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Cover Page Footnote

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RECENT NEW YORK APPELLATE DECISIONS WILL IMPACT MUNICIPAL TORT LITIGATION

*John M. Shields**

INTRODUCTION

Throughout the past thirty years, the *Fordham Urban Law Journal* has progressively published numerous articles concerning a broad range of topics, including discussions of decisions affecting litigation practice and municipal liability.[1] This Article will discuss and summarize the recent significant decisions by the New York State Court of Appeals and other appellate courts that will alter or greatly impact future tort litigation, especially with regard to municipal liability.

Although the State of New York has waived its sovereign immunity, the waiver was not absolute. The waiver of sovereign immunity is specifically conditioned upon compliance with the requirements that accompany the waiver and the standards established by the Court of Claims Act.[2] In *Alston v. State of New York*,[3] the Court of Appeals stressed the potential rigidity of the time limitations for filing a claim against the State, pursuant to the Court of Claims Act.[4]

On several recent occasions, the Court of Appeals thoroughly discussed the "serious injury" standard conditioned within New

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1. *See* Constantine N. Katsoris, *The* Fordham Urban Law Journal: *A New Millennium*, 30 FORDHAM URB. L.J. 797 (2003); Constantine N. Katsoris, *The* Fordham Urban Law Journal: *Twenty Years of Progress*, 19 FORDHAM URB. L.J. 915 (1992).

2. N.Y. CT. CL. ACT §§ 1 *et seq.* (Consol. 2003).

3. 762 N.E.2d 923 (N.Y. 2001).

4. *Id.* at 926.

York Insurance Law.[5] Accident victims must present admissible evidence that contains verified, quantitative, and objective medical results in order to successfully establish a prima facie case that a plaintiff sustained a "serious injury," as defined by the State Insurance Law.[6]

In more than one decision, the court took the opportunity to clarify the rule of apportionment contained within Article 16 of the Civil Practice Law and Rules ("CPLR").[7] Article 16 permits a defendant to seek apportionment of its liability with another tortfeasor. Additionally, apportionment of damages for personal injuries is permissible between a negligent landlord or owner and a non-party assailant in cases involving negligent security.[8]

Twice this past year, the court addressed the standard of care required for the operation of hazard and emergency vehicles.[9] The court confirmed that "recklessness" was the proper standard of care to apply to "hazard" vehicles.[10] At the same time, the court rejected the argument that such vehicles must be located in a designated "work area" in order to qualify for the hazard vehicle exemption.[11]

In *Criscione v. City of New York*,[12] the Court of Appeals clarified that a "police officer who was driving a patrol car in response to a [non-emergency] dispatch call was engaged in the 'emergency operation' of a vehicle as defined in New York State Vehicle and Traffic Law ("VTL") [section] 114-b."[13] "Consequently, [the officer's] actions should not be measured by ordinary negligence standards, but rather by the 'reckless disregard' standard of [VTL] section 1104(e)."[14]

The appellate courts further discussed the requisite standard required to establish municipal liability for the negligent performance of a governmental function.[15] Absent a special relationship,

5. *See, e.g.*, Toure v. Avis Rent A Car Sys., Inc., 774 N.E.2d 1197, 1199-1200 (N.Y. 2002); Oberly v. Bangs Ambulance, 751 N.E.2d 457, 460 (N.Y. 2001); Grossman v. Wright, 707 N.Y.S.2d 233, 236-37 (App. Div. 2000).

6. N.Y. INS. LAW § 5102(d) (Consol. 2003).

7. *See, e.g.*, Faragiano v. Town of Concord, 749 N.E.2d 184, 184-86 (N.Y. 2001); Rangolan v. County of Nassau, 749 N.E.2d 178, 181-83 (N.Y. 2001).

8. *See, e.g.*, Chianese v. Meier, 774 N.E.2d 722, 725-26 (N.Y. 2002).

9. *See, e.g.*, Riley v. County of Broome, 742 N.E.2d 98, 103-05 (N.Y. 2000).

10. *Id.* at 104.

11. *Id.* at 102.

12. Criscione v. City of New York, 762 N.E.2d 342, 345 (N.Y. 2001).

13. *Id.* at 343; *see* N.Y. VEH. & TRAF. LAW § 114-b (Consol. 2003).

14. *Criscione*, 762 N.E.2d at 343; *see* N.Y. VEH. & TRAF. LAW § 1104(e).

15. *See, e.g.*, Clark v. Town of Ticonderoga, 737 N.Y.S.2d 412, 414-16 (App. Div. 2002).

tort liability cannot be fixed for the State's performance of a governmental function.[16] The plaintiff must demonstrate that the State, through direct personal contact, assumed an affirmative duty to act on the injured party's behalf, which was conveyed to the injured party and subsequently relied upon.[17] Courts have recently focused on the most critical element of the special relationship, the injured party's justifiable reliance on the government's assurances.[18] The plaintiff must prove that the defendant's conduct actually placed her in a more dangerous position by creating a false sense of security, causing her to relax her guard and not pursue other options of protection.[19]

Similarly, the court reiterated that immunity protects discretionary engineering decisions made by municipalities.[20] Recently, the court confirmed that the decision to install a traffic control device is a purely discretionary governmental function, which is completely protected from liability by qualified immunity.[21] "Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function."[22] "[N]either letters urging [a municipality] to install a signal nor the recommendation by the [private engineer] that one be installed raises an issue of fact concerning the reasonableness of the [municipality's] determination."[23]

Finally, the court discussed whether a party to a contract may be liable in tort to a third party.[24] Although a contractual obligation alone does not give rise to tort liability in favor of a third party, the court articulated three specific exceptions that would create liability in such circumstances.[25]

16. *Id.*
17. *Id.* at 414.
18. *Id.*
19. *Id.* at 415.
20. *See* Affleck v. Buckley, 758 N.E.2d 651, 653-54 (N.Y. 2001).
21. *Id.*
22. *Id.* at 654.
23. *Id.* at 653
24. *See* Church v. Callanan Indus., 782 N.E.2d 50, 52 (N.Y. 2002); Espinal v. Melville Snow Contractors, 773 N.E.2d 485, 488 (N.Y. 2002).
25. *Church*, 782 N.E.2d at 53.

