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PURSUANT TO MILITARY LAW, PETITIONER SHOULD HAVE BEEN DEEMED TO HAVE SUCCESSFULLY COMPLETED HER NYC POLICE-OFFICER PROBATIONARY PERIOD BY VIRTUE OF HER DEPLOYMENT ON MILITARY DUTY DURING THE PROBATIONARY PERIOD (FIRST DEPT).

The First Department, reversing Supreme Court, determined that Military Law controlled and petitioner, a probationary NYC police officer, must be deemed to have satisfactorily completed her probation by virtue of her military deployment while on probationary status:

Under New York City personnel rules, "[s]ubject to the provisions of the [M]ilitary [L]aw," the computation of a probationary period is based on time the employee is "on the job in a pay status" (55 RCNY 5.2.2[b]). The personnel rules further provide that, notwithstanding rule 5.2.2, the probationary period will be extended while a probationer "does not perform the duties of the position" (55 RCNY 5.2.8[b]) for instance, while on limited duty status … . These rules are expressly subject to Military Law § 243(9), which provides, in pertinent part, that if a probationary employee is deployed on military duty before the expiration of his or her probationary period, "the time [she] is absent on military duty shall be credited as satisfactory service during such probationary period."

Military Law § 243(9) is unambiguous in providing that respondents are required to credit the period that probationary officers spend in military service as "satisfactory service" towards completion of the probationary period. The statute does not distinguish between probationers on restricted or modified duty and those on full duty status at the time of deployment, or give respondents discretion to distinguish between types of probationers … . Matter of Aroca v Bratton, 2019 NY Slip Op 03277, First Dept 4-30-19

POLICE BODY-WORN-CAMERA FOOTAGE DOES NOT CONSTITUTE A PERSONNEL RECORD AND IS NOT THEREFORE PROTECTED FROM RELEASE TO THE PUBLIC BY CIVIL RIGHTS LAW 50-a (FIRST DEPT).

The First Department determined police officers' body-worn-camera footage did not constitute a personnel record within the meaning of Civil Rights Law 50-a. Therefore the Patrolmen's Benevolent Assn. of the City of N.Y.'s petition for a preliminary injunction prohibiting release of the footage was properly denied:

We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a … . The purpose of body-worn-camera footage is

for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.

Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional processes. New York Civil Liberties Union v New York City Police Department (__NY3d__, 2018 NY Slip Op 8423 [2018]), which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability. Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v De Blasio, 2019 NY Slip Op 03265, First Dept, 4-30-19

COUNTY NOT LIABLE IN THIS INMATE-ON-INMATE THIRD PARTY ASSAULT CASE (SECOND DEPT).

The Second Department determined the county's motion for summary judgment in this inmate-on-inmate third party assault case was properly granted. Plaintiff, an inmate in county jail, was assaulted with a pool cue by another inmate (named Batts). The complaint against the county alleged negligent supervision:

… [T]he County defendants demonstrated that prior to the incident, the plaintiff and Batts had a friendly relationship and joked around with each other. They had no prior physical altercations with one another, and Batts had not been involved in any prior violent incidents with other inmates. The County defendants also demonstrated that prior to August 11, 2013, there had been no incident at the facility where an inmate had used a pool cue as a weapon to attack another inmate.

The County defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action sounding in negligent supervision by demonstrating that the assault by Batts upon the plaintiff was not reasonably foreseeable … . As for the cause of action sounding in negligent entrustment, the County defendants established, prima facie, that they did not possess special knowledge concerning a characteristic or condition peculiar to Batts that rendered his access to the pool cue unreasonably dangerous … . Dickson v Putnam, 2019 NY Slip Op 03025, Second Dept 4-24-19

RECORDS KEPT BY A VOLUNTEER AMBULANCE NOT-FOR-PROFIT CORPORATION NOT SUBJECT TO DISCLOSURE PURSUANT TO THE FREEDOM OF INFORMATION LAW (FOIL) BECAUSE THE CORPORATION IS NOT A GOVERNMENTAL ENTITY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, Volunteer Ambulance, a not-for-profit corporation, was not a government agency, and therefore was not subject to the Freedom of Information Law (FOIL) (Public Officers Law 86). "The petitioner, an emergency medical technician, made requests under the Freedom of Information Law (Public Officers Law art 6; hereinafter FOIL) for the production of certain records pertaining to the rejection of her application to be reinstated as a member of the Cortlandt Community Volunteer Ambulance Corps, Inc. (hereinafter Volunteer Ambulance):"

Volunteer Ambulance was formed and incorporated without any participation or assistance of public officials in the Town. Neither the Town nor the District has the authority to select or appoint directors, officers, or members of Volunteer Ambulance. Volunteer Ambulance is not required to submit its budget to the Town or District for review, and neither the Town nor the District has authority to approve Volunteer Ambulance's budget. Neither the Town nor the District has any authority to review or audit Volunteer Ambulance's financial books and records. Volunteer Ambulance receives the majority of its funding from sources other than the payment it receives from the District pursuant to the contract, and purchases all of its equipment, supplies, and services from its own assets. Volunteer Ambulance receives no funding from the Town or District apart from the contract payment. Volunteer Ambulance is solely responsible for the maintenance and expenses related to its buildings. Volunteer Ambulance has the authority to hire staff, who are employees of Volunteer Ambulance, not of the District or Town, and it obtains its own workers' compensation policy for coverage of its employees and members; these persons are not covered by the workers' compensation policy maintained by the District or the Town for its employees or volunteers. Neither the District nor the Town has authority to review or approve contracts entered into by Volunteer Ambulance for professional or other services necessary for its operation.

Under these circumstances, it cannot be said that Volunteer Ambulance is a "governmental entity performing a governmental . . . function" so as to render it an agency subject to the mandates of FOIL (Public Officers Law § 86[3] … . Matter of Outhouse v Cortlandt Community Volunteer Ambulance Corps, Inc., 2019 NY Slip Op 02881, Second Dept 4-17-19

DEFENDANT TRANSIT AUTHORITY DID NOT ELIMINATE QUESTIONS OF FACT ABOUT WHETHER THE MOVEMENT OF THE BUS WAS UNUSUAL AND VIOLENT, PLAINTIFF-PASSENGER WAS INJURED WHEN SHE FELL ON THE BUS, TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT)

The Second Department, reversing Supreme Court, determined that defendant NYC Transit Authority's motion for summary judgment in this bus-passenger injury case should not have been granted:

According to the plaintiff, the bus stopped in a manner that caused her to fall and sustain injuries. …

In seeking summary judgment dismissing a complaint which alleges injuries to a plaintiff arising out of a fall on a bus, a common carrier has the burden of establishing, prima facie, that the stop that caused the fall was not unusual and violent … .

We disagree with the Supreme Court's determination granting the defendant's motion. The evidence submitted by the defendant, which included, inter alia, the deposition testimony of the plaintiff regarding her fall and the bus camera video footage of her fall, failed to eliminate triable issues of fact as to whether the movement of the bus at issue was unusual and violent … . Giordano v New York City Tr. Auth., 2019 NY Slip Op 02684, Second Dept 4-10-19

CAUSE OF ACTION BASED UPON A THEORY NOT ALLEGED IN THE NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department determined plaintiff's first cause of action was properly dismissed because it alleged a theory of liability in this slip and fall case that was not alleged in the notice of claim. Apparently the plaintiff fell after getting off defendants' bus:

[In the notice of claim] the plaintiff alleged … that the accident was caused by "the carelessness, recklessness and negligence of . . . New York City Transit Authority in the ownership, operation, maintenance, repair, construction, renovation, supervision and control of the aforesaid location." …

… [T]he … defendants established their prima facie entitlement to judgment as a matter of law dismissing the first cause of action … by submitting proof that the amended notice of claim contained no allegation that the bus

operator was negligent in failing to provide the plaintiff with a safe place to alight … . Rojas v Hazzard, 2019 NY Slip Op 02573, Second Dept 4-3-19

ABUTTING PROPERTY OWNER NOT RESPONSIBLE FOR TRIP AND FALL IN TREE WELL NEAR THE SIDEWALK, THE TREE WELL IS NOT UNDER THE PROPERTY OWNER'S CONTROL (FIRST DEPT).

