its holding was limited and did not specifically address "how the special duty rule should apply in a different case 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*."[62] As it ties into this case, the Court simply could not find a reason to move past the fact that Decedent's "family members did not justifiably rely on any promises by CPS or APS and relax their vigilance."[63] As a matter of policy, the Court found imposing liability would "impose a 'crushing burden' . . . which may render [government] less effective in fulfilling [its] mission to protect vulnerable individuals."[64] In its concluding sentence, the Court explained, "[w]here, as here, the elements of a voluntarily assumed duty, including justifiable reliance, were capable of being satisfied through [Decedent's] family members, but simply were not met, the sound principles supporting the special duty rule require us to decline to amend that rule here."[65]

The dissent would have allowed the case to proceed. In an emotional opening, the dissent explained,

> Laura Cummings is dead. She was an intellectually disabled 23–year–old with the mental age of an 8–year–old. Over at least the last six months of her short life, she was continuously tortured, raped, sodomized and ultimately murdered. All of this happened in her own home. All of this happened at the hands of her own mother and brother. All of this happened despite numerous complaints to, and visits by, caseworkers from

59. *Maldovan,* 205 N.E.3d at 398.
60. *Id.*
61. *Id.*
62. *Id.* (emphasis added).
63. *Id.*
64. *Maldovan,* 205 N.E.3d at 399.
65. *Id.*

> Erie County's offices of Child Protective Services and Adult Protective Services.[66]

The dissent then moved to the broader context for this claim, noting, "the physical and psychological abuse of intellectually disabled children and adults, especially women, is commonplace."[67] Nevertheless, the dissent noted the holding in *Maldovan* "immunizes the very agencies [Adult Protective Services and Children's Protective Services] bound by law to protect vulnerable adults, when the legislature has clearly stated those agencies do not enjoy immunity from grotesque agency failures such as those turning a blind eye to [Decedent's] horror."[68]

Moreover, while the majority blandly noted the relative reporting the potential abuse to Child Protective Services (through the conduit of a local town justice who also happened to be Decedent's neighbor) was out-of-town, the dissent focused on the fact that the report came from an overseas member of the military in an attempt to undercut the majority's statement that he still exercised diligence despite seeking action from local agencies.[69] As to the Adult Protective Services visit, the dissent focused on the local justice's report and the failure of Adult Protective Services to follow their own policies, which required Adult Protective Services to speak to the Decedent directly and alone.[70] The reporting relative's further requests were dismissed.[71]

After an extensive history of the waiver of sovereign immunity in New York by statute and the subsequent common-law limitations on liability, the dissent reached its basic background principle: "New York and its municipalities have a long history of paying damages for their own negligence in a great variety of circumstances, and the limits on such payments for nearly the past century arise from judge-made doctrines that we have continually revised."[72]

Unlike the majority, the dissent would have addressed the first form of special duty: a statutory duty.[73] The dissent cited Plaintiff's

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66. *Id.* at 399–400.
67. *Id.* at 400.
68. *Id.* Notably, the dissent described the "horror" in detail. "Laura was often tied to a chair, with a bag over her head, and subjected to repeated physical and sexual abuse by her mother and her brother Luke, which included being violated with a broomstick." *Id.* at 401.
69. *Maldovan*, 205 N.E.3d at 401.
70. *Id.* at 402.
71. *Id.*
72. *Id.* at 403–09.
73. *Id.* at 409–13.

complaint and verified bill of particulars as preserving these arguments.[74] The dissent did not mention whether the argument had been preserved in motion practice or appellate practice.[75] Instead, it argued the contention could be raised on appeal for the first time under the Court's own case law.[76] As to the statutory duty question, the dissent noted, "the legislative history of the immunity provision governing APS shows that civil liability was the intended enforcement mechanism" and, "[t]herefore, implying a cause of action here would both promote the legislative purpose and be fully consistent with the scheme."[77]

Turning to the special relationship issue, the dissent also would have held "[t]he majority's decision to bar [Decedent's] recovery on grounds of insufficient reliance defies both commonsense and caselaw."[78] After noting the justifiable reliance element is a judge-made requirement that could be modified or distinguished by the Court in an appropriate case, the dissent summarized the irony of the majority's position: Decedent's "claim fails solely because [others] bothered to call APS and CPS."[79]

The Court decided another special relationship case in *Howell v. City of New York* on the same day, again over the dissent of Judge Wilson, with another dissent filed by Judge Rivera.[80] There, "Plaintiff's ex-boyfriend brutally attacked her and pushed her out of a third-floor window, in violation of an order of protection."[81] The ex-boyfriend was sentenced for his crimes.[82] Plaintiff sued the City of New York and its police officers for failure to protect her against the assault.[83] As with *Maldovan*, *Howell* turned on the Plaintiff's failure to raise a question of fact on the justifiable reliance element of the special relationship analysis.[84] As the Court noted in its analysis, "[t]he mere existence of an order of protection, standing alone, will not prove justifiable reliance."[85] On policy grounds, the Court noted, "[Every day],

74. *Maldovan*, 205 N.E.3d at 409.
75. *See id.*
76. *Id.* at 409, n.11.
77. *Id.* at 412–13.
78. *Id.* at 414.
79. *Maldovan*, 205 N.E.3d at 416.
80. Howell v. City of New York, 202 N.E.3d 569 (N.Y. 2022).
81. *Id.* at 571.
82. *Id.*
83. *Id.*
84. *Id.* at 572.
85. *Howell,* 202 N.E.3d at 572.