I. STRICT TIME LIMITATIONS FOR FILING CLAIM AGAINST THE STATE

In *Alston v. State of New York*,[26] the Court of Appeals stressed the potential rigidity of the time limitations for filing a claim against the State, pursuant to the Court of Claims Act.[27] In *Alston*, after an unsuccessful attempt in federal court by parole officers to recover overtime allegedly earned, the claimants filed a proceeding in the Court of Claims to obtain the same monetary reward.[28] The Court of Claims granted the State's motion to dismiss the claims because the claimants failed to timely file their claims pursuant to section 10(4) of the Court of Claims Act.[29]

"The State's waiver of sovereign immunity was not absolute, but [specifically] conditioned upon claimant's compliance with the [requirements accompanying] the waiver, including the . . . filing [of] deadlines."[30] "The Court of Claims Act could not be [more] clear in conditioning the waiver of sovereign immunity on compliance with the [established] time limitations . . . ."[31] The unequivocal language of the Act states that, "*no judgment shall be granted* in favor of any claimant, unless [the] claimant" complies with the existing time limitations.[32] "[B]ecause the claimants failed to [timely] file their claims in the Court of Claims . . . and did not timely seek relief from the Court under the Court of Claims Act [section] 10(6), the State was entitled to dismissal of the claim on sovereign immunity grounds."[33]

II. REVISITING THE "SERIOUS INJURY" STANDARD UNDER INSURANCE LAW

The Court of Appeals has addressed the "serious injury" standard within the meaning of No-Fault Law, New York State Insur-

26. Alston v. State, 762 N.E.2d 923 (N.Y. 2001).

27. *Id.* at 926.

28. *Id.* at 924.

29. *Id.*

30. *Id.* at 926.

31. *Id.*

32. *Id.* (quoting N.Y. CT. CL. ACT § 10 (Consol. 2001)).

33. *Id.*; *see* Clark v. City of New York, 739 N.Y.S.2d 624, 624-25 (App. Div. 2002); James v. City of New York, 662 N.Y.S.2d 542, 543 (App. Div. 1997); Deegan v. City of New York, 643 N.Y.S.2d 596, 597 (App. Div. 1996); Ragin v. City of New York, 636 N.Y.S.2d 83, 84 (App. Div. 1995); Lamper v. City of New York, 626 N.Y.S.2d 253, 253 (App. Div. 1995); Weber v. County of Suffolk, 616 N.Y.S.2d 807, 808 (App. Div. 1994).

ance Law section 5102(d),[34] in several decisions during the past two years. The No-Fault Law provides a system whereby victims of automobile accidents can receive compensation for their economic losses without regard to fault or negligence.[35] An injured party may still bring an action to recover for non-economic loss, pain, and suffering, as long as the plaintiff can demonstrate that she has suffered a "serious injury" within the definition of No-Fault Law.[36]

In *Oberly v. Bangs Ambulance*, the court indicated "that only a 'total loss' of use [of a body organ, member, function, or system] is compensable as a 'permanent loss of use' exception to the no-fault remedy."[37] In *Oberly,* the plaintiff suffered a minor injury to his forearm when a pump fell on his arm while he was being transported in an ambulance.[38] The court held that "the statute speaks in terms of a loss of a body member, without qualification."[39] Additionally, "requiring a total loss is consistent with the statutory [language] of the categories 'permanent consequential limitation of use of a body or organ or member' and 'significant limitation of use of a body function or system.'"[40] Accordingly, only a total loss of use is compensable under the permanent loss of use exception.[41]

A. Nature and Extent of Qualified, Objective Medical Evidence Necessary to Meet the Serious Injury Threshold

In *Toure v. Avis Rent A Car Systems*,[42] the court consolidated three appeals and focused specifically on the nature and extent of qualified, objective medical evidence required to overcome the serious injury threshold.[43] Initially, the court noted that the legisla-

34. "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. INS. LAW § 5102 (d) (Consol. 2003).

35. Oberly v. Bangs Ambulance, 751 N.E.2d 457, 459 (N.Y. 2001).

36. *Id.* at 458.

37. *Id.* at 459.

38. *Id.* at 458-59.

39. *Id* at 460.

40. *Id.*

41. *Id.* at 458.

42. Toure v. Avis Rent A Car Sys., Inc., 774 N.E.2d 1197 (N.Y. 2002).

43. *Id.* at 1204-05.

tive intent of the No-Fault Law was to eliminate "frivolous claims and limit recovery to serious injuries."[44] The court stressed that objective medical evidence of a plaintiff's injury is required to satisfy the serious injury threshold.[45] An expert's quantitative and qualitative assessment of a plaintiff's condition may substantiate a claim, "provided that the evaluation [is supported by] an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body [part]."[46]

In one case, the plaintiff submitted an affirmation of a neurosurgeon to oppose defendant's motion for summary judgment.[47] The court held that the plaintiff, at a minimum, created an issue of fact by submitting an expert's affirmation supported by objective medical evidence, including Magnetic Resonance Image ("MRI") and Computerized Tomography ("CT") scan tests and reports and personal observations, which sufficiently described the qualitative nature of the plaintiff's limitations.[48] Similarly, in the second case, the treating orthopedic surgeon described the qualitative nature of plaintiff's limitations based on the normal function, including the plaintiff's own medical history, physical examination, and review of the MRI scan.[49]

In the final case, the court held that the plaintiff's doctor failed to adequately demonstrate a significant limitation.[50] Although the doctor detected a back spasm, he failed to articulate what objective test, if any, induced the spasm.[51] Additionally, the expert's conclusion was based, in part, on a review of an MRI report that was never introduced into evidence, thus foreclosing cross-examination.[52]