The First Department determined defendant property owner's (Val-Mac's) motion for summary judgment in this sidewalk slip and fall case was properly granted. Plaintiff fell in a tree well near the sidewalk abutting defendant's property:

Plaintiff tripped and fell in a tree well as he walked on the sidewalk in front of Val-Mac's property, which was undergoing repairs to a sewer line running to the street. Absent evidence that Val-Mac controlled the construction or made special use of the sidewalk, there is no issue of fact as to whether it proximately caused the accident, rather than "merely furnish[ing] the condition or occasion for the occurrence of the event" … . As the tree well is not part of the sidewalk under Val-Mac's control, the court properly granted summary judgment … . Schwartz v City of New York, 2019 NY Slip Op 02465, First Dept 4-2-19

CONVERSION OF A HISTORIC LOWER MANHATTAN LANDMARK, A RARE CLOCK AND CLOCK TOWER, TO A LUXURY APARTMENT WAS PROPERLY APPROVED BY THE NYC LANDMARKS PRESERVATION COMMISSION, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, reversing the Appellate Division, determined the NYC Landmarks Preservation Commission (LPC) properly approved the redevelopment of 346 Broadway, a historic building in Lower Manhattan that the LPC had previously designated as a landmark. The redevelopment entailed conversion of an interior landmark (a clock) to a luxury apartment:

In its initial designation report, the LPC noted several of the building's unique features. The exterior of the "palazzo-like tower," constructed in "the neo-Italian Renaissance style," was largely built with "white Tuckahoe

marble." The "interiors" were also "designed using the finest craftmanship and lavish materials" including "marble, bronze, [and] mahogany." Among the interior spaces designated were the former "Banking Hall," a "grand and boldly scaled neo-Classical room" with "monumental freestanding Corinthian columns, and "[t]he clock tower" which housed a "No. 4 Striking Tower Clock"—a mechanical clock driven "by a thousand pound weight" which "strikes the hours" with a hammer and a "5000 pound bell." The clock was manufactured by E. Howard Watch & Clock Company and "was specially equipped with a double three-legged gravity escapement"—a feature, petitioners claim, is shared by only one other tower clock: the clock housed by Elizabeth Tower (also home to the bell known as Big Ben) in London. In total, the LPC landmarked 20,000 square feet out of the building's total interior space of 420,000 square feet. * * *

… [T]the developer intended to keep the clock running electrically. …

… [T]he LPC found that the developer's plan would have "the main lobby, stair hall, clock tower rooms and banking hall . . . fully restored." Additionally, it would "allow accessibility by the public to the lobby and former banking hall." The LPC also found that "the clock mechanism and faces will be retained, thereby preserving these significant features." In sum, the LPC found that "the proposed restorative work will return . . . the interior closer to [its] original appearance, and will aid in [its] long-term preservation."

FROM JUDGE RIVERA'S DISSENT:

Notwithstanding the historical significance of the clock to the City, the LPC approved the building owner's request to convert this interior landmark into a luxury apartment. The former is a rare horological masterpiece; the latter is a typical, now-commonplace, development for the wealthy by the wealthy. Although the LPC has great latitude to decide whether to approve an alteration to an interior landmark, it cannot approve an alteration that, by its very nature, amounts to a de facto rescission of a landmark designation. So, the question is, when is an interior landmark no longer an interior landmark? The answer is contained in the plain language of the Landmarks Preservation Law, which defines an interior landmark as accessible to the public for the people's benefit and welfare. Transforming an interior landmark into a private residence such that it is completely closed off from the public, annuls its designation and is inconsistent with the purpose of the Landmarks Preservation Law. Matter of Save America's Clocks, Inc. v City of New York, 2019 NY Slip Op 02385, CtApp 3-28-19

ALTHOUGH PLAINTIFFS APPEARED FOR THE 50-h HEARING, PLAINTIFFS' ATTORNEY REFUSED TO LET THE PLAINTIFFS TESTIFY UNLESS EACH PLAINTIFF COULD HEAR THE OTHER'S TESTIMONY, BECAUSE THE 50-h HEARING IS A CONDITION PRECEDENT TO BRINGING SUIT, PLAINTIFFS' LAWSUIT WAS PROPERLY PRECLUDED (SECOND DEPT).

The Second Department, over a two-justice dissent, determined that plaintiffs were precluded from proceeding with the lawsuit because, although plaintiffs appeared for the 50-h hearing, plaintiffs attorney refused to participate in the 50-h hearing unless each plaintiff was present when the other testified. The majority held that the 50-h hearing is a condition precedent to any lawsuit and the statute does not create a right for plaintiff's to be present for each other's testimony at the hearing:

The purpose of General Municipal Law § 50-h is to enable a municipality to make a prompt investigation of the circumstances of a claim by examining the claimant about the facts of the claim … . The oral examination of a claimant pursuant to General Municipal Law § 50-h serves to supplement the notice of claim and provides an investigatory tool to the municipality, with a view toward settlement … . "Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" … . "A party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality" … . …

" [A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact'" … . Moreover, "[i]n the construction of statutes, each word or phrase in the enactment must be given its appropriate meaning" … , which is in derogation of the common law, is to be strictly construed … . In strictly construing a statute, courts "will not go beyond the clearly expressed provisions of the act" … . Colon v Martin, 2019 NY Slip Op 02312, Second Dept 3-27-19

STUDENT ON STUDENT ASSAULT WAS NOT FORESEEABLE, THEORIES IN THE PLEADINGS WHICH WERE NOT MENTIONED IN THE NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should have been granted in this student-on-student assault case. The assault arose abruptly and and lasted 20 to 30 seconds and was not foreseeable. In addition, the theories of liability not mentioned in the notice of claim, but asserted in the pleadings, should have been dismissed:

… [T]he School District established, prima facie, that the alleged assault by the fellow student was an unforeseeable act and that the School District had no actual or constructive notice of prior conduct of the students involved here which was similar to the subject incident … . Moreover, the School District established, prima facie, that "the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries" … . …

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" … . However, if the defendant is a municipality, the plaintiff may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that "substantially alter" the nature of the claim or add a new theory of liability … . … By submitting evidence that the notice of claim did not mention … causes of action and legal theories, the School District established its … entitlement to judgment as a matter of law dismissing all of the causes of action, other than negligent supervision, that were asserted in the complaint and bill of particulars against the School District … . Meyer v Magalios, 2019 NY Slip Op 02336, Second Dept 3-27-19

UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED 50-h HEARING REQUIRED DISMISSAL OF THE COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' failure to comply with defendants' demand for a 50-h hearing required dismissal of the complaint. Defendants were sued in their capacities as municipal employees acting within the scope of their employment:

We agree with defendants that Supreme Court erred in denying the motion. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" … . Here, plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action … . "Although compliance with General Municipal Law § 50-h (1) may be excused in exceptional circumstances' "… , there were no such circumstances here. Kluczynski v Zwack, 2019 NY Slip Op 02236, Fourth Dept 3-22-19

RELATED PUBLIC AUTHORITIES PROPERLY REQUIRED TO FILE SEPARATE REPORTS WITH THE NYS AUTHORITIES BUDGET OFFICE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the NYS Authorities Budget Office (ABO) properly required the Madison County Industrial Development Agency (MCIDA) and the related Madison Grant Facilitation Corporation (MGFC) to file separate reports pursuant to the Public Authorities Accountability Act (PAAA) and the Pbblic Authorities Law. MCIDA had filed a single consolidated report and brought an Article 78 proceeding arguing the ABO's determination that separate reports must be filed was arbitrary and capricious:

The ABO's narrow record-keeping determination was not contrary to law. The Public Authorities Law plainly provides that a local development corporation such as MGFC, which is "affiliated" with a local IDA, is also a local authority subject to the PAAA and, as such, has reporting obligations (Public Authorities Law § 2 [2] [d]). Regardless of whether MGFC is also a subsidiary, it is clearly an "affiliate" of MCIDA within the meaning of the statute … . The PAAA does not contain a reporting exception for subsidiaries of local authorities, and petitioners have not identified any other statute or regulation that excused MGFC from its obligation to separately report. Matter of Madison County Indus. Dev. Agency v State of New York Auths. Budget Off., 2019 NY Slip Op 02150, CtApp 3-21-19

PRIOR PUBLIC USE DOCTRINE PRECLUDED CONDEMNATION OF LAND ALREADY SUBJECT TO A PUBLIC USE BECAUSE THE PROPOSED USE WOULD INTERFERE WITH THE EXISTING PUBLIC USE (SECOND DEPT).