New York courts issue hundreds of orders of protection in favor of persons at risk of harm," amounting to almost 200,000 orders per year.[86] The Court summarized Plaintiff's testimony as follows: "Plaintiff . . . 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, and that the officers never told her that her ex-boyfriend would be arrested for violating the order of protection."[87] On these facts, the Court noted, "Plaintiff's own testimony demonstrates that she did not relax her vigilance based on any police promises that her ex-boyfriend would be arrested for violating the order of protection."[88]

As with *Maldovan*, the dissent opened with an emotional exposition of the case:

> Passersby found Dora Howell face down on the pavement outside her apartment building, screaming for help and unable to move. Ms. Howell's knee, pelvis, and hip were all broken, and her spine was fractured. She remained [sic] the hospital for over a month undergoing surgeries to treat her extensive injuries. How did this happen?
>
> Ms. Howell's ex-boyfriend, Andre Gaskin, dragged her by the hair into his third-floor apartment, a floor above hers, and physically assaulted her. When Ms. Howell went to the window yelling for someone to call the police to help her, Mr. Gaskin said, "You want help? I'll send you for help," and threw her out of the window.
>
> Mr. Gaskin had violently assaulted Ms. Howell before, beginning when she was pregnant with their child. The first time he assaulted her, he threw her on the floor and kicked her stomach, causing her to bleed and require hospitalization. On the basis of that assault, Ms. Howell obtained an order of protection against Mr. Gaskin, requiring him to stay away from and not communicate with her. Based on Mr. Gaskin's subsequent conduct, Ms. Howell obtained seven additional orders of protection against him, the most recent of which issued less than two months before Mr. Gaskin threw her out of the window. How did it happen that a woman who obtained eight orders of protection against the same abuser wound up unprotected?

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86. *Id.*

87. *Id.*

88. *Id.* ("It also shows that the police were not on the scene or in a position to provide assistance if necessary nor had they promised to provide assistance at some reasonable time.").

> Unfortunately, that question is harder to comprehend. Orders of protection are supposed to mean something. Ms. Howell called the police to report violations of the September 26th order on October 7, October 15, October 18, October 29, November 5, November 6, November 12, and November 13—each time explaining that Mr. Gaskin had violated the order of protection. Three times in the weeks leading up to this incident, the same two police officers, defendants Mosely-Lawrence and Meran, responded to her calls. As explained below, they assured Ms. Howell that they were handling the situation, yet completely failed to do so. Their actions and inactions rendered Ms. Howell's multiple orders of protection meaningless, constituting both a dereliction of their duties and an affront to the courts.[89]

The dissent then framed its legal analysis with respect to a 1994 law, which "required officers to arrest persons in violation of domestic violence protective orders"[90] and contrasted its requirement with the fact that "[o]n numerous occasions, [her assailant] was present at the scene when the police arrived and observed him in violation of the orders of protection."[91]

More broadly, the dissent would have found Plaintiff raised a question of fact as to whether a statutory duty existed based on the statutory duty form, the control form, and the justifiable reliance form.[92]

As to the statutory duty issue, the Court relied on Criminal Procedure Law 140.10 (4) (b), which required officers to arrest any person—such as Plaintiff's assailant—who has violated an order of protection.[93] The dissent found Plaintiff was "a member of the class for whose benefit CPL 140.10 (4) was enacted: victims of domestic violence who have obtained orders of protection."[94] As to enforcement of the statute, the dissent would have provided civil relief because the legislature did not give another method of enforcement in the statute: "the legislature imposed a duty but provided no public or private enforcement mechanism, and no preexisting mechanism existed by which the new statutory duty could be enforced."[95] Finally, the dissent

89. *Id.* at 573–74.
90. *Howell,* 202 N.E.3d at 574.
91. *Id.*
92. *Id.*
93. *Id.* at 581.
94. *Id.*
95. *Howell,* 202 N.E.3d at 582.

would have found allowing for civil recovery would further the legislative scheme of "protect[ing] victims of domestic abuse from the escalation of violence—and the police indifference—of exactly the type that [Plaintiff] experienced."[96]

The dissent would also have owed Plaintiff a special duty because it would have found the City and its employees assumed control over a dangerous situation.[97] On the dissent's theory, the City controlled the situation through a pair of circumstances.[98] On the one hand, the dissent noted "existence of multiple orders of protection; [her assailant's] prior beating of a pregnant [Plaintiff]; and his repeated violations of the orders of protection observed by the officers, including his bashing of her door with a pipe and breaking her lock."[99] The dissent juxtaposed this knowledge with "the officers' repeated assurances that she would be safe; the officers' involvement of [her assailant's] uncle; the emphatic instruction that [Plaintiff] should not call the police again; and the officers' decision to violate CPL 140.10 (4) and instead resolve the threat in their own way."[100]

Finally, the dissent addressed the majority's holding that the City did not voluntarily assume a special duty by virtue of a special relationship with Plaintiff.[101] As the dissent noted, the majority's analysis focused on the fourth factor: justifiable reliance.[102] The dissent began from the proposition that, on summary judgment, decedent was entitled to have the facts viewed "in the light most favorable to [Plaintiff]."[103] The dissent noted the following facts should have precluded summary judgment: (1) Plaintiff "understood [her assailant] had not left the building because [her assailant's] uncle was working late and not immediately available to transport him away and that [her assailant's] prior appearances were merely to recover his clothes and were sanctioned by the officers; (2) based on "observations about the relationship between [her assailant's] uncle and the officers, . . . [Plaintiff] understood that the officers were taking a step to ensure her security by involving the uncle, who appeared to have some authority over the officers"; (3) the officers stymied Plaintiff from calling again by

96. *Id.*
97. *Id.* at 586–87.
98. *Id.* at 586.
99. *Id.*
100. *Howell*, 202 N.E.3d at 586.
101. *Id.* at 587.
102. *Id.*
103. *Id.*

telling her "if she called the police again, she would be arrested."[104] Thus, the dissent reasoned a jury could have found "the police were telling her they had the situation under control, there was absolutely no need for her to call again to seek their further protection, and it was her summoning of the police that was escalating the situation with [her assailant]."[105] Finally, the dissent noted Plaintiff "yelled out of the window to ask any person within earshot to call the police, demonstrating that she continued to rely on them to aid her."[106]

Judge Rivera filed a separate dissent, which echoed Judge Wilson's dissent on the special duty analysis, but added she would have handled the special duty analysis differently in the specific context presented by *Howell*.[107] Judge Rivera's analysis started from the proposition that "the special duty test applied by the majority is designed for cases of individual discretionary action, not where the officers—by legislative fiat—have no discretion" (i.e. pursuant to the DVIA).[108] The judge critiqued the majority for performing a "mechanical application of the special duty test" that "simply fail[ed] to square with the officers' legislatively-imposed obligation to arrest [Plaintiff's assailant] once they were informed that he violated plaintiff's orders of protection."[109]

Judge Rivera's analysis began by putting the special duty doctrine into context as a "pragmatic response to unlimited liability in those cases where the municipality and its agents have discretion to act."[110] While acknowledging the "doctrine presupposes, first, that the municipality need do nothing at all—the municipality may decide not to provide police protection," Judge Rivera distinguished this case from the general proposition because "once the municipality or its agents assume the duty to act on behalf of the injured party in a particular case and acts accordingly, the municipality has knowingly chosen to direct its resources to protect the individual and is therefore subject to tort liability for negligence."[111] Thus, Judge Rivera explained the theories underlying the doctrine,

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104. *Id.* at 587–88.