B. Threshold for "Serious Injury" Under Insurance Law Requires Admissible, Verified, Objective Medical Findings

Previously, the New York State Supreme Court, Appellate Division, Second Department thoroughly clarified the specific type and quality of admissible evidence necessary to sustain a "serious in-

44. *Id.* at 1199-1200.
45. *Id.*
46. *Id.* at 1200.
47. *Id.* at 1200-01.
48. *Id.* at 1202.
49. *Id.* at 1202-03.
50. *Id.* at 1204.
51. *Id.*
52. *Id.* at 1204-05.

jury" claim. Accident victims must present admissible evidence that contains verified, quantitative, objective medical results in order to successfully establish a prima facie case that the plaintiff sustained a "serious injury."[53]

In *Grossman v. Wright*, the plaintiff alleged that, as a result of a motor vehicle accident, he sustained an injury to his back.[54] "The plaintiff specifically alleged that as a result of the accident, he sustained a 'significant limitation of use of a body function or system.'"[55] The defendant moved for summary judgment "on the ground that the plaintiff failed to establish that he had sustained a serious injury."[56] "In support of [the] motion, the defendant supplied . . . affirmed medical reports prepared by . . . an orthopedic surgeon and . . . a radiologist."[57] The plaintiff submitted an unsworn affidavit prepared by a chiropractor.[58]

Applying an interpretation of the legislative intent, the Court of Appeals determined that the word "significant," as applied to "'limitation of use of a body function or system,' should be construed to mean something more than a minor limitation of use."[59] A "minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute."[60] The "legislative intent of the 'no-fault' legislation was to [eliminate] frivolous claims and [restrict] recovery to major or significant injuries."[61] Accordingly, "summary judgment should be granted in cases where the plaintiff's opposition [consists solely of] 'conclusory assertions tailored to meet statutory requirements.'"[62]

C. Defendant Establishes Injuries Are Not "Serious" Through Admissible Medical Evidence

"[A] defendant can establish that the plaintiff's injuries are not serious within the meaning of [section] 5102(d) by submitting affi-

53. Grossman v. Wright, 707 N.Y.S.2d 233, 234 (App. Div. 2000).
54. *Id.* at 235.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 235-36.
59. *Id.* at 236 (quoting Licari v. Elliot, 441 N.E.2d 1088, 1091 (N.Y. 1982)).
60. *Id.*
61. *Id.*; Milne v. Cheema, 706 N.Y.S.2d 84, 85 (App. Div. 2000).
62. *Grossman*, 707 N.Y.S.2d at 236-37 (citing Lopez v. Senatore, 65 N.Y.S.2d 1017, 1019 (App. Div. 1985)); *see* Walker v. Betts Cab Corp., 710 N.Y.S.2d 28, 28-29 (App. Div. 2000) (concluding that plaintiff's medical evidence was unsworn, conclusory, and speculative); Decayette v. Kreger Truck Renting, Inc., 687 N.Y.S.2d 680, 681 (App. Div. 1999) (detailing how a plaintiff doctor relied on inadmissible medical records).

davits or affirmations of medical experts who examined the plaintiff and conclude[d] that no objective medical findings support the plaintiff's claim."[63] The medical report prepared by the defendant's orthopedic surgeon in *Grossman* stated that he had conducted an independent medical examination of the plaintiff two days earlier.[64] After a brief absence from work, the plaintiff resumed his full work responsibilities and was no longer undergoing any treatments or taking any prescription medication.[65] The defendant's chiropractor and radiologist specified the observations made and the objective medical records and tests conducted on the plaintiff during the physical examination.[66] The diagnosis was that any minor problems were resolved or unrelated to the accident.[67]

D. Plaintiff Must Submit Verified Objective Medical Evidence

Once the defendant has demonstrated prima facie entitlement to summary judgment, the "burden [then] shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained . . . ."[68] "The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient."[69]

A plaintiff's subjective claim of pain and limitation of motion must be supported by quantitative "*verified objective medical findings*," based on objective tests and a recent examination of the plaintiff.[70] Accordingly, any considerable delay between the conclusion of the "plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained."[71]

63. *Grossman*, 707 N.Y.S.2d at 237 (citing Turchuk v. Town of Wallkill, 681 N.Y.S.2d 72, 72-73 (App. Div. 1998)).

64. *Id.* at 235.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 237 (citing Gaddy v. Eyler, 591 N.E.2d 1176, 1176 (N.Y. 1992)).

69. *Id.* (citing Powell v. Hurdle, 625 N.Y.S.2d 634, 634-35 (App. Div. 1995); Giannakis v. Paschilidou, 622 N.Y.S.2d 112, 113 (App. Div. 1995)); Decayette v. Kreger Truck Renting, Inc., 687 N.Y.S.2d 680, 681 (App. Div. 1999).

70. *Grossman*, 707 N.Y.S.2d at 237 (citing Kauderer v. Penta, 689 N.Y.S.2d 190, 191-92 (App. Div. 1999) (emphasis added)); Garland v. Allison, 705 N.Y.S.2d 682, 682-83 (App. Div. 2000).

71. *Grossman*, 707 N.Y.S.2d at 237 (citing Smith v. Askew, 695 N.Y.S.2d 405, 406 (App. Div. 1999)); *see* Jimenez v. Kambli, 708 N.Y.S.2d 460, 461 (App. Div. 2000); Schifano v. Golden, 701 N.Y.S.2d 406, 407 (App. Div. 2000); *Decayette*, 687 N.Y.S.2d at 681.