The Second Department, reversing the condemnation of a parcel of land owned by the city, determined that the proposed new use of the land would interfere with its current public use as a bus depot, a violation of the prior public use doctrine:

… [T]he proposed condemnation is prohibited under the doctrine of prior public use. Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue … . However, land already devoted to a public use may be condemned without legislative authority " where the new use would not materially interfere with the initial use'" … . The Agency does not contest that the subject parcel is devoted to a public use, or that there exists no legislative authority for the proposed condemnation … . Thus, the subject parcel may not be condemned unless the new use would not materially interfere with the existing public use … .

The Agency's proposed condemnation of the subject parcel for the purpose of returning the parcel to productive use in furtherance of urban renewal would materially interfere with its existing public use as a bus depot. … Accordingly, the Agency's determination to condemn the subject parcel must be rejected. Matter of City of New York v Yonkers Indus. Dev. Agency, 2019 NY Slip Op 02087, Second Dept 3-20-19

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO THE CITY IN THIS SIDEWALK SLIP AND FALL CASE, NO SUCH MOTION WAS BEFORE THE COURT (SECOND DEPT).

The Second Department determined that Supreme Court should not have searched the record and awarded summary judgment to the city in this sidewalk slip and fall case. No such motion was before the court:

… [T]he Supreme Court should not have, in effect, searched the record and awarded summary judgment to the City, which did not move for such relief. "A court may search the record and grant summary judgment in favor

of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" … . Since no party made any motion with respect to the plaintiff's direct cause of action against the City contained in the amended complaint, the court should not have granted relief with respect to that cause of action … . Cerbone v Lauriano, 2019 NY Slip Op 02056, Second Dept 3-20-29

ELDERLY PLAINTIFF'S HEALTH PROBLEMS EXCUSED HER FAILURE TO APPEAR FOR A 50-h HEARING, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the elderly plaintiff's complaint, based upon a fall at defendant's city hospital, should not have been dismissed because plaintiff failed to appear at an oral examination pursuant to General Municipal Law 50-h. Her failure to appear was due to medical problems and should have been excused:

"Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" … . The failure to submit to such an examination, however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity … .

Under the circumstances of this case, the plaintiff's failure to appear for the examination pursuant to General Municipal Law § 50-h should have been excused in light of the nature and extent of the plaintiff's medical and mental conditions, as documented by her doctors' letters … . Riabaia v New York City Health & Hosps. Corp., 2019 NY Slip Op 02136, Second Dept 3-20-19

NYC CHARTER DID NOT GIVE THE PUBLIC ADVOCATE AUTHORITY FOR A SUMMARY INQUIRY INTO THE ADEQUACY OF SOFTWARE USED TO TRACK STUDENTS WITH INDIVIDUALIZED EDUCATION PROGRAMS, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, over a full-fledged, two-justice, dissenting opinion, reversing Supreme Court, determined that the NYC Charter did give the Public Advocate the power to

conduct a summary inquiry into the adequacy of computer software designed to keep track of students with Individualized Education Programs (IEP's) and to seek appropriate funding from Medicaid:

We agree with [Matter of Green v Giuliani (187 Misc 2d at 138)] that [NYC Charter] section 1109's reach includes not only corruption, but "all forms of official misconduct."… Arguably, in light of Green, section 1109's reach continues to evolve over time to include areas not limited to corruption. The question that remains is whether the section 1109 phrase "any alleged violation or neglect of duty" should be broadened so as to bring within its reach all forms of conduct, including acts that amount to administrative inefficiency, deficiency, or mismanagement. We believe it should not, mindful of the admonition uttered over a century ago: "It would be intolerable if . . . all the heads of departments of the city could be haled into court and cross-examined by disaffected taxpayers, or even by some other hostile official, with no result except publicity. It is much better that proceedings of this kind should be confined to the legitimate purposes of the law" … .

Section 1109 is set forth in Chapter 49 of the Charter, entitled "Officers and Employees." Neither that chapter, nor the Charter itself, defines "violation" or "neglect of duty." In the absence of a clear definition, either by statute or case law, we are guided by dictionary definitions because they are "useful guideposts" in determining the meaning of a statutory word or phrase … . * * *

… .[W]e find no legal basis to expand section 1109's reach beyond allegations that clearly fall within the plain meaning of a "violation" or a "neglect of duty…"… . … [P]etitioner's allegations of administrative mismanagement, namely, the inefficient governmental administration of a computer software … are not sufficient bases to support the instant section 1109 judicial summary inquiry application. Matter of James v Fariña, 2019 NY Slip Op 01729, First Dept 3-12-19

LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION, SERVED THREE YEARS AFTER THE DEVELOPMENTALLY DELAYED CHILD'S BIRTH, SHOULD HAVE BEEN DEEMED TIMELY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determent the late notice of claim in this medical malpractice action should have been deemed timely served. The notice of claim was served in 2012 and the plaintiff-child was born in 2009. It became apparent in 2010 that the child was unable to bear weight on her legs and her development was delayed:

The record here indicates that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose … .

The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90-day period expired. When the child's injuries became apparent, the plaintiff served a late notice of claim without leave of court. Although this Court has ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court … , in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50-h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explore … . Feduniak v New York City Health & Hosps. Corp. (Queens Hosp. Center), 2019 NY Slip Op 01564, Second Dept 3-6-19

THE EXCLUSIONARY LANGUAGE IN THE NYC ADMINISTRATIVE CODE PROVISION WHICH CRIMINALIZES POSSESSION OF AMMUNITION IS AN EXCEPTION THAT MUST BE AFFIRMATIVELY PLED, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction of unlawful possession of ammunition pursuant to New York City Administrative Code § 10-131(i)(3), determined that the exclusionary language in the code provision is an exception which must be affirmatively pled in the accusatory instrument:

We find that the relevant language in section 10-131(i)(3), which makes it a crime to possess pistol or revolver ammunition unless authorized to possess a pistol or revolver, constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York. As the People failed to do so, defendant's conviction under section 10-131(i)(3) must be vacated and that count dismissed.

In order to determine whether a statute defining a crime contains "an exception that must be affirmatively pleaded as an element in the accusatory instrument" or "a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial," one must look to the language of the statute itself … . Indeed, "[i]f the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute," it is termed a proviso and "generally is a

matter for the defendant to raise in defense" … . "Legislative intent to create an exception [whose existence must be negated by the prosecution] has generally been found when the language of exclusion is contained entirely within" the statute itself … . In contrast, where the language of the exclusion depends on a source outside the statute, courts will infer that the language functions as a proviso … . People v Tatis, 2019 NY Slip Op 01507, First Dept 2-28-19

APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE ABSENCE OF A REASONABLE EXCUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim should have been granted. Petitioner alleged he was injured by the malfunction of weightlifting equipment at a city recreation center:

Assuming that the law firm's clerical error was not a reasonable excuse, " [t]he absence of a reasonable excuse is not, standing alone, fatal to the application,'" where the municipal respondent had actual notice of the essential facts constituting the claim and was not prejudiced by the delay … . Here, petitioner's affidavit stating that he signed an incident report prepared by respondent's employee shortly after the accident, and that the weightlifting equipment was repaired a few months later, demonstrate prima facie that respondent received actual notice of the pertinent facts underlying his claim, if not the negligence claim itself, which supports a "plausible argument" that the City will not be substantially prejudiced in investigating and defending the claim … . Matter of Mercedes v City of New York, 2019 NY Slip Op 01487, First Dept 2-28-19

ZONING BOARD OF APPEALS (ZBA) HAS EXCLUSIVELY APPELLATE JURISDICTION AND HAS NO AUTHORITY TO DECIDE A MATTER THAT HAS NOT FIRST BEEN THE SUBJECT OF A DECISION BY AN ADMINISTRATIVE OFFICIAL, ALTHOUGH THE OPEN MEETINGS LAW WAS VIOLATED, THE VIOLATION WAS NOT A BASIS FOR ANNULMENT OF THE ZBA DETERMINATION (SECOND DEPT).