105. *Howell*, 202 N.E.3d at 588.

106. *Id.*

107. *Id.* at 599. While Judge Rivera would not have found Plaintiff's statutory duty arguments had been preserved, she would nevertheless have addressed (and rejected) the claim under an exception to the preservation rule. *Id.* at 591.

108. *Id.* at 599.

109. *Id.* at 599–600.

110. *Howell*, 202 N.E.3d at 601.

111. *Id.*

> are misplaced when the government in the first instance promises—or, put another way, enters a form of social compact with New Yorkers—to protect against a category of potential future harm, as when a survivor of domestic violence has informed the police that an order of protection for their benefit has been violated and the law mandates an arrest.[112]

Judge Rivera would have held the typical analysis does not apply where, as here, "the municipality and its agent have no choice in how to act" by virtue of statute "because the factors are satisfied by the legislative abrogation of officer discretion."[113] Judge Rivera put great weight on the legislative removal of discretion, noting it "removed officer discretion with full knowledge of the removal's impact on local law enforcement resources," which the legislature knew would require significant financial resources.[114] To the extent "our prior articulation of the special duty doctrine and its narrow exception fail to account for the scenario presented in this appeal,"[115] Judge Rivera would have "realign[ed] the doctrine to serve the state's clear legislative objectives."[116]

### *B. The Court of Appeals, Over A Dissent, Held An Employer Can Be Liable For Its Employee's Fraud Even Where Fraud Affects Potential Customer As Opposed To Current Customer*

On the eve of the *Survey* period, the Court of Appeals issued its decision in *Moore Charitable Foundation v. PJT Partners*, which came to the Court in the procedural context of a motion to dismiss.[117] At issue in *Moore Charitable Foundation* was the pleading standard for negligent supervision of an employee.[118] Specifically, the issue in the case was whether an investment bank negligently supervised its employee who was accused of defrauding a charitable trust out of $25,000,000.[119] However, from a substantive torts perspective, the Court's decision on the issue of whether the duty of supervision runs beyond the customers of a Defendant is the area of focus.

The Court of Appeals reversed the appellate division's holding that Plaintiffs' failure to allege their status as customers of the bank

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Howell*, 202 N.E.3d at 601.
116. *Id.*
117. Moore Charitable Found. v. PJT Partners, 217 N.E.3d 8, 11 (N.Y. 2023).
118. *Id.*
119. *Id.*

was "fatal" to its negligent supervision claim.[120] The Court explained, it had "never held that a cause of action for negligent supervision and retention is maintainable only by customers of the defendant."[121] To the contrary, it explained, "there is substantial authority in this State that non-customers may pursue such claims, particularly when they allege physical injuries or property damage inflicted by a negligently supervised employee."[122] Thus, the Court "reject[ed] any . . . requirement" that "a special relationship or privity between plaintiff and employer is a necessary element of a negligent supervision claim."[123]

In response to a perceived concern that its holding would result in "crushing liability to an indeterminate class of plaintiffs," the Court noted, "the elements of the tort already protect employers from limitless liability in several ways," including noting, "a defendant's duty in this context is only to act as a prudent and reasonable employer would under the circumstances."[124] Indeed, the Court noted while "plaintiffs were not customers of defendants, as that term is typically understood," plaintiffs' allegations nevertheless fell within the scope of the employer's duty to supervise because "plaintiffs alleged that they were prospective customers who were solicited by [the employee] to participate in a financing arrangement related to one of defendants' legitimate business deals, supported by defendants' genuine documentation and information, which he was given access to by defendants as part of his employment."[125]

Judge Singas and Judge Garcia dissented, explaining the majority's decision did not promote predictability or clarity in New York law.[126] To the contrary, the dissenters argued the decision "exposes law firms, banks, hedge funds, and countless other financial institutions to limitless liability for the criminal actions of rogue employees," which would "all but transform employers into insurers, an outcome against which we have repeatedly cautioned."[127] The dissent's concern flowed from breaking the privity barrier and allowing "potential

120. *Id.* at 16.

121. *Id.* at 17.

122. *Moore Charitable Found.*, 217 N.E.3d at 17 (citing Hogle v. H. H. Franklin Mfg. Co., 92 N.E. 794, 796 (N.Y. 1910); Selmani v. City of New York, 984 N.Y.S.2d 114, 115 (N.Y. App. Div. 2d Dep't 2014); Quiroz v. Zottola, 948 N.Y.S.2d 77, 88 (N.Y. App. Div. 2d Dep't 2012); RESTATEMENT (SECOND) OF TORTS, § 317 (AM. L. INST. 1965)).

123. *Id.* (citing N.Y. Civ. Jury Instr. § 2:240).

124. *Id.* at 17–18.

125. *Id.* at 18.

126. *Id.* at 19.

127. *Moore Charitable Found.*, 217 N.E.3d at 19.

customers to sue employers for an employee's fraud unrelated to the employment but perpetrated via company email or phone," which "would result in unmitigated proliferation of claims and virtually unlimited liability."[128] Indeed, the dissent raised the specter of liability for an employer where "any employee, regardless of their title, who goes into the office or uses a telephone to defraud any third party may expose the employer to liability," which would mean employers could "now . . . owe a duty to virtually anyone."[129]

### *C. The Court of Appeals Addressed Assumption Of The Risk Doctrine As Applied To School Sports In Combined Decision On Two Cases*

In *Grady v. Chenango Valley Central School District*,[130] the Court of Appeals addressed the continued viability of the "primary assumption of risk doctrine" as it relates to "injuries sustained during organized sports practices for high school athletic teams."[131] The *Grady* decision addressed two appeals and the majority's decision distinguished between the same.[132]