In opposition to the motion, the plaintiff in *Grossman* submitted his own affidavit, as well as an affirmation by a doctor of chiropractic medicine, and other medical records, which were presented in unsworn and inadmissible form.[72] The plaintiff complained that he had been forced to make lifestyle changes as a result of the injuries, that he experienced daily pain, and he could no longer participate in vigorous athletic activities he previously enjoyed.[73] As part of the examination, the plaintiff's chiropractor performed range of motion tests on the plaintiff's spine, where he found slight restrictions in the range of motion.[74]

The affirmed report of a medical expert must not only contain objective clinical findings, but also must demonstrate that the plaintiff's injuries are causally related to the subject accident.[75] Physical examinations personally conducted by the doctor preparing the affidavit or affirmation are sufficient.[76] "An affidavit or affirmation simply setting forth the observations of the affiant are insufficient, [however,] unless supported by objective proof, such as X-rays, MRIs, or other similarly-recognized tests or quantitative results based on a neurological examination."[77]

E. Opposition in *Grossman* in Inadmissible Form and Failed to Describe Objective Tests

The court in *Grossman* held that the evidence submitted by the defendant in support of her motion was sufficient to establish a prima facie case that the plaintiff did not sustain a "serious" injury.[78] The medical opinions expressed by the defendant's doctors were supported by a personal physical examination of the plaintiff,

72. *Grossman*, 707 N.Y.S.2d at 235-36.

73. *Id.* at 236.

74. *Id.*

75. Williams v. Hasenflue, 708 N.Y.S.2d 343, 343 (App. Div. 2000); Latiuk v. Cona, 708 N.Y.S.2d 531, 531 (App. Div. 2000); Har-Sinay v. Accessible Windows & Glass & Mirror Corp., 708 N.Y.S.2d 634, 634 (App. Div. 2000).

76. *Grossman*, 707 N.Y.S.2d at 237 (citing Cesar v. Felix, 581 N.Y.S.2d 411, 411-12 (App. Div. 1992)).

77. *Id.*; *see* Garvey v. Riela, 708 N.Y.S.2d 148, 149 (App. Div. 2000); Green v. Miranda, 708 N.Y.S.2d 310, 311 (App. Div. 2000); Mitchell v. Kowalski, 708 N.Y.S.2d 437, 438 (App. Div. 2000); Jimenez v. Kambli, 708 N.Y.S.2d 460, 461 (App. Div. 2000); Pramnieks v. Bush, 707 N.Y.S.2d 682, 683 (App. Div. 2000); Kraemer v. Henning, 655 N.Y.S.2d 96, 97 (App. Div. 1997); Zalduondo v. Lazowska, 651 N.Y.S.2d 117, 117 (App. Div. 1996); Kim v. Cohen, 618 N.Y.S.2d 386, 387 (App. Div. 1994); Georgia v. Ramautar, 579 N.Y.S.2d 743, 744 (App. Div. 1992); Spezia v. DeMarco, 570 N.Y.S.2d 87, 88 (App. Div. 1991).

78. *Grossman*, 707 N.Y.S.2d at 237.

a review of plaintiff's medical records, and the objective physical tests performed on the plaintiff.[79]

By contrast, the court found that the plaintiff's opposition was insufficient to raise a triable issue of fact.[80] The medical evidence submitted consisted of various reports which were not in admissible form.[81] The affirmation of the plaintiff's chiropractor was not subscribed before a notary or equivalent authorized official, and therefore was not deemed competent evidence.[82] Regardless, the report failed to present a triable issue of fact as to whether the plaintiff sustained a serious injury, as the report was void of any description of any objective tests performed that substantiated the doctor's conclusions concerning the claimed restrictions in the plaintiff's motion.[83]

III. THE COURT OF APPEALS CLARIFIES ARTICLE 16 APPORTIONMENT FOR CASES INVOLVING JOINT AND SEVERAL LIABILITY

Article 16 of the CPLR, adopted as part of 1986 Tort Reform Legislation, was drafted to address inequities created by the common law rule of joint and several liability.[84] "Prior to the [enactment of Article 16,] a joint tortfeasor could be held liable for an entire judgment, regardless of the relative share of culpability."[85] Thus, joint and several liability provided an incentive to sue "deep pocket" defendants, including municipalities, even if they were only minimally involved with the injury causing event. In 1986, the Governor's Advisory Commission on Liability Insurance recommended that the rule of joint and several liability be amended "to assure that no defendant who is assigned a minor degree of fault

79. *Id.*

80. *Id.*

81. *Id.* (citing Pagano v. Kingsbury, 587 N.Y.S.2d 692, 693-95 (App. Div. 1992)).

82. *Id.* at 238 (citing N.Y. C.P.L.R. § 2106 (Consol. 2003)); *see* Bernadel v. Beran, 704 N.Y.S.2d 289, 290 (App. Div. 2000); Perry v. Pagano, 699 N.Y.S.2d 882, 882 (App. Div. 1999); Young v. Ryan, 697 N.Y.S.2d 150, 151 (App. Div. 1999): Doumanis v. Conzo, 696 N.Y.S.2d 201, 202 (App. Div. 1999): Valencia v. Lui, 657 N.Y.S.2d 1007, 1007 (App. Div. 1997); Gill v. O.N.S. Trucking, 657 N.Y.S.2d 452, 453 (App. Div. 1997).

83. *Grossman*, 707 N.Y.S.2d at 238.

84. Rangolan v. County of Nassau, 749 N.E.2d 178, 181 (N.Y. 2001); Morales v. County of Nassau, 724 N.E.2d 756, 759 (N.Y. 1999).

85. *Rangolan*, 749 N.E.2d at 181 (citing Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1372 (N.Y. 1992)).

can be forced to pay an amount grossly out of proportion to that assignment."[86]

CPLR section 1601 provides that when there is a verdict for a plaintiff in a personal injury action involving multiple tortfeasors who are jointly liable, and the liability of one of the defendants is found to be fifty percent or less of the total liability, the liability of such defendant for non-economic loss shall not exceed the defendant's equitable share.[87] Although Article 16 was intended to remedy the inequities created by joint and several liability where one defendant is found to be minimally at fault, yet where "deep pocket" defendants, including municipalities, remain subject to various exceptions that preserve the traditional rule.[88]