The Second Department determined (1) the zoning board of appeals (ZBA) does not have jurisdiction absent a determination of an administrative official which is appealed; and (2) although the Open Meetings Law was violated, the violation did not warrant annulment of the ZBA's determination on that ground. The petitioner had sought an interpretation of the local zoning law to determine whether a particular use of the land was permitted. Because no administrative official had ruled on that issue, the ZBA did not have authority to make a determination and the determination was properly annulled on that ground:

Absent a determination of the Building Inspector or other administrative official charged with the enforcement of the local zoning law, the Zoning Board of Appeals was without jurisdiction to consider Chestnut Ridge Associates' application for an interpretation of the local zoning law to determine if the plaintiffs/petitioners' landscaping business on certain premises was a permitted use in a laboratory office-zoned district … . Accordingly, we agree with the Supreme Court's annulment of the determination of the Zoning Board of Appeals on that basis. …

… [T]he record supports a finding that the Zoning Board of Appeals violated the Open Meetings Law with regard to a workshop meeting held on January 17, 2012, by failing to give proper notice of the meeting … . However, the plaintiffs/petitioners failed to establish good cause to annul the Board's determination on that ground, as the improperly noticed meeting was open to the public and the determination at issue was adopted at a publicized, public meeting, after a series of public meetings with regard thereto had previously been held … . Accordingly, the Supreme Court should not have annulled the determination of the Zoning Board of Appeals on the ground that the Open Meetings Law had been violated, and should not have awarded the plaintiffs/petitioners costs and attorneys' fees pursuant to Public Officers Law § 107(2) based on that violation … . Chestnut Ridge Assoc., LLC v 30 Sephar Lane, Inc., 2019 NY Slip Op 01388, Second Dept 2-27-19

A TAX FORECLOSURE SALE OF THE SERVIENT ESTATE SUBSEQUENT TO THE PLAINTIFFS' PURCHASE OF TITLE INSURANCE WAS NOT A TITLE DEFECT WHICH ENTITLED THE TITLE INSURANCE COMPANY, AS A MATTER OF LAW, TO DENY PLAINTIFFS' CLAIM, THE CLAIM STEMMED FROM THE CONSTRUCTION OF A FENCE ACROSS AN EASEMENT ON THE SERVIENT ESTATE WHICH WAS THE ONLY ACCESS TO PLAINTIFFS' PROPERTY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant title insurance company should not have been granted summary judgment supporting its denial of plaintiffs' title insurance claim. A fence had been constructed across an easement on the servient estate which blocked plaintiffs' access to their property. Years after the title insurance was purchased and before the fence was constructed, the servient was the subject of a tax foreclosure and sale. The Second Department held that the tax sale was not a title defect which justified, as a matter of law, denial of the claim by the title insurance company:

… [P]laintiffs purchased a policy of title insurance from the defendant Old Republic National Title Insurance Company (hereinafter Old Republic), dated January 17, 2007. The policy specifically insured against losses or damages sustained as a result of the plaintiffs' "[l]ack of a right of access to and from the land." The policy excluded from coverage "[d]efects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to Date of Policy." …

Contrary to Old Republic's contention, if the plaintiffs acquired a valid easement appurtenant from [plaintiffs' predecessors in title] in 2007, such easement would not have been extinguished by the 2013 tax sale … . Thus, Old Republic's contention that the 2013 tax sale constituted a defect, lien, encumbrance, adverse claim or other matter "attaching or created subsequent to Date of Policy" within the meaning of the relevant policy exclusion is without merit, and cannot serve to establish Old Republic's prima facie entitlement to judgment as a matter of law. Buroker v Phillips, 2019 NY Slip Op 01386, Second Dept 2-27-19

CITY, AS THE OWNER OF THE MARINA WITH RIPARIAN RIGHTS, WAS ENTITLED TO EJECT DEFENDANTS WHO WERE USING AN INOPERABLE VESSEL AS A HOUSEBOAT DOCKED AT THE MARINA (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the city should have been granted summary judgment in this ejectment proceeding. The defendants were using an inoperable vessel as a houseboat docked at a city marina:

To demonstrate entitlement to judgment on a cause of action for ejectment, a plaintiff must establish "(1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate" … . "The owner of uplands on a tidal, navigable waterway possesses riparian rights" which include the right to build a pier, dock, or wharf … .

Here, the City established its prima facie entitlement to judgment as a matter of law with respect to its first cause of action, for ejectment, by demonstrating that it is the owner of the subject slip … , with a present or immediate right to possession thereof … , and that the defendants are in possession of that property. City of New York v Anton, 2019 NY Slip Op 01389, Second Dept 2-27-19

QUESTION OF FACT WHETHER THE RECKLESS STANDARD APPLIED IN THIS PEDESTRIAN-POLICE CAR ACCIDENT CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether the reckless standard applied in this pedestrian-police car traffic accident case. The court noted that the governmental function immunity doctrine does not apply to this scenario:

The governmental function immunity doctrine does not apply in this case where plaintiff pedestrian was injured when she was struck by a police vehicle that was allegedly pursuing a vehicle that had committed a traffic infraction … . Instead, where a plaintiff alleges that a municipality and/or its employees were negligent in the ownership or operation of an authorized emergency vehicle while engaged in one of the activities protected by

Vehicle and Traffic Law § 1104(b), the "reckless disregard" standard set forth in Vehicle and Traffic Law § 1104(e) applies … .

Here, a factual issue exists as to whether defendants were engaged in a protected activity under Vehicle and Traffic Law § 1104(b), namely, proceeding past a steady red signal (see Vehicle and Traffic Law § 1104[b][2]), while pursuing a vehicle for a traffic violation so as to apply the reckless standard of care as opposed to ordinary negligence principles … . Santana v City of New York, 2019 NY Slip Op 01348, First Dept 2-26-19

POLICE DOG RELEASED TO TRACK SUSPECTS WENT OUT OF THE HANDLER'S SIGHT AND BIT PLAINTIFF, 42 USC 1983, NEGLIGENCE AND BATTERY ACTIONS SURVIVED SUMMARY JUDGMENT, QUESTION OF FACT WHETHER POLICE OFFICER ENTITLED TO QUALIFIED IMMUNITY, CITY ENTITLED TO SUMMARY JUDGMENT PURSUANT TO THE PROFESSIONAL JUDGMENT RULE (THIRD DEPT).

The Third Department determined several causes of action property survived summary judgment in this case where a police officer (Ashe) released his K-9 partner (a trained police dog named Elza) which bit plaintiff as he was walking to his car. After Elza was released she ran out of Ashe's sight. Ashe was attempting to use Elza to track suspects who had just robbed a gas station. The Third Department held, inter aliia, that the 42 USC 1983 action properly survived summary judgment, Ashe was not entitled to qualified immunity as a matter of law, the battery action properly survived summary judgment, and the city was entitled to summary judgment on the common-law negligence action based on the professional judgment rule:

There is at least a question of fact as to whether a reasonable police officer, aware that the dog could not differentiate a suspect from an innocent bystander, would allow the dog to search off leash and out of sight of the handler. Moreover, the record contains evidence from which a jury could find that the City "fail[ed] to train its employees in a relevant respect [that] evidences a deliberate indifference to the rights of its inhabitants[, which] can . . . be properly thought of as a city policy or custom that is actionable under [42 USC] § 1983" … . …

… [P]laintiffs' expert … opined in his affidavit that Ashe failed to comply with standard police practice, including keeping the K-9 within visual range and providing audible warnings. Based on the foregoing, there are triable issues of fact that preclude summary judgment on the issue of Ashe's entitlement to qualified immunity … . …

… [T]he City was entitled to dismissal of the common-law negligence claims based on the professional judgment rule. " That rule 'insulates a municipality from liability for its employees' performance of their duties where the . . . conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions' … . Relf v City of Troy, 2019 NY Slip Op 01287, Third Dept 2-21-19