In *Secky v. New Paltz Central School District*, the first of the two cases, "Plaintiff, who had played basketball at the highest amateur student level, was injured during a drill in which the players competed to retrieve a rebound."[133] Prior to the accident, "Plaintiff's coach had explained that the boundary lines of the court would not apply during the drill and that only major fouls would be called."[134] Plaintiff suffered injuries "when, pursuing a loose ball from the top of the key towards the [retracted] bleachers, another player collided with him, causing plaintiff to fall into the bleachers and sustain an injury to his right shoulder."[135] The majority affirmed the appellate division's decision reversing the supreme court's decision and granting summary judgment to the schools.[136] The Court held, "plaintiff's injury is one inherent in the sport of basketball and so he assumed the risk of the injury he sustained," and specifically reasoned, "[t]he drill assigned to

128. *Id.* at 20.
129. *Id.*
130. Grady v. Chenango Valley Cent. Sch. Dist., 215 N.E.3d 1157 (N.Y. 2023).
131. *Id.* at 1159.
132. *Id.* at 1162.
133. *Id.* at 1161.
134. *Id.*
135. *Grady,* 215 N.E.3d at 1161.
136. *Id.*

plaintiff and his teammates did not unreasonably increase the risk of injury beyond that inherent in the sport of basketball."[137]

Judge Rivera dissented in *Secky*, but the dissent focused broadly on a call to "correct the errors of the past and abandon the implied assumption of risk doctrine that the Court has retained despite the Legislature's unequivocal abolition of contributory negligence and assumption of risk as complete defenses. New York is a comparative fault jurisdiction."[138] According to the dissent, the Court of Appeals' prior case law "confirms that the Court has misapplied CPLR 1411 [the comparative fault statute] by retaining a bar to recovery in contravention of the text and the legislature's intent that fact finders apportion liability commensurate with the culpability of each party's conduct."[139] While Judge Rivera would strike down the remainder of the primary assumption of the risk doctrine for all athletic events, they found it particular inapt as applied "to student athletes and recreational sports participants."[140]

The majority analyzed the *Grady* case differently. There, "Plaintiff, a senior on the Chenango Valley High School varsity baseball team, was injured during his participation in a fast-moving, intricate drill," which,

> involved two coaches hitting balls to players stationed in the infield, with one coach hitting to the third baseman, who would then throw to first base, while another coach hit to the shortstop, who would throw to the second baseman who would, in turn, throw to a player at "short first base," positioned a few feet from regulation first base.[141]

The coaches, anticipating potential conflict between the thrown balls, "positioned a protective screen, measuring seven by seven, between the regulation first baseman and the short first baseman" to avoid potential injury.[142]

> Plaintiff, in the group of players assigned to first base, was injured when an errant ball, intended for the short first baseman, bypassed the short first baseman and the protective screen and

137. *Id.* at 1162.
138. *Id.* at 1163.
139. *Id.* at 1167.
140. *Grady,* 215 N.E.3d at 1176.
141. *Id.* at 1162.
142. *Id.*

> hit him on the right side of his face, causing serious injury to his eye including significant vision loss.[143]

The Court held the coaches had materially increased the risks associated with baseball by conducting the drill "with multiple balls in play directed to the same part of the field and with only a relatively small protective screen positioned in front of the first baseman."[144] While the Court acknowledged, "[e]rrant balls may be an inherent risk of playing baseball," it reasoned, "a jury should be permitted to determine . . . whether the risks were concealed or unreasonably enhanced by the complexity of the drill performed with use of a small protective screen."[145]

Judge Singas dissented in *Grady* because the prior case law "repeatedly made clear that being hit with a mis-thrown ball while playing baseball is a textbook example of a risk 'commonly encountered' or 'inherent' in the sport."[146] Moreover, as Judge Singas explained, "the practice drill was as safe as it appeared," and "[n]o concealed risks existed inasmuch as plaintiff admitted that he thought the drill was unsafe but participated anyway."[147] Moreover, Judge Singas explained that "[t]he use of multiple balls at a baseball practice is prevalent and inherent to such training sessions" and "use of a protective screen is commonplace at baseball practices." [148] Therefore, Judge Singas would have found nothing out of the ordinary in the conduct of the drill that would be sufficient to establish Plaintiff had not assumed the risk of injury.

### *D. Appellate Division Case Law*

In *Kolenda v. Incorporated Village of Garden City*, a trip-and-fall case involving a public sidewalk, the Second Department issued a split decision as to whether the Plaintiffs met their burden of complying with the municipality's prior written notice law.[149] The provision at issue required residents to provide prior written notice to the Village Board of Trustees upon discovering an allegedly defective

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143. *Id.*

144. *Id.* at 1163.

145. *Grady,* 215 N.E.3d at 1163 (quoting Custodi v. Town of Amherst, 980 N.E.2d 933, 935 (2012) (internal quotations omitted)).

146. Grady v. Chenango Val. Cent. Sch. Dis., 215 N.E.3d at 1178 (N.Y. 2023) (citing Bukowski v. Clarkson Univ., 971 N.E.2d 849, 850 (N.Y. 2012)).

147. *Id.*

148. *Id*.

149. Kolenda v. Incorporated Vill. Of Garden City, 187 N.Y.S.3d 669, 669 (App. Div. 2d Dep't 2023).

condition.[150] Through an affidavit from the Village Clerk, the majority held, "the Village established, prima facie, that it did not have prior written notice of the alleged defective sidewalk condition" and that "the plaintiffs failed to raise a triable issue of fact."[151]

The dissent would have held "plaintiffs raised a triable issue of fact as to whether the Village Board of Trustees had prior written notice of the allegedly defective condition" because "[p]rior to the subject incident, a Village employee inspected the sidewalk at issue and prepared a written survey identifying several specific sidewalk defects," including the defect Plaintiff complained of and, further, "the Village notified the homeowners that repairs to the sidewalk were required."[152] After the Village made repairs to the area, the defect at issue in the case persisted.[153] Thus, the dissent would have found Plaintiffs had raised a triable issue of fact on prior written notice based on the Village's letter to the homeowners.[154] Further, the dissent would have found an exception to the general rule requiring strict compliance with prior written notice provisions where, as the dissent would have found, "the Village had actual notice of a defective condition and notified the homeowners to repair it or authorize the Village to do so, which they did."[155]