Initially, CPLR section 1602 established that the limitations created by the general rule in section 1601 do not apply to cases involving the use or operation of motor vehicles, although municipalities are entitled to protection for accidents involving fire or police vehicles. Additionally, section 1602(2)(iv) excludes apportionment protection for "any liability arising by the reason of a non-delegable duty."[89] The plain language of CPLR section 1602(2)(iv) clearly indicates that the legislature did not intend to create an exception to the apportionment rule, but rather section 1602(2)(iv) was drafted to preserve the principles of vicarious liability and prevent defendants from improperly disclaiming responsibility for non-delegable duties.[90]

A. *Rangolan v. County of Nassau*

In *Rangolan*, the plaintiff, who had cooperated as a confidential informant against other inmates, was seriously beaten by a fellow inmate while incarcerated.[91] Although the plaintiff's inmate file specifically cautioned that he was not to be housed with his assailant, the two inmates were placed in the same dormitory.[92] In *Rangolan*, the plaintiff commenced a federal action against the County of Nassau, alleging, among other things, negligence for failure to protect him while in custody and violation of his Eighth

86. *Id.* at 182.
87. N.Y. C.P.L.R. § 1601 (Consol. 2003).
88. *Id.*
89. *Id.* § 1602(2)(iv).
90. *See Rangolan*, 749 N.E.2d at 182-83.
91. *Id.* at 181.
92. *Id.*

Amendment rights under 42 U.S.C. § 1983.[93] The district court dismissed his § 1983 claim, but granted judgment as a matter of law on his negligence claim.[94] The court refused to instruct the jury on apportionment of damages between the county and the attacker, holding that CPLR section 1602(2)(iv) prohibited apportionment where the defendant's liability arose from a breach of a non-delegable duty.[95]

Following a damages award for pain and suffering, both parties appealed to the United States Court of Appeals for the Second Circuit.[96] The appellate court affirmed the dismissal of the 1983 claim, but, noting the absence of controlling precedent interpreting CPLR section 1602(2)(iv), certified to the New York State Court of Appeals the question whether a municipal tortfeasor can seek to apportion its liability with another tortfeasor, pursuant to CPLR section 1601, or whether CPLR section 1602(2)(iv) precludes such apportionment.[97]

B. CPLR Section 1602(2)(iv) Is Not an Exception to Apportionment, but a Savings Provision that Preserves Vicarious Liability

The Court of Appeals held that under the facts and circumstances of the case in *Rangolan*, the defendant was permitted to seek apportionment of its liability with another tortfeasor, such as the other inmate.[98] The fact that "the precise 'shall not apply' language [drafted] by the legislature to [delineate] the exceptions" to the rule is absent "in section 1602(2)(iv) indicates that the legislature [did not] intend to include an exception for liability based on a breach of a non-delegable duty."[99] Therefore, the court in *Rangolan* held that CPLR section 1602(2)(iv) does not create an exception to apportionment, but is a "savings provision that preserves the principles of vicarious liability."[100]

93. *Id.*; *see* Rangolan v. County of Nassau, 51 F. Supp. 2d 233, 233 (E.D.N.Y. 1999), *aff'd in part, question certified by*, 216 F.3d 1073 (2d Cir. 2000).

94. *Rangolan*, 749 N.E.2d at 181.

95. *Id.*; Sanchez v. State, 2002 N.Y. LEXIS 3578, at *1 (N.Y. Nov. 21, 2002) (deciding whether an attack on an inmate was foreseeable and holding that the question raised a triable issue of fact).

96. *Rangolan*, 749 N.E.2d at 181.

97. *Id.*

98. *Id.* at 184

99. *Id.* at 182-83.

100. *Id.* at 181; Rucker v. Allis, 732 N.Y.S.2d 493, 494 (App. Div. 2001); Grant v. Ore, 725 N.Y.S.2d 386, 387-88 (App. Div. 2001) (detailing claim by passenger injured in automobile accident when driver failed to see maintenance work site on bridge).

CPLR section 1602(2)(iv) was drafted to prevent defendants from disclaiming liability for duties for which they are responsible by delegating such responsibilities to another party.[101] Accordingly, CPLR section 1602(2)(iv) ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR Article 16 is not construed to alter this liability.[102] When a municipality delegates a duty for which it is legally responsible, such as the maintenance of its roads, the municipality remains vicariously liable for the negligence of the contractor, and cannot rely on CPLR section 1601(1) to apportion liability with regard to its contractor.[103] Similarly, CPLR section 1602(2)(iv) prohibits an employer from disclaiming respondeat superior liability by arguing that an employee was the actual tortfeasor.[104] "[N]othing in CPLR 1602(2)(iv)," however, "precludes a municipality, landowner or employer from seeking apportionment between itself and other tortfeasors for whose liability it is not answerable."[105]

"[Section] 1602 [contains] several exceptions to the apportionment rule, [that] explicitly [state] that Article 16 shall 'not apply' in certain circumstances."[106] The *Rangolan* court reasoned that CPLR section 1602(2)(iv) specifically does not contain the "shall not apply" introductory language, "but instead provides that the limitations on liability shall 'not be construed' to impair, limit or modify any liability arising from a non-delegable duty or respondeat superior."[107] The court in *Rangolan* held that "the Legislature did not intend 1602(2)(iv) to establish a free-standing exception to the apportionment rule."[108] "[Section] 1602(2)(iv) was [simply] intended to insure that the courts did not [interpret] article 16 as altering [established] law regarding respondeat superior or non-delegable duties."[109]

The fact that CPLR section 1602(8), using the "shall not apply" language, creates a separate non-delegable duty exception, reinforces that section 1602(2)(iv) was not intended as an exception to

101. *Rangolan*, 749 N.E.2d at 182.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* (citations omitted); *see* Faragiano v. Town of Concord, 749 N.E.2d 184, 185-86 (N.Y. 2001); *Grant*, 725 N.Y.S.2d at 388; Denio v. State, 723 N.Y.S.2d 914, 915 (App. Div. 2001).
106. *Rangolan*, 749 N.E.2d at 182.
107. *Id.*
108. *Id.*
109. *Id.*

the apportionment rule.[110] "To construe CPLR 1602(2)(iv) as creating a blanket non-delegable duty exception would render CPLR 1602(8) meaningless and redundant."[111] A statutory construction that "'result[s] in the nullification of one part of a [statute] by another,' is impermissible" because the various elements of a statute must be compatible with each other and conform with the general intent of the statute.[112]