VILLAGE CODE PROVISION WHICH REQUIRES WRITTEN NOTICE OF A SIDEWALK DEFECT BEFORE MUNICIPAL LIABILITY CAN BE IMPOSED APPLIES TO A STAIRWAY FROM A PUBLIC ROAD TO A MUNICIPAL PARKING LOT, STAIRWAY SLIP AND FALL ACTION PROPERLY DISMISSED (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined that the village code provision which requires written notice of a sidewalk defect before the village can be held liable applies to a stairway connecting a public road to a municipal parking lot. Because plaintiff did not plead or prove written notice of a stairway defect, plaintiff's slip and fall action was properly dismissed:

In Woodson v City of New York, this Court determined that a stairway may be classified as a sidewalk for purposes of a prior written notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve" (93 NY2d 936, 937-938 [1999] …). * * *

The courts below correctly applied Woodson in holding that the stairway at issue "functionally fulfills the same purpose" as a standard sidewalk, and therefore plaintiff was required to show that the Village received prior written notice of the allegedly defective condition … . Hinton v Village of Pulaski, 2019 NY Slip Op 01261, CtApp 2-21-19

LOCAL LAW WHICH HAD BEEN DECLARED VOID COULD NOT BE THE BASIS FOR DETERMINING WHETHER PETITIONER'S USE OF THE LAND FOR MINING WAS A VALID PREEXISTING NONCONFORMING USE (THIRD DEPT).

The Third Department determined that a local law which had been declared void could not be the basis for determining whether the petitioner's use of the property for mining was a valid preexisting nonconforming

use. Once the local law had been declared void the prior law went back into effect. That law was not changed until 2015. So the 2015 law is the proper basis for determining whether the property is subject to a valid preexisting nonconforming use:

Central to petitioner's contention is the general premise that the judicial nullification and voidance of an ordinance revives, by operation of law, the prior ordinance in effect before the null and void law was adopted … . Even more fundamental, a voided law can have no lasting effect … . To that end, "a void thing is no thing. It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. In the eye of the law it is merely a blank, the same as if the types had not reached the paper"… . Therefore, inasmuch as an annulled law can have no lingering effect, petitioner is entitled to have its nonconforming use rights evaluated as of the effective date of the 2015 ordinance, unless, of course, that ordinance is also annulled prior to any such determination … . To hold otherwise would not only give the annulled Local Law No. 2 complete effect, i.e., render mining a nonconforming use in petitioner's zoning district as of the date of the illegally-enacted law, but it would incentivize municipalities to rush to enact local laws with any number of infirmities, including SEQRA violations. Matter of Cobleskill Stone Prods., Inc. v Town of Schoharie, 2019 NY Slip Op 01272, Third Dept 2-21-19

LATE NOTICE OF CLAIM SHOULD HAVE BEEN DEEMED TIMELY SERVED, MEDICAL RECORDS PROVIDED TIMELY NOTICE OF THE NATURE OF THE MEDICAL MALPRACTICE CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's motion to deem a late notice of claim timely served should have been granted. The attempt to serve the notice of claim was three years late. Plaintiff, who was born in 2010, brought a medical malpractice action alleging the city hospital was negligent by sending plaintiff's mother home when she presented at the emergency room complaining of contractions. The Second Department held that the medical records provided the defendant with timely knowledge of the nature of the claim:

The medical records demonstrated that the hospital failed to admit the plaintiff's mother to the hospital when she presented to the emergency room on November 23, 2010, notwithstanding an order in the emergency room record from a physician that the mother "was to be admitted secondary to non-reassuring fetal heart tracing." Inasmuch as the medical records, upon independent review, showed that the mother was not admitted to the hospital on November 23, 2010, despite a physician's order, and that two days later, the plaintiff was delivered

one hour after the mother arrived at the hospital and only after a fetal heart monitor alarm sounded four times, they provided the hospital with actual knowledge of the essential facts constituting the claim … . …

… [T]the plaintiff made an initial showing that the hospital would not suffer any prejudice by the delay in serving a notice of claim, and the hospital failed to rebut the showing with particularized indicia of prejudice… . Further, the absence of prejudice was demonstrated by virtue of the fact that the hospital had possessed timely actual knowledge of the essential facts constituting the claim … . J.H. v New York City Health & Hosps. Corp., 2019 NY Slip Op 01203, Second Dept 2-20-19

FOOTAGE FROM A POLICE OFFICER'S BODY-WORN CAMERA IS NOT A PERSONNEL RECORD AND THEREFORE IS NOT PROTECTED FROM DISCLOSURE BY CIVIL RIGHTS LAW 50-a (FIRST DEPT).

The First Department determined that footage from a police officer's body-worn camera was not a "personnel record" protected from disclosure by Civil Rights Law 50-a:

While we recognize petitioner's valid concerns about invasion of privacy and threats to the safety of police officers, we are tasked with considering the record's general "nature and use," and not solely whether it may be contemplated for use in a performance evaluation. Otherwise, that could sweep into the purview of § 50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by § 50-a.

We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a … . The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building.

Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with any pending disciplinary charges or promotional processes. New York Civil Liberties Union v New York City Police Department, __NY3d__, 2018 NY Slip Op 8423 [2018], which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and

promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability. Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v De Blasio, 2019 NY Slip Op 01170, First Dept 2-19-19

IN THESE MARITIME LAW ACTIONS STEMMING FROM A FATAL BOATING ACCIDENT, THE TOWN DID NOT DEMONSTRATE ITS ENTITLEMENT TO SUMMARY JUDGMENT, THE COMPLAINTS ALLEGED NEGLIGENT PLACEMENT OF BUOYS (SECOND DEPT).

The Second Department, reversing Supreme Court in this boat-accident case, determined that the town was not entitled to summary judgment. Four boat passengers were killed and others were injured. The complaints alleged the town was negligent in the placement of buoys:

Maritime law, which is applicable in this case, recognizes a general theory of liability for negligence… . "[N]egligent conduct on the navigable waters that causes loss to another constitutes a maritime tort"… . Once the Town set a channel through the use of navigational aids, it had a duty to maintain those navigational aids in a reasonable and prudent manner … .

Upon applying maritime law, we conclude that the Town failed to establish its prima facie entitlement to judgment as a matter of law. Although the Town submitted evidence suggesting that the accident may have been at least partly caused by negligence on the part of the boat's operator, the Town failed to meet its prima facie burden of demonstrating the lack of any triable issues of fact regarding the Town's comparative fault based on its placement and maintenance of the buoys … . Sugamele v Town of Hempstead, 2019 NY Slip Op 01118, Second Dept 2-13-19

PERSONAL PROPERTY LOCATED ON REAL PROPERTY SUBJECT TO A TAX FORECLOSURE WAS NOT ABANDONED BY THE OWNER OF THE PERSONAL PROPERTY (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, reversing Supreme Court, determined respondent's application to vacate "that portion of a judgment of [tax} foreclosure that deemed respondent's personal property located at a foreclosed property to be abandoned to petitioner" should have been vacated. The

petitioner-city foreclosed on real property which was not owned by the respondent. The respondent owned hundreds of auto parts which were on the foreclosed property:

… [W]e agree with respondent that the court lacked jurisdiction to dispose of personal property. Supreme Court may exercise in rem jurisdiction over real property in a proceeding to foreclose a tax lien (see RPTL 1120 et seq.). A proceeding of that kind "produces a judgment binding only on those who have been named as parties and duly notified—the usual understanding of what due process requires"… . " [T]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title' "… . Here, petitioner did not provide notice to respondent with respect to respondent's personal property and could not have done so. The notice procedures in the statute relate to real property only, not personal property (see RPTL 1122-1125). Moreover, RPTL article 11 does not contain a mechanism by which the tax district may obtain a party's personal property upon that party's default. In the event of a default, the tax district is awarded "possession of any parcel of real property described in the petition of foreclosure" and is entitled to a deed conveying to the tax district full and complete title to the parcel (RPTL 1136 [3] [emphasis added]). Upon the execution of the deed, any person with a right or interest "in or upon such parcel shall be barred and forever foreclosed" of that right or interest (id. [emphasis added]).