In *Marra v. Zaichenko*, the Third Department issued a three-two split decision in a slip-and-fall case that involved the application of the storm-in-progress doctrine, which provides, "property owner will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter."[156] Plaintiff had left his vehicle to be serviced at Defendant's business before snow began.[157] "After retrieving his keys, plaintiff exited the building and began to cross the parking lot to where the vehicle was parked."[158] When he reached his vehicle, "he reached to open the door of his vehicle" and then "slipped and fell."[159]

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150. *Id.* at 670.
151. *Id.* at 671.
152. *Id.* at 672.
153. *Id.*
154. *Kolenda*, 187 N.Y.S.3d at 673.
155. *Id.*
156. Marra v. Zaichenko, 185 N.Y.S.3d 815, 815 (App. Div. 3d Dep't 2023) (quoting Telesco v. Smith, 159 N.Y.S.3d 211 (App. Div. 3d Dep't 2021)).
157. *Id.* at 816.
158. *Id.*
159. *Id.*

The majority held Defendant sustained its initial burden on summary judgment by submitting "plaintiff's deposition testimony wherein he testified that it was snowing at the time of the incident" along with expert opinions from "a meteorologist, who averred that, in her opinion, since the time it started snowing that day, approximately one inch of new snow had fallen."[160] The meteorologist "opined that any snow or ice that was present on the ground at the time of plaintiff's fall was a result of the storm that was currently in progress and that it was not plausible that plaintiff's fall occurred from old ice rather than the storm in progress due to freezing temperatures and minimal snow pack in the days leading up to the fall."[161] In opposition, Plaintiff submitted his deposition testimony where he explained "it began snowing within the hour before he picked up his truck," and "prior to his fall, he observed between a quarter of an inch to a half inch of snow on the ground, but that he did not see the ice until after he fell."[162] Plaintiff also offered his own expert meteorologist, who opined, "at the time plaintiff fell, only approximately one inch of snow had accumulated" and "given the air temperature conditions and melt/refreeze processes in the days leading up to the accident, it was more likely than not that ice was present in the parking lot of the business."[163] The majority held this evidence raised a question of fact, which should have precluded summary judgment.[164]

The dissent, however, disagreed that Plaintiff successfully raised a question of fact.[165] The dissent would have held, "plaintiff's submissions do not adequately address the specific icy condition that led to his fall and were insufficient to meet his burden in opposition to defendant's motion."[166] More specifically, the dissent found Plaintiff's experts offered generalized conclusions that "it was more likely than not" that ice was present based on "a thaw/refreeze process because of solar radiation from direct sunshine that 'sometimes' caused melting to occur in freezing temperatures."[167] Further, the dissent reasoned Plaintiff's experts could not rely on a former employee's affidavit as to whether "there was ice in the area where the truck was parked on the day of the incident" because the employee conceded "she could

160. *Id.* at 817.
161. *Zaichenko,* 185 N.Y.S. 3d. at 817 (citations omitted).
162. *Id.*
163. *Id.* at 818.
164. *Id.*
165. *Id.* at 819.
166. *Zaichenko,* 185 N.Y.S. 3d. at 819.
167. *Id.*

not recall" if ice was present at the location of the fall on the day of the incident.[168]

In *S.G. v. Harlem Village Academy Charter School*, the First Department issued a split three-two decision as to the foreseeability of an injury that occurred when a Plaintiff, on a playground, kicked a "Drano bomb."[169] The incident occurred on a playground "adjacent to" a public school.[170] Plaintiff "sustained chemical burns to her legs and feet after an 'explosion occurred' when she kicked a 'foggy' plastic Vitamin Water bottle apparently containing Drano (a 'Drano bomb')" while she was part of a publicly-funded afterschool program.[171] "[P]laintiffs allege[d] negligent supervision and that defendant knew or should have known of the dangerous condition created by the presence of the Drano bomb."[172]

The majority affirmed the supreme court's order granting summary judgment.[173] "Plaintiff testified that, before she was injured, she had seen other children, who were not participating in [the] afterschool program, on a different basketball court in the public park pouring a liquid into a Poland Spring bottle," which was a different type of bottle than the bottle she ultimately kicked.[174] Plaintiff argued the "staff should have observed the conduct of these children and intervened to stop them."[175] The majority identified this issue as a red herring, because the majority analyzed the case as a matter of proximate cause as opposed to notice of a dangerous condition: "plaintiff's own testimony . . . established that the actions of the children — even indulging the speculative assumption that they created the Drano bomb that later injured plaintiff — were the intentionally wrongful, spontaneous, and unforeseeable acts of third parties over whom [the school] had no control or authority."[176]

The dissent would have held Defendants did not meet their initial burden as a matter of law.[177] The dissent noted Defendants' motion "presented no evidence whatsoever from any of its employees,

168. *Id.*
169. S.G. v. Harlem Vill. Acad. Charter Sch.,184 N.Y.S.3d 334, 335 (App. Div. 1st Dep't 2023).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *S.G.,* 184 N.Y.S.3d at 335.
175. *Id.*
176. *Id.*
177. *Id.* at 336.

teachers, supervisors, or in the form of records from the afterschool program," and therefore the dissent reasoned the motion papers did not shift the burden on the notice issue.[178] As to proximate cause, the dissent explained Defendants failed to establish the incident was "sudden, spontaneous, impulsive, or unanticipated" and therefore unforeseeable.[179] In particular, the dissent noted Defendants failed to meet their initial burden, but emphasized Plaintiff had raised a question of fact by reference to her own testimony, which viewed "in the light most favorable to plaintiffs, suggests that sufficient time elapsed between her seeing the boys pouring something into a bottle and her kicking the bottle to have permitted defendant . . . employees to observe the boys' activity and prevent the incident."[180]