Given the breadth of responsibilities that may be considered non-delegable, each potentially requiring a specific inquiry, the legislature could not have intended to exclude the breach of every non-delegable duty from possible apportionment.[113] "Reading [section] 1602(2)(iv) as an exception would impose joint and several liability on municipalities . . . the[ ] . . . precise[ ] . . . entities that [the rule] was designed to protect."[114]

In *Faragiano*, the plaintiff was a passenger injured in a motor vehicle accident who commenced an action against several parties, including "the contractor that resurfaced the road and the Town of Concord . . . alleg[ing] that the Town negligently constructed and maintained [the] road and that [the] contractor . . . negligently permitted a build-up of oil or tar on the road."[115] "The Town asserted, as an affirmative defense, that its liability for any noneconomic losses should be apportioned among the other tortfeasors pursuant to CPLR [section 1602(2)(iv)]," while the plaintiffs argued that CPLR section 1602(2)(iv) precluded apportionment.[116] The court in *Faragiano* held that the "plaintiffs [could] not rely on CPLR [section] 1602(2)(iv) to preclude the Town from seeking apportionment between itself and other joint tortfeasors for whose liability it was not answerable."[117] The court went on to State, however, that the town could not use CPLR section 1602(2)(iv) to apportion liability to the agent for whom it was vicariously responsible.[118]

110. *Id.* at 183.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. Faragiano v. Town of Concord, 749 N.E.2d 184, 186 (N.Y. 2001).
116. *Id.*
117. *Id.*; *see* Grant v. Ore, 725 N.Y.S.2d 386, 387-88 (App. Div. 2001).
118. *Faragiano*, 749 N.E.2d at 186.

C. Recent Rulings Concerning Apportionment Relating to Premises Security

Recently, three separate Appellate Division First Department panels issued rulings concerning Article 16 apportionment. In all three cases, the named defendants were sued for simple negligence for failing to secure the premises against an assailant, not named as a party, that injured the plaintiff.

In *Concepcion v. New York City Health and Hospitals Corporation*, the plaintiff was stabbed by an out-patient while visiting a hospital.[119] Following a threatening confrontation with the out-patient, plaintiff informed a nurse about the incident, who assured the plaintiff that she would alert security.[120] The nurse failed to inform security and the plaintiff was assaulted.[121] The Court in *Concepcion* held that:

> [t]here is nothing in the exclusion that would indicate that it was intended to preclude a negligent tortfeasor from seeking apportionment from [a non-party] intentional tortfeasor. Moreover, any further extension of the exclusion would defeat the purpose of Article 16, which is to protect low-fault, "deep pocket" defendants from being fully liable pursuant to joint and several liability rules.[122]

Chianese v. Meier involved allegations of inadequate building security.[123] The court held that the fact that an assailant had acted intentionally did not elevate the purely negligent behavior of the other actors to intentional conduct, thus entitling the defendant building owner and manager to Article 16 protection.[124] Accordingly, apportionment of damages for personal injuries is permissible between a negligent landlord and a nonparty intentional tortfeasor.[125]

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119. Concepcion v. N.Y. City Health & Hosp. Corp., 729 N.Y.S.2d 478, 479 (App. Div. 2001).

120. *Id.*

121. *Id.*

122. *Id.* at 480; *see* Roseboro v. N.Y. City Transit Auth., 729 N.Y.S.2d 472, 474-75 (App. Div. 2001) (finding that apportionment is available against non-party intentional tortfeasors); Maria E. v. 599 West Assocs., 726 N.Y.S.2d 237, 242-43 (Sup. Ct. 2001) (providing pleading requirements of Article 16 apportionment).

123. Chianese v. Meier, 774 N.E.2d 722, 723 (N.Y. 2002).

124. *Id.* at 725-26.

125. *See id.* at 726; *see also* N.X. v. Cabrini Med. Ctr., 228 N.Y. L.J., Oct. 28, 2002, at 25 (N.Y. Sup. Ct.).

D. Intentional Act of Non-Party Tortfeasor Does Not Bring Pure Negligence Action Within Section 1602(5) Exclusion

Section 1602 excepts certain types of actions from the ambit of section 1601, including "actions requiring proof of intent."[126] "This exception applies to prevent defendants who are found to have committed an intentional tort from invoking the benefits of section 1601."[127] In *Chianese*, a tenant sued her landlord and building manager for negligence, alleging inadequate building security, after she was assaulted inside the building.[128] The attacker was later apprehended and convicted of a series of crimes, including the attack on the plaintiff.[129] A jury found the landlord and manager fifty percent responsible for the assault, and apportioned damages on that basis.[130] The plaintiff in *Chianese* argued that her negligence claim against defendants, because it necessarily involved an intentional act by her attacker, was also an "action requiring proof of intent," thus precluding apportionment by defendants.[131]

"Because the plaintiff's negligence claim is not an 'action requiring proof of intent,' section 1602(5), on its face, does not apply to preclude apportionment of liability."[132] The defendants' liability, in *Chianese*, did not depend on proof of the attacker's state of mind.[133] The plaintiff merely had to prove that "she was injured as a result of the defendants' failure to provide adequate security on the premises."[134] The mere fact "that a nonparty tortfeasor acted intentionally does not bring a pure negligence action within the scope of the exclusion."[135]

"While section 1602(5) forecloses intentional tortfeasors from seeking apportionment irrespective of the mental state of any other tortfeasors, section 1602(11) precludes apportionment with any parties found to have acted knowingly or intentionally and in concert."[136] "The primary purpose of [section 1602](11) is . . . to pre-