Nothing in RPTL article 11 confers upon Supreme Court in rem jurisdiction over personal property. Matter of The Foreclosure of Tax Liens By Proceeding In Rem Pursuant To Art. 11 of The Real Prop. Tax Law By The City of Utica (Suprunchik), 2019 NY Slip Op 01020, Fourth Dept 2-8-19

COLLATERAL ESTOPPEL CONTROLLED THIS ARBITRATION PROCEEDING TO DETERMINE HEALTH BENEFITS FOR RETIRED FIREFIGHTERS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined that collateral estoppel controlled this proceeding concerning firefighter health benefits as provided for in the collective bargaining agreement (CBA). The issue had been resolved in prior arbitration proceedings for firefighters who had retired before 2010. The instant proceeding was brought on behalf of firefighters who have or will retire after 2010:

Arbitration awards are entitled to collateral estoppel effect and will bar a party from relitigating a material issue or claim resolved in the arbitration proceeding after a full and fair opportunity to litigate … . It is undisputed that the arbitration award, rendered after a formal evidentiary hearing at which the parties were represented by

counsel, afforded defendant a full and fair opportunity to litigate the issues therein. Accordingly, the only question is whether plaintiffs, as the parties seeking to invoke collateral estoppel, satisfied their burden of "show[ing] the identity of the issues" between those resolved in the arbitration awards and those in play here … . * * *

The 2010 and 2012 arbitration awards were never vacated — indeed, the 2012 award was confirmed — and are binding. Inasmuch as plaintiffs retired during the period that the reimbursement was provided to retirees under CBAs containing section 27.1, the finding in those awards "that [defendant] is obligated to reimburse retired firefighters for these payments under the CBA is dispositive of the claims raised here" … . Holloway v City of Albany, 2019 NY Slip Op 00940, Third Dept 2-7-19

ALTHOUGH THE CITY OWED A SPECIAL DUTY TO A STUDENT WHO WAS STRUCK BY A CAR ATTEMPTING TO CROSS THE ROAD, THAT DUTY WAS FULFILLED WHEN THE CROSSING GUARD TOLD THE STUDENT TO WALK TO THE NEXT AVAILABLE CROSSWALK, THE STUDENT, HOWEVER, THEN ATTEMPTED TO CROSS WHERE THERE WAS NO CROSSWALK (SECOND DEPT).

The Second Department determined the city's motion for summary judgment in this traffic accident case involving a student who had just left school was properly granted. The city owed a special duty to the student-plaintiff. A school crossing guard had stopped the plaintiff from crossing the street where there was no crosswalk and told her to walk to the next crosswalk. The plaintiff, however, attempted to cross where there was no crosswalk and was hit by a car. Any alleged negligent supervision was not the proximate cause of the student's injury:

… [A] special duty existed between the City defendants' crossing guard and the infant plaintiff … . Nevertheless, given that the crossing guard, inter alia, told the infant plaintiff to not cross 7th Avenue at an unsafe location and pointed the infant plaintiff to the crosswalk at 19th Street, the City defendants established, prima facie, that its employees did not breach their duty to the infant plaintiff. Moreover, the City defendants, while under a duty to adequately supervise the students in their charge, are not insurers of their safety … . The evidence submitted by the City defendants established, prima facie, that the infant plaintiff crossed 7th Avenue in the middle of the block where there was no intersection or crosswalk, and no traffic device affording her a right-of-way. Additionally, the infant plaintiff admitted that she attempted to cross the road "fast," and that she did not look

for oncoming traffic. Where an accident occurs so quickly that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury … . K.A. v City of New York, 2019 NY Slip Op 00861, Second Dept 2-6-19

STATEMENTS MADE BY THE COUNTY EXECUTIVE CONCERNING HER DECISION TO FIRE PLAINTIFF, THE EXECUTIVE DIRECTOR OF THE MONROE COMMUNITY HOSPITAL, WERE EITHER ABSOLUTELY OR QUALIFIEDLY PRIVILEGED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined statements made to the press by the county executive (Brooks) concerning her decision to terminate plaintiff (the executive director of the Monroe Community Hospital (MCH)) were either absolutely or qualifiedly privileged:

The absolute privilege defense affords complete immunity from liability for defamation to " an official [who] is a principal executive of State or local government' . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties" … "The first prong of that test . . . [requires an examination of] the personal position or status of the speaker," and "the second prong . . . requires an examination of the subject matter of the statement and the forum in which it is made in the light of the speaker's public duties" … . We conclude that absolute privilege applies here because Brooks was the Monroe County Executive (see id.) and her statements with respect to plaintiff's termination concerned matters involving her official duties. Furthermore, because the investigation and the underlying actions of plaintiff became a matter of public attention and controversy, Brooks's form of communication, i.e., statements to the press, was warranted … .

Even assuming, arguendo, that the statements were not covered by absolute privilege, we conclude that the defense of qualified privilege applies. "Generally, a statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned" … . Here, defendants satisfied their initial burden by establishing that Brooks made the relevant statements in her role as the Monroe County Executive, thereby discharging her responsibility to keep the public informed regarding a sensitive issue that had obtained extensive media attention … , and thus "the burden shifted to plaintiff[] to raise a triable issue of fact whether the statements were motivated solely by malice" … . Spring v County of Monroe, 2019 NY Slip Op 00747, Fourth Dept 2-1-19

STATUTORY PRESUMPTION THAT THE PAINT CONTAINED LEAD DID NOT APPLY BECAUSE THERE WAS NO EVIDENCE THE INTERIOR OF THE BUILDING WAS PAINTED PRIOR TO JANUARY 1, 1960; HOWEVER QUESTIONS OF FACT WERE RAISED ABOUT THE PRESENCE OF LEAD PAINT AND THE CONNECTION BETWEEN THE PAINT AND INFANT PLAINTIFF'S LEAD POISONING, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court, determined that questions of fact were raised about the landlord's (New York City Housing Authority's, NYCHA's) responsibility for the lead poisoning of infant plaintiff (A.L.). Successive blood tests revealed increasing lead levels as the child aged, and a decrease after the apartment was repainted. The first issue the court dealt with was whether Local Law 1, which creates a presumption that the paint in the apartment contains more than .5 percent lead for buildings "erected" prior to January 1, 1960, applied. The certificate of occupancy for the building was issued in March, 1961, but there was evidence the building was under construction in 1959. "Erected" was (apparently) interpreted to mean when the apartment was painted, so the statutory presumption did not apply:

Here, A.L.'s elevated blood lead level suggests … a hazardous condition may have existed in the apartment during the relevant period. While there are other sources of lead poisoning, housing is a prime source … The circumstantial evidence of a hazardous lead-based paint condition is also supported by an affirmation by Dr. Douglas B. Savino and an affidavit by lead paint expert William Savarese. Dr. Savino concluded that the apartment contained a hazardous level of lead-based paint, given the "chronology of the infant plaintiff's blood lead levels," which was "environmentally and temporally related to the infant plaintiff's residence." He noted that A.L.'s blood levels increased over time until he was diagnosed with 16 ug/dl on March 19, 2003, coinciding with the repainting of the apartment on March 5-6, 2003. Dr. Savino attributed the lead spike in A.L.'s blood to A.L. ingesting an excessive amount of lead dust. Dr. Savino further pointed out that A.L.'s blood lead levels declined gradually after the 2003 apartment repair and the 2004 removal of the chipped and peeling interior doors. William Savarese echoed Dr. Savino's statements and conclusions. A.L. v New York City Hous. Auth., 2019 NY Slip Op 00702, First Dept 1-31-19

CITY'S POTENTIAL LIABILITY FOR THE ACTIONS OF A CITY BUS DRIVER WAS BASED ON RESPONDEAT SUPERIOR, THEREFORE A NEGLIGENT HIRING AND RETENTION ACTION WAS NOT VIABLE AND THE DRIVER'S PERSONNEL FILE WAS NOT DISCOVERABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the city's motion to vacate the order compelling disclosure of the city bus driver's personnel file should have been granted. Plaintiff alleged she was injured when she fell on a city bus. The city acknowledged that the driver was acting within the scope of his employment when the accident occurred. Therefore the city's potential liability was based upon respondeat superior, and a negligent hiring and retention action was not viable. Therefore the personnel records were not discoverable:

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention"… . In light of the defendants' formal concession that the bus driver was acting within the scope of his employment when the accident occurred, the personnel records of the bus driver are not discoverable… . Furthermore, the plaintiff failed to show any other basis to justify granting her request for the personnel records, as "any prior acts of carelessness or incompetence of the defendant's employee would not be admissible at trial" … . Therefore, the additional discovery sought by the plaintiff is not relevant or reasonably calculated to lead to evidence relevant to the issue of the driver's alleged negligence … . Trotman v New York City Tr. Auth., 2019 NY Slip Op 00631, Second Dept 1-30-19

IN THIS HYBRID ARTICLE 78-DECLARATORY JUDGMENT ACTION, THE PORTIONS OF THE PETITION WHICH SOUGHT A DECLARATION THAT AMENDMENTS TO THE ZONING CODE ARE ILLEGAL AND RELATED DAMAGES SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, IN THE ABSENCE OF A SPECIFIC DEMAND FOR DISMISSAL (SECOND DEPT).