The Fourth Department issued a three-two decision in a negligence case, *Weaver v. DeRonde Tire Supply*, that arose out of a workplace incident where "tires that were being moved by a forklift struck [Plaintiff] when they fell from the forklift after it drove over a crack in the concrete floor" of a building.[181] Plaintiff sued the owner of the property, alleging the crack in the concrete floor constituted a dangerous condition.[182] The majority found Defendant established "it was an out-of-possession landlord" and therefore it was "not liable for plaintiff's injuries" because its lease did "not include a general requirement that defendant repair or maintain the premises, . . . limit[ed] defendant's responsibility to repair the premises to structural defects in the bearing walls and roof," and established the tenant "was responsible for all other maintenance and repairs."[183] Moreover, "defendant established that it relinquished control of the premises."[184] The majority, however, also found "plaintiff raised a triable issue of fact whether defendant was liable based on its contractual obligation to maintain the structural integrity of the roof and walls" on reargument.[185] Specifically, the majority found, "an affidavit from one of plaintiff's former colleagues and from a code enforcement officer, who each averred that the damage to the floor may have been caused by water damage

178. *Id.*
179. *S.G.,* 184 N.Y.S.3d at 337.
180. *Id.*
181. Weaver v. DeRonde Tire Supply, Inc. 182 N.Y.S.3d 431, 432 (App. Div. 4th Dep't 2022).
182. *Id.* at 433.
183. *Id.*
184. *Id.*
185. *Id.* at 434.

or water infiltration due to poor maintenance of the roof and walls," raised a question of fact.[186]

The dissent would have held Plaintiff did not raise a question of fact.[187] According to the dissent, the affidavits Plaintiff submitted were "wholly speculative to the extent that they allege that defendant made previous repairs to the floor in the area where plaintiff sustained his injury, or that the crack in the concrete floor that allegedly contributed to plaintiff's injury was caused by water infiltrating through the roof or walls."[188] As the dissent noted, "[o]ther than the speculation contained in the affidavits submitted by plaintiff, there is no evidence in the record establishing any nexus between structural defects in the bearing walls and roof, which were defendant's responsibility to repair, replace and maintain, and the floor defect that allegedly caused plaintiff's injuries."[189]

## II. LABOR LAW

In *Green v. Evergreen Family Limited Partnership*, the Fourth Department issued a split three-two decision in a Labor Law section 240 (1) case.[190] "Plaintiff commenced [the] action to recover damages for injuries he sustained when he fell from an A-frame ladder while working on a 10-foot-high car wash overhead door."[191] Defendants moved for summary judgment dismissing Plaintiff's Labor Law section 240 (1) claim, and Plaintiff cross-moved for the opposite relief.[192] The first issue covered whether Plaintiff was engaged in a Labor Law activity (repair) or a non-Labor Law activity (routine maintenance).[193] The majority held the issue required trial:

> T]he evidence submitted . . . raises triable issues of fact whether plaintiff was engaged in the replacement of overhead door parts that occurred due to normal wear and tear or whether the work being performed by plaintiff at the time of the

186. *Weaver*, 182 N.Y.S.3d at 434.
187. *Id.*
188. *Id.*
189. *Id.*
190. *See* Green v. Evergreen Fam. Ltd. P'Ship, 179 N.Y.S.3d 506, 507 (App. Div. 4th Dep't 2022).
191. *Id.* at 508.
192. *Id.*
193. *Id.* (citing Dos Santos v. Consolidated Edison of N.Y., Inc., 963 N.Y.S.2d 12, 13 (App. Div. 1st Dep't 2013).

> accident was necessary to restore the proper functioning of an otherwise inoperable overhead door."[194]

Next, the majority held Supreme Court properly granted Plaintiff summary judgment on Defendant's claim that Plaintiff solely proximately caused the accident.[195] "[D]efendants submitted an affidavit from an expert who opined that plaintiff was the sole proximate cause of his accident because he improperly stood on the second to last step of the ladder at the time of his fall and shifted his weight."[196] But "[t]he expert offered no opinion, however, on whether the eight-foot A-frame ladder was adequate to allow plaintiff to safely complete his assigned task at the time of the accident without standing on the top two steps."[197] Defendants further relied on "plaintiff's deposition testimony wherein plaintiff admitted that he understood it to be unsafe to stand on the top two steps of the ladder."[198] In opposition, Plaintiff also submitted expert evidence explaining

> the eight-foot ladder provided to plaintiff was not an adequate safety device because it could not be positioned in the car wash bay so as to permit plaintiff to access the bearing and shaft on which he was working without standing on the top step of the ladder and reaching forward.[199]

In reply, "Defendants never addressed the opinion of plaintiff's expert, but argued . . . that plaintiff testified at his deposition that he had 'selected his ladder for the project and confirmed it was appropriate for the work he was going to perform.'"[200]

The majority found Plaintiff's testimony did not change the analysis. At the outset, it noted, "there [was] no dispute that the only safety devices available for plaintiff's use on the job site at the time of the accident were two eight-foot A-frame ladders," which distinguished this case from cases where Plaintiff wrongly chose between different and available safety devices.[201] On the merits, the majority explained, "plaintiff testified at his deposition that he considered an eight-foot A-frame ladder to be appropriate, i.e., 'safe or tall' enough, . . . generally and he thought that this ladder 'probably might' be 'sufficient' to

194. *Id.* (citing Esposito v. N.Y. City Indus. Dev. Agency, 802 N.E.2d 1080, 1081 (N.Y. 2003).
195. *Green*, 179 N.Y.S.3d at 508.
196. *Id.*
197. *Id.* at 508–09.
198. *Id.* at 508.
199. *Id.* at 509.
200. *Green*, 179 N.Y.S.3d at 509.
201. *Id.*

perform the work on the car wash overhead door," but Plaintiff also explained the ladder would have been his second choice and was only used when "the customer did not want to pay for a platform lift."[202] Moreover, because Defendants did not submit reply expert evidence establishing the ladder was adequate for Plaintiff's work, the majority held, "Plaintiff . . . established his entitlement to judgment as a matter of law dismissing the sole proximate cause affirmative defense."[203]

Justices Peradotto and NeMoyer dissented on the sole proximate cause issue.[204] The dissent would have denied Plaintiff's motion for summary judgment on the sole proximate cause defense—notwithstanding Plaintiff's expert proof—because "plaintiff . . . submitted conflicting evidence in the form of his own deposition inasmuch as his testimony, viewed in the appropriate light, indicates that he considered and adjudged the eight-foot ladder adequate to safely perform the assigned work on the subject 10-foot overhead car wash door."[205] The dissent pointed to specific testimony from Plaintiff, in which he admitted he controlled the type of ladder available at his work site: "his supervisor would inform him that a service call involved a 10-foot overhead door and instruct him to take an appropriate ladder, which plaintiff understood to mean a ladder that was safe and tall enough to work on that overhead door."[206] He also testified, "he would use an eight-foot A-frame ladder to perform work on a 10-foot overhead door and that, for the type of service call involving such a door, he would be instructed by his supervisor to take an eight-foot A-frame ladder."[207] Citing the deferential standard used in assessing evidence in opposition to a summary judgment motion, the dissent would have found, "plaintiff and his supervisor [in contrast to Plaintiff's expert] considered an eight-foot ladder to be safe and tall enough to complete work on a 10-foot overhead door" and,