126. *Chianese*, 774 N.E.2d at 724.
127. *Id.* at 724-25.
128. *Id.* at 723.
129. *Id.*
130. *Id.* at 724-25.
131. *Id.* at 725.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*; *see* Roseboro v. N.Y. City Transit Auth., 729 N.Y.S.2d 472, 475 (App. Div. 2001); Concepcion v. N.Y. City Health & Hosp. Corp., 729 N.Y.S.2d 478, 480 (App. Div. 2001); Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 321 (App. Div. 1997).
136. *Chianese*, 774 N.E.2d at 726.

vent apportionment among multiple intentional tortfeasors . . . when dividing liability among them would [place] them under the section 1601 [fifty percent guideline]."[137] This interpretation of section 1602(5) is consistent with the exception to apportionment set out in section 1602(11) and "does not render section 1602(11) duplicative."[138]

What little legislative history there is accords with the reading of section 1602(5) which indicates that Article 16 preserves joint and several liability for instances where a defendant performs acts are willfully or intentionally performed in concert with others.[139] Conversely, there is "no indication in the legislative history that section 1602(5) was intended to create what would amount to a broad exception to apportionment at the expense of the low-fault, merely negligent landowners and municipalities—the very parties article 16 intended to benefit."[140]

In *Chianese,* under the plaintiff's proposed reading of the statute, the right of a low-fault defendant to benefit from apportionment:

> would depend entirely on the nature of the culpability of the third-party tortfeasor. A negligent defendant could apportion liability with a negligent or reckless third-party tortfeasor, but not an intentional tortfeasor . . . . Such a result is not only illogical but also inconsistent with the [legislative intent and] chief remedial purpose of article 16.[141]

The unequivocal language of CPLR section 1602(2)(iv) bespeaks that the legislature did not intend to create an exception to the apportionment rule. Section 1602(2)(iv) does not contain the precise language, explicitly present in other areas of CPLR section 1602, necessary to create an exception. CPLR section 1602(2)(iv) was formulated to simply preserve the principles of vicarious liability.

IV. MUNICIPAL VEHICLES ARE PROTECTED BY A RECKLESSNESS STANDARD WHILE ENGAGED IN WORK ON A HIGHWAY

The Court of Appeals recently confirmed that "recklessness" was the proper standard of care to apply to "hazard" vehicles, which are exempt from the rules of the road, pursuant to New

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*; Rangolan v. County of Nassau, 749 N.E.2d 178, 182 (N.Y. 2001).
141. *Chianese*, 774 N.E.2d at 726 (citations omitted).

York Vehicle and Traffic Law ("VTL") section 1103(b). At the same time, the court rejected the argument that such vehicles must be located in a designated "work area" in order to qualify for the hazard vehicle exemption.

In *Riley v. County of Broome and Wilson v. New York*, the Court of Appeals addressed two independent situations that involved injuries resulting from automobile collisions with a municipal street sweeper and snow plow respectively.[142] The trial courts dismissed, and the Appellate Division affirmed both personal injury claims, finding that, under VTL section 1103(b), "all vehicles engaged in 'highway maintenance' are exempt from the rules of the road and subject . . . to [the higher] recklessness standard."[143]

The Vehicle and Traffic Law section 117's definition of a "hazard vehicle" includes a municipal vehicle engaged in highway maintenance or ice and snow removal, where such operation involves the use of a public highway.[144] "Hazardous operation" is defined in VTL section 117-b as, "the operation, or parking, of a vehicle on or . . . adjacent to a public highway while such vehicle is actually engaged in an operation which would . . . interfere with the normal traffic flow . . . ."[145]

Obviously, a certain "degree of risk . . . is inherent in travel on public highways."[146] Particular classes of vehicles are intended to reduce the risks involved in highway travel by maintaining the safety of roadways.[147] "While serving an important public function, however, [such] vehicles may themselves cause [certain] risks to [routine] motorists."[148]

"At common law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard."[149] The common law and various statutes also recognized that the level of care owed by emergency and roadwork vehicles must be tempered by the nature of their work, providing certain exceptions to the rules of the

142. Riley v. County of Broome, 742 N.E.2d 98, 99 (N.Y. 2000).

143. *Id.* at 100; Kearns v. Piatt, 716 N.Y.S.2d 418, 419 (App. Div. 2000) (applying the recklessness standard to a municipal truck applying sand and salt mixture to icy road); Wilson v. State, 703 N.Y.S.2d 848, 848-49 (App. Div. 2000) (affirming decision exempting snowplow plowing snow on a highway); Gawelko v. State, 710 N.Y.S.2d 762, 763-65 (Ct. Cl. 2000) (holding a snowplow that lost control was exempt).

144. *Riley*, 742 N.E.2d at 100.

145. *Id.* at 100 n.1 (quoting N.Y. VEH. & TRAF. LAW § 117-b (Consol. 1996)).

146. *Id.* at 100.

147. *Id.*

148. *Id.*

149. *Id.* at 101.

road for such vehicles.[150] "Nevertheless, the common law required that such vehicles . . . [act] with care and caution [proportional to] the purpose and necessity of the right."[151]

Vehicle and Traffic Law section 1103(b) explicitly states that the rules of the road do not apply to vehicles "while actually engaged in work on a highway."[152] Section 1103(b) further states that such operators shall not be protected from the consequences of "reckless disregard for the safety of others."[153]

In *Bliss v. New York*,[154] the claimant impacted the rear of a New York State Thruway Authority ("NYSTA") truck that was operating in reverse as part of a three truck crew dismantling a lane closure on a bridge.[155] The court in *Bliss* held that even though the state driver pled guilty to the VTL violation of unsafe backing, and may have failed to adhere to NYSTA's regulations for operating a truck in reverse on a highway, his conduct did not rise to the level of recklessness required by section 1103(b).[156] "The recklessness standard requires more than a showing of lack of due care, which is associated with ordinary negligence," such as a violation of an administrative regulation or traffic rule.[157]