The Second Department determined that the zoning code provisions enacted by the village board of trustees, which concerned the maximum floor space and coverage on residential lots, were consistent with the village's comprehensive plan and properly enacted. The Second Department further found that the requirements of the State Environmental Quality Review Act (SEQRA) were met. However, the portions of the petition which sought declaratory relief and related damages should not have been summarily dismissed along with the portions which sought Article 78 relief because no demand for dismissal of the declaratory relief portions had been made:

… [I]n the absence of a dispositive motion addressed to the fifth, sixth, seventh, and eighth causes of action, which sought declaratory relief and damages not in the nature of CPLR article 78 relief, the Supreme Court should not have, in effect, dismissed those causes of action. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" … . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" … . Matter of Bonacker Prop., LLC v Village of E. Hampton Bd. of Trustees, 2019 NY Slip Op 00432, Second Dept 1-23-19

ALTHOUGH THERE WAS PROBABLE CAUSE TO ARREST PLAINTIFF ON A SUBWAY FOR A TRANSIT VIOLATION, THE CONCURRENCE CALLED INTO QUESTION THE 'TRANSIT DATABASE' WHICH PROBABLY INCLUDES PERSONS WHOSE CRIMINAL CHARGES WERE SEALED AND DISMISSED, THE DATABASE DOES NOT PROVIDE A DISTINCT BASIS FOR ARREST (FIRST DEPT).

The First Department, over a concurrence, determined that there was probable cause to arrest the plaintiff based on the transit offense of passing between two subway cars on a moving train. Because there was probable cause, the majority did not reach the issue of the fairness or constitutionality of a so-called "transit database" which encompasses so-called "transit recidivists." The concurrence made it clear that plaintiff's designation as a "transit recidivist" did not provide the police with a separate basis to arrest plaintiff:

From the concurrence:

It must be said that plaintiff's designation as a transit recidivist did not give the officers a separate basis to arrest plaintiff … . The definition of "transit recidivist" at the time of plaintiff's arrest encompassed not only persons convicted of crimes, but those with prior arrests in the transit system or prior felony arrests within New York City … . This overbroad classification subverted the presumption of innocence and likely violated state sealing laws. …

… [T]he database was likely contaminated by sealed arrests and summons histories and, as such, ran afoul of provisions of the Criminal Procedure Law that require that the records of any criminal prosecution terminating

in a person's favor or by way of noncriminal conviction be sealed … Statistics … indicate that in 2016 alone, over 50% of all criminal cases arraigned in New York City Criminal Court were terminated in favor of the accused, and accordingly entitled to sealing … . From 2007 through 2015 an average of 23% of all criminal summonses were dismissed for facial insufficiency … . Unless otherwise permitted by law, no one, including a private or public agency, can access a sealed record, except with a court order upon a showing that justice so requires.

The presence of arrest and summons data in the database also undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed.

…[T]his is not the first NYPD database to have included unlawfully broad data. NYPD previously recorded the name of every individual stopped and frisked as recently as 2010, until forced by a federal lawsuit to discontinue the practice.

Finally, there is little doubt that the "transit recidivist" database had a disproportionately negative effect on black and Hispanic communities, perpetuating this City's history of overpolicing communities of color. Vargas v City of New York, 2019 NY Slip Op 00370, First Dept 1-22-19

QUESTION OF FACT WHETHER CITY HAD PRIOR WRITTEN NOTICE OF THE DEFECTS IN THE SIDEWALK AND RAILING WHERE PLAINTIFF'S DECEDENT FELL INTO A GORGE, CITY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (THIRD DEPT).

The Third Department determined the city's motion for summary judgment in this slip and fall case was properly denied. Plaintiff's decedent fell from a paved trail into a gorge. There were questions of fact about whether the city had prior written notice of the broken sidewalk and railing:

… [P]laintiff produced a police investigation report concluding that decedent had fallen along a part of the trail with multiple defects, including broken pavement, a "bent/unsecured hand railing . . . and huge gap spaces in sidewalk edge adjacent to [the] cliff side edge." Plaintiff also demonstrated that, by the time of the fall, the Department of Public Works had received numerous written complaints about the condition of the trail. General complaints and the subsequent efforts of department personnel to evaluate the condition of the trail did not "obviate the need for prior written notice" of the particular defects implicated in decedent's fall … . That said,

one of the written complaints was a January 2012 email forwarded to an Assistant Superintendent of Public Works that was, according to his testimony, "probably" shared with the Superintendent of Public Works, and attached to the email is a map with photographs that appear to reference the defects in the area where decedent fell. Van Wageningen v City of Ithaca, 2019 NY Slip Op 00343, Third Dept 1-17-19

APPLICATION FOR LEAVE TO FILE LATE NOTICES OF CLAIM AGAINST THE VILLAGE STEMMING FROM A HAZARDOUS SUBSTANCE IN THE WATER SUPPLY PROPERLY GRANTED, ALTHOUGH THERE WAS NO ADEQUATE EXCUSE FOR THE DELAY, THE VILLAGE HAD TIMELY NOTICE OF THE FACTS UNDERLYING THE CLAIM AND WAS NOT PREJUDICED BY THE DELAY (THIRD DEPT).

The Third Department determined Supreme Court properly granted petitioners' application to file late notices of claim against the village stemming from a hazardous substance, PFOA, in the municipal water supply. Although petitioners did not have an adequate excuse for the delay, respondents had timely knowledge of the facts underlying the claim and were not prejudiced by the the delay:

… [I]t is evident that respondent was well aware of the PFOA contamination in its municipal water system, the likelihood of increased PFOA levels in the blood of its residents as a result of exposure to PFOA and the potential negative health consequences as a result thereof. On the record before us, therefore, respondent cannot plausibly claim that it had only a "general awareness" of the presence of PFOA in its municipal water system. Accordingly, we conclude that Supreme Court properly found that respondent had actual notice of all the essential facts underlying petitioners' claims … . …

Further, there has been no demonstration of substantial prejudice to respondent as a result of petitioners' delay in seeking to file late notices of claim … . Respondent has been aware of the subject PFOA contamination since at least October 2014, it was apprised of the potential negative health risks to its residents from PFOA exposure and, as a result of the blood testing program commenced by DOH, it learned of the elevated levels of PFOA in its residents — despite its efforts to downplay said results. Moreover, respondent alleges that it has located the source of the PFOA contamination and petitioners, as residents of respondent, remain available for any further investigation into whether respondent's conduct was the proximate cause of their alleged injuries. In turn, other than the passage of time, respondent has offered no particularized evidence in opposition to establish that it suffered substantial prejudice … . Matter of Holbrook v Village of Hoosick Falls, 2019 NY Slip Op 00342, Third Dept 1-17-19

DEFAMATORY REMARKS MADE AT A MUNICIPAL PUBLIC MEETING HAD NOTHING TO DO WITH THE SUBSTANCE OF THE MEETING AND THEREFORE WERE NOT ABSOLUTELY PRIVILEGED, PLAINTIFF'S DEFAMATION ACTION PROPERLY SURVIVED A MOTION TO DISMISS (SECOND DEPT).