> viewed in the appropriate light, plaintiff's answer was in response to the culmination of questioning on the topic whether using an eight-foot A-frame ladder would be adequate—i.e., safe and tall enough—to work upon an overhead car wash door, like the one at issue, with a height of 10 feet.[208]

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202. *Id.*
203. *Id.*
204. *Id.* at 510.
205. *Green*, 179 N.Y.S.3d at 510.
206. *Id.*
207. *Id.*
208. *Id.* at 510–11.

Finally, because "plaintiff testified that, based on his safety training, it was never appropriate to stand on the second step from the top or the top cap of an A-frame ladder," the dissent would have found, "plaintiff's submissions raised an issue of fact whether it was necessary for plaintiff to be on that step in order to perform his work on the 10-foot overhead door and, if not, whether plaintiff's own actions were the sole proximate cause of the accident."[209]

## III. DOG BITES

In *Zicari v. Buckley*, the Fourth Department issued a three-two decision in a case involving an interesting twist on the typical dog-bite case.[210] Plaintiff "was attacked by a dog owned by defendant . . . and, while retreating from the dog, he fell down the front steps of defendant's home" on alleged snow and ice.[211] The majority began by noting Defendant had failed to meet his initial burden of establishing his dog did not have vicious propensities, and further noted Plaintiff had, in any event, raised a question of fact.[212] The majority made its determination based on Plaintiff's deposition testimony, which Defendants submitted in support of its motion.[213] The testimony revealed, "while plaintiff was at defendant's door, the dog came running and was barking, pushed the door open, and lunged at plaintiff, biting him in the right thigh."[214] The majority found the "unprovoked and vicious nature of the attack and the severity of the injuries sustained by plaintiff" persuasive, but the evidence did not stop there.[215] Indeed, the majority also noted Plaintiff's testimony that Defendant admitted "the dog doesn't like people who wear coats" and that "the dog was protective."[216] Moreover, a nonparty witness explained, "the dog was 'protective' of the persons who lived in the home."[217] The majority also found Plaintiff raised a question of fact through "the dog's veterinary records, which indicated that the dog had prior, known 'territorial issues,' that the dog was 'barking a lot at people he did not like,' and

209. *Id.* at 511–12.
210. Zicari v. Buckley, 184 N.Y.S.3d 499 (4th Dep't 2023).
211. *Id.* at 500.
212. *Id.* at 500–01.
213. *Id.*
214. *Id.* at 500.
215. *Zicari*, 184 N.Y.S.3d at 501.
216. *Id.*
217. *Id.*

that it was recommended to defendant that he engage in daily 'socialization exercises' with the dog."[218]

The dissent would have granted Defendant's motion on the vicious propensity issue.[219] The dissent would have relied on the portions of Defendant's submission that established "the dog was a gentle, well-behaved family dog, who was not aggressive, menacing, or intimidating, was not a guard dog, and had never growled at, nipped, or bitten anyone before."[220] The dissent paired this evidence with further evidence establishing "[n]either defendant nor the tenant had ever observed the dog exhibit any aggressive behavior in the past."[221] The dissent explicitly disagreed with the majority that evidence that a dog is "protective" constituted evidence of a vicious propensity, either generally or as explained by Defendant and the nonparty.[222] As to the evidence regarding the dog's protective nature, the dissent noted, "[s]uch behavior, however, was not accompanied by any aggressiveness or growling, and thus the dog's placid mannerism of placing himself between familiar people and strangers is consistent with nothing more than 'normal canine behavior.'"[223] Likewise, the dissent did not find the alleged admission that the dog disliked people wearing coats established a vicious propensity because "defendant did not say whether the dog had previously growled at people in coats, the tenant never observed the dog exhibit any behavior toward someone wearing a coat, and the dog had never growled at or acted aggressively toward anyone."[224] Therefore, the dissent would have held Defendant met his initial burden.[225]

The dissent would also have held Plaintiff did not raise a question of fact using the veterinary records.[226] The dissent explained the supposedly admissible evidence on this point amounted to two isolated notations that were made more than three years prior to the incident, noting, "[t]here was no suggestion," in the notes, that such barking was aggressive or threatening or accompanied by any growling or other indicia of vicious propensities, or that the veterinary

218. *Id.*
219. *Id.* at 504 (Peradotto and Montour, JJ., dissenting).
220. *Zicari*, 184 N.Y.S.3d at 502–03.
221. *Id.* at 503.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Zicari*, 184 N.Y.S.3d at 502.
226. *Id.* at 503.

recommendation to socialize the dog when he was a puppy was the result of any such behavior."[227]

Turning to the premises liability claim, the majority found "defendant met his initial burden on that part of the motion seeking to dismiss the second cause of action by demonstrating that plaintiff could not identify the alleged negligent maintenance of the steps as a cause of his fall without engaging in speculation" because "Plaintiff testified that he was 'not sure' whether he stepped on the front steps when he turned."[228] The dissent did not take issue with this holding.[229]

## IV. DEFAMATION

The Court of Appeals became the latest court to issue a decision in the winding *Gottwald v. Sebert* litigation involving the singer Kesha and her former music producer, Lukasz Gottwald (or, Dr. Luke).[230] Briefly, the story of the *Gottwald* case started in 2014, when Kesha "sought to void her contractual arrangement with Gottwald by filing an action in California, alleging that Gottwald raped her shortly after she signed the original recording deal."[231] Gottwald responded by suing Kesha, alleging defamation.[232] The Court of Appeals, in a broad ranging decision, held (1) "Gottwald is a limited public figure who must prove by clear and convincing evidence that Sebert acted with actual malice"; (2) "five of the allegedly defamatory statements are privileged as a matter of law while the issue of privilege as to the remaining 20 statements must be resolved by a jury"; and (3) "certain provisions of the 2020 amendments to Civil Rights Law §§ 76-a and 70-a apply to this action."[233] For the purposes of substantive tort law, the first and second holdings are of particular interest.

The Court began its analysis by determining whether Gottwald was a public figure, and more specifically whether he was a "limited purpose" public figure.[234] If Gottwald held public figure status, he would have to prove Kesha spoke with actual malice, which would in turn mean he would have to prove by clear and convincing evidence

227. *Id.*
228. *Id.* at 500, 501.
229. *See id.* at 502.
230. Gottwald v. Sebert, No. 32/33, 2023 N.Y. Slip Op. 03183, at 1 (N.Y. June 13, 2023).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*

that Kesha spoke with actual knowledge that the statement was false or with a reckless disregard for the truth of her statements.[235] "One becomes such a limited-purpose public figure through some 'purposeful activity,' by which the individual has thrust themself into the public spotlight and sought a continuing public interest in [their] activities."[236]

The majority held Gottwald qualified as a limited purpose public figure by injecting himself into the public spotlight.[237] As the Court explained, "when Gottwald initiated this defamation action, he was, by his own account, a celebrity—an acclaimed music producer who had achieved enormous success in a high-profile career."[238] The Court further noted, "[h]e purposefully sought media attention for himself, his businesses, and for the artists he represented, including Sebert, to advance those business interests."[239]

The majority next reviewed several statements to determine whether "the litigation privilege, the pre-litigation privilege, and the statutory fair report privilege under Civil Rights Law § 74" would apply.[240] The Court held, "questions of fact exist as to the application of the pre-litigation and fair report privileges—those issues must go to a jury—but disagree as to application of the absolute litigation privilege."[241]

The appellate division's decision on the litigation privilege turned on "a line of cases holding that this privilege may be 'lost if abused' in certain circumstances," including where "the underlying action was brought with malice," which is sometimes known as the "sham exception" to the litigation privilege.[242] But the Court rejected the "sham exception," explaining it "is inconsistent with the absolute privilege recognized by this Court for statements made in connection with judicial proceedings."[243] Therefore, the Court found five statements, which were made with regard to "the California complaint, the counterclaims in the New York action, and an affidavit in support of her motion for a preliminary injunction," as privileged.[244]

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235. *Gottwald*, 2023 Slip Op 03183, at 1.
236. *Id.* (citations omitted).
237. *Id.*
238. *Id.*
239. *Id.*
240. *Gottwald*, 2023 Slip Op 03183, at 1.
241. *Id.* at 2.
242. *Id.* (citations omitted).
243. *Id.*
244. *Id.*

Turning next to the pre-litigation privilege, the Court acknowledged, "statements made in anticipation of good faith litigation are privileged, given that communication during this pre-litigation phase should be encouraged and not chilled by the possibility of being the basis for a defamation suit."[245] While acknowledging the privilege, the Court also noted the privilege "has the potential to be abused" and therefore explained it is a qualified privilege that can be lost if "a defendant proves that the statements were not pertinent to a good faith anticipated litigation."[246] The Court agreed with the courts below that "there is an issue of fact for the jury as to whether the California suit was at this stage good faith anticipated litigation."[247]

Finally, the Court addressed the statutory fair reporting privilege embodied in Civil Rights Law section 74.[248] The Court held questions of fact precluded a decision as to the privilege at the pre-trial phase based on an exception similar to the sham litigation exception, holding, "it is an admittedly narrow qualification to the statutory privilege, applicable in this case," and noted the case presented "a question of fact as to whether the litigation in California and counterclaims in New York were brought by Sebert in good faith or maliciously to defame Gottwald and pressure plaintiffs to release her from her contracts."[249]

Judge Rivera dissented on two points: (1) whether "the pre-litigation privilege applies to an embargoed draft of the complaint sent to counsel for settlement purposes and to a tabloid the day before filing"; and (2) whether "the statutory fair report privilege applie[d] to all but two of the allegedly defamatory statements to the media."[250]

As to the pre-litigation privilege, Judge Rivera reasoned that sending the complaint to opposing counsel and a tabloid just before filing should be protected by a privilege. As to the courtesy copy of the Complaint sent to opposing counsel:

> [I]t is odd to conclude that Kesha's allegations as they appeared in the filed complaint are privileged, while her identical allegations as they appeared in the draft complaint are not similarly protected simply because the former was served on

245. *Gottwald*, 2023 Slip Op 03183 (citations omitted).
246. *Id.* (citations omitted).
247. *Id.* at 3.
248. *See* N.Y. CIV. RIGHTS LAW § 74 (Consol. 2023).
249. *Gottwald*, 2023 Slip Op 03183 at 3.
250. *Id.* at 5.

> counsel and the latter was provided to counsel as a courtesy in anticipation of litigation.[251]

As for sending the proposed complaint to the tabloid, Judge Rivera would have found "there is no logical basis to distinguish between the complaint as it was filed and the complaint as it was shared with a media outlet one day prior with the understanding that it could not be made public until after the actual filing."[252]

As to the fair reporting privilege, Judge Rivera would have held "all but two [of the complained of statements] are covered by the statutory fair report privilege."[253] As to the two statements that Judge Rivera would not have found to be privileged as a matter of law, the Judge noted the statements fell outside the scope of the Complaint and therefore could not relate to the litigation.[254] As to the other statements, however, she would have held "those statements are privileged because they reflect specific allegations she has made in the course of the litigation."[255] Finally, unlike the majority, Judge Rivera would not have found the statutory fair reporting privilege had been abused.[256]

## CONCLUSION

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

Stay tuned.

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251. *Id.* at 10.

252. *Id*.

253. *Id.*

254. *See Gottwald*, 2023 Slip Op 03183 at 10 ("In a 2014 cable news interview and during an episode of a legal issues podcast, Kesha's attorney suggested that Dr. Luke's conduct was not limited to Kesha. However, Kesha's complaint did not allege that Dr. Luke sexually assaulted or otherwise abused multiple women. Therefore, a jury could determine that those statements are not "substantially accurate" reports of the litigation and are therefore not statutorily privileged.").

255. *Id.*

256. *Id.*