The Second Department determined plaintiff's defamation action properly survived a motion to dismiss. The defendant sought permission from the Village's Board of Historic Preservation and Architectural Review to add an exterior stairway to her house. At the public meeting plaintiff, defendant's neighbor, objected to the stairway. Then defendant made some remarks directly to plaintiff which, in essence, accused plaintiff of setting up a camera to view defendant's daughter's bedroom. The Second Department noted that statements at a public meeting before a municipal body are generally absolutely privileged. But here the statements had nothing to do with the substance of the meeting:

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" … .

"Absolute privilege is based upon the personal position or status of the speaker and is limited to the speaker's official participation in the processes of government" … . "The absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings. This protection is designed to ensure that such persons' own personal interests—especially fear of a civil action, whether successful or otherwise—do not have an adverse impact upon the discharge of their public function" … .

Here, as a threshold matter, the challenged statements, considered in the context in which they were made, tended to expose the plaintiff to public contempt, hatred, ridicule, aversion, or disgrace.

The challenged statements, which were made in the context of a contested application before a municipal body whose determination is subject to judicial review pursuant to CPLR article 78 …, would ordinarily be subject to absolute privilege… . Nevertheless, the absolute privilege embraces only those statements that may possibly be or become material or pertinent to the matters before the Board, construed under an extremely liberal standard… . Upon our review of the papers and documentary evidence submitted by the parties, we discern "not one scintilla of evidence present upon which to base the possible pertinency of [the] defendant's statement[s]"… . Therefore,

under the circumstances of this case, the challenged statements are not subject to an absolute privilege … . Gugliotta v Wilson, 2019 NY Slip Op 00261, Second Dept 1-16-19

IN THIS SLIP AND FALL CASE, THE PARKING LOT WAS THE SUBJECT OF A LICENSE AGREEMENT BETWEEN THE CITY AND THE ATHLETIC CLUB, NOT A LEASE, THEREFORE THE OUT OF POSSESSION LANDLORD DOCTRINE WAS NOT APPLICABLE, ALTHOUGH THE LICENSE AGREEMENT REQUIRED THE ATHLETIC CLUB TO MAINTAIN THE PARKING LOT, THE LICENSE AGREEMENT IMPOSED CERTAIN MAINTENANCE DUTIES ON THE CITY AS WELL, THE CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant city did not demonstrate that it had relinquished control over the parking lot where plaintiff allegedly fell into an access pit. The access pit was exposed because a snow removal contractor pushed the cover off when plowing snow. The city had a license agreement with an athletic club, Fitmar, which required Fitmar to maintain the parking lot. Fitmar had hired the snow removal contractor. The city argued it was an out of possession landlord and the parking lot was solely Fitmar's responsibility. The Second Department held that the parking lot was subject to a license agreement, not a lease, and therefore the out of possession landlord doctrine did not apply. The Second Department went on to find that the terms of the license agreement did not demonstrate as a matter of law that the city had relinquished control over the maintenance of the parking lot:

… [T]he license agreement granted Fitmar a license to use the premises, and not a leasehold interest … . Thus, the standard applied to out-of-possession landlords is inapplicable here … . Rather, the City, "as landowner, remains in presumptive control over its property and subject to the attendant obligations of ownership until it is found that control was relinquished" … .

The City failed to meet its prima facie burden of demonstrating that it relinquished control of the premises such that it owed no duty to the plaintiff to remedy the allegedly defective condition. While the license agreement assigned responsibility for maintenance of the premises, and specifically of the parking lot, to Fitmar, it vested the City with ultimate approval authority over Fitmar's operating procedures. The City had unfettered access to the premises and could sponsor or promote its own special events at the premises. The agreement required a yearly inspection of the premises by the City to determine the extent of any repairs to be performed by Fitmar,

and the City was permitted to inspect the premises at any time and direct Fitmar to undertake repairs. The City could maintain field personnel at the premises to observe the means and methods of anticipated construction work by Fitmar, and also reserved the right for the City to perform construction or maintenance work at the premises at any time. Fitmar's former general manager testified at his deposition that the City conducted regular inspections of the premises, and that representatives of the Parks Department would often show up unannounced to conduct inspections. Agbosasa v City of New York, 2019 NY Slip Op 00250, Second Dept 1-16-19

PLAINTIFF'S WHISTEBLOWER ACTION AGAINST THE SCHOOL DISTRICT, ALLEGING THE DISTRICT TOOK RETALIATORY ACTION AGAINST PLAINTIFF BECAUSE OF ALLEGATIONS PLAINTIFF MADE AGAINST ANOTHER DISTRICT EMPLOYEE, SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff's Civil Service Law 75-b action alleging disciplinary action against him was taken in retaliation for his reporting certain allegations about another school district employee should not have been dismissed. Defendant school district notified plaintiff, the district's head bus driver, he was charged with a conflict of interest in violation of General Business Law 800 the day after plaintiff had made the allegations against the employee in front of the Board of Education. Supreme Court should not have dismissed plaintiff's whistleblower action by finding the General Municipal Law 800 conflict of interest charge, not plaintiff's allegations against the employee, constituted the basis for the district's disciplinary action against plaintiff:

Supreme Court … erred in the substantive application of Civil Service Law § 75-b relative to defendants' contention that an independent basis existed for placing plaintiff on administrative leave. To assert a whistleblower claim under Civil Service Law § 75-b, plaintiff must allege, "(1) an adverse personnel action; (2) disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which [the plaintiff] reasonably believes to be true and which [he or] she reasonably believes constitutes an improper governmental action; and (3) a causal connection between the disclosure and the adverse personnel action"… . The element of causation requires "that 'but for' the protected activity, the adverse personnel action by the public employer would not have occurred"… . Here, the court found that the purported General Municipal Law violation sufficed as a separate and independent basis for the adverse action and dismissed plaintiff's claim. However, even assuming that the General Municipal Law violation is ultimately demonstrated, the trial court must make "a separate determination regarding the employer's motivation" to ensure against pretextual dismissals and "shield employees from being retaliated against by an employer's selective application of theoretically neutral rules" … . Lilley v Greene Cent. Sch. Dist., 2019 NY Slip Op 00019, Third Dept 1-3-19

PLAINTIFF SUED THE VOLUNTEER FIRE COMPANY, NOT THE FIRE DISTRICT WHICH WAS THE PROPER PARTY, PLAINTIFF NEVER SERVED A NOTICE OF CLAIM ON THE DISTRICT, THE ACTION WAS PROPERLY DISMISSED (THIRD DEPT).

The Third Department determined the action against the Coeymans Hollow Volunteer Fire Company was properly dismissed and the proper party, the Coeymans Hollow Fire District #3, could not be sued because it was never served with a notice of claim. Plaintiff alleged she was injured when members of the Coeymans Hollow Volunteer Fire Company evacuated her from her house during a fire call:

A volunteer fire company, such as defendant, "shall be under the control of the . . . fire district . . . having, by law, control over the prevention or extinguishment of fires therein" (N-PCL 1402 [e] [1]). Indeed, the Fire District was responsible for preventing and extinguishing fires within its jurisdiction and trained and supervised defendant's members. Furthermore, when defendant's members responded to the fire at [plaintiff's] house, they acted under the direction of the Chief of the Fire District. Because defendant and the Fire District are separate entities and defendant does not exert control over its members, defendant cannot be held liable for the alleged negligence of its members … . …

We reject plaintiff's contention that defendant and the Fire District are so inextricably intertwined that timely service of the notice of claim upon defendant equates to timely service upon the Fire District. Furthermore, although defendant conducted an examination of [plaintiff] under General Municipal Law § 50-h, equitable estoppel does not preclude any claim that Roberts failed to serve the notice of claim upon the proper party … . We also note that, even though defendant was not obligated to inform Roberts that she failed to name the proper party … , defendant did so as an affirmative defense in its answer.

Plaintiff additionally contends that General Municipal Law § 50-e (3) (c) permits deeming the notice of claim served upon defendant as being timely served upon the Fire District. We disagree. This savings provision is "limited in scope to defects in the manner of serving the notice of claim on the correct public entity" … . That said, plaintiff fails to identify, nor does the record disclose, any infirmities in the service of the notice of claim. More critically, before any defects in service can be overlooked, service on the proper party must be accomplished in the first instance … . Roberts v Coeymans Hollow Volunteer Fire Co., 2019 NY Slip Op 00006, Third Dept 1-3-19