Section 1103(b) adds that VTL section 1202(a), "which regulates stopping, standing, and parking, does not apply to hazard vehicles while actually engaged in hazardous operation on . . . the highway, but shall apply to such vehicles when traveling to or from such hazardous operation."[158] "Similarly, [VTL section] 1104 exempts 'emergency vehicles,' such as ambulances, police . . . and fire vehicles, [from the rules of the road while] engaged in emergency operations, subject to [certain] conditions."[159]

The plain language of these statutes clearly states that vehicles actually engaged in work on a highway, similar to emergency vehicles engaged in emergency operations, are exempt from the rules of the road, regardless of their classification.[160] The statute does not create a distinction between hazard vehicles and work vehicles,

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. 686 N.Y.S.2d 556 (Ct. Cl. 1998).
155. *Id.* at 558.
156. *Id.* at 560.
157. *Id.*
158. Riley v. County of Broome, 742 N.E.2d 98, 101 (N.Y. 2000).
159. *Id.*
160. *Id.*

nor does it deny "hazard vehicles" the special protection given to all vehicles actually engaged in roadwork.[161]

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the legislature. . . . [T]he words of the statute are the best evidence of the Legislature's intent . . . [and] unambiguous language is alone determinative."[162] The history of section 1103(b) evidences that the legislature intended to create an expansive exemption from the rules of the road for all vehicles engaged in highway construction and maintenance, regardless of their classification.

> Thus, the exemption [focuses] on the nature of the work being performed, not on the nature of the vehicle employed for the work.
>
> Further, the legislative history shows that the reference to "hazard vehicles" in section 1103(b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road. Notably, the original version of section 1103(b) exempted vehicles "engaged in work on a highway" from the rules of the road, [but] *did* not contain any separate provisions concerning hazard vehicles. In 1970, the legislature amended the Vehicle and Traffic Law to [define] the "hazard class" of vehicles . . . and amend[ed] section 1103(b) to exempt hazard vehicles from the standing, stopping and parking regulations.[163]

The history of the amendment demonstrates that it was intended to distinguish the classification of different flashing colored lights on various vehicles, but was not intended to curtail the exemption for any vehicles.[164]

Section 1103(b) does not require that a vehicle be located in a designated "work area" in order to receive the protection.[165] The VTL section that defines work area was not enacted until long after section 1103(b) was adopted. "Thus, there is no credible argument that the legislature only had designated work areas in mind when it adopted section 1103(b)."[166]

Originally, section 1103(b) provided vehicles actually engaged in work on a highway with an unqualified exemption from the rules of the road.[167] In 1974, the legislature amended section 1103(b), ad-

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161. *Id.* at 102.
162. *Id.*
163. *Id.* at 102- 03 (citations ommitted).
164. *Id.*
165. *Id.* at 105.
166. *Id.*
167. *Id.* at 103.

ding that vehicles actually engaged in work on a highway must proceed with due regard for the safety of others and are not protected "from the consequences of their reckless disregard for the safety of others."[168] The legislative history explains that the "minimum standard of care" was designed to curtail the outright exemption of vehicles engaged in road work from the rules of the road.[169]

In *Saarinen v. Kerr*, the Court of Appeals held that VTL section 1104(e), which contains identical language requiring emergency vehicles to act with "due regard for the safety of all persons," imposes a standard of reckless disregard.[170] Specifically, under section 1104(e), a plaintiff seeking to recover for injuries caused by an emergency vehicle must show that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome."[171] Section 1103(b) imposes the same recklessness standard on vehicles actually engaged in work on a highway.[172] The legislature's specific reference to reckless disregard would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence, reasonable care under the circumstances, were the intended standard.

In *Saarinen*, a driver was struck by a police vehicle with its emergency light activated that was engaged in a brief pursuit of a vehicle that was driving recklessly.[173] The common law and VTL section 1104 recognize that emergency and police vehicles are frequently faced with emergency situations.[174] The court in *Saarinen* reasoned that any standard other than a recklessness standard would result in judicial second-guessing of split second decisions made by emergency personnel in the midst of highly pressurized situations and could deter trained emergency personnel from acting decisively to protect or save human life or property.[175]

As a general principle of statutory construction, when a word is used in a statute, and subsequently used in a statute concerning the same topic, it is understood to possess the same meaning for each

168. *Id.*
169. *Id.*
170. Saarinen v. Kerr, 644 N.E.2d 988, 992-93 (N.Y. 1994).
171. *Id.* at 991 (citing PROSSER & KEETON ON TORTS § 34, at 213 (W. Page Keeton et al. eds., 5th ed. 1984)).
172. *See Riley*, 742 N.E.2d at 102.
173. *Saarinen*, 644 N.E.2d at 989.
174. *Id.* at 991.
175. *Id.* at 992.

application.[176] The "history of section 1103(b) confirms that the Legislature intended to subject vehicles engaged in road work to the same standard of care as emergency vehicles."[177] In *McDonald*, the court stated that although the snowplow operator was clearly negligent in failing to observe the claimants' vehicle before initiating a lane change, the "improvident determination . . . did not rise to a level of a reckless disregard for the safety of others so as to warrant a recovery by claimants."[178]

Several judges have found it difficult to accept the prevailing interpretation that gives all hazard vehicles more expansive section 1103(b) exemption, regardless of whether in a designated work area or performing their jobs.[179] According to the Court in *Gawelko*, rural letter carriers and truck drivers appear to benefit from greater protection than ambulance drivers and police.[180] Although the court indicated that this result defied logic and plain common sense, "the most fundamental and overriding rule of statutory construction is that courts must give effect to the intent of the legislature."[181]

In *Cottingham*, the court held that the hazard vehicle exception should be narrowly construed to a limited "work area," as defined by VTL section 160.[182] The court concluded that there is no compelling reason or explicit legislative intent to extend the standard of ordinary negligence to reckless disregard for the operation of hazardous vehicles.[183] The court in *Cottingham* stated that it would be absurd to provide drivers of hazard vehicles greater protection than drivers of police vehicles, concluding that VTL sections 1103 and 1104 merely created four distinct categories of vehicles that each receive varying degrees of protection.[184]

The protection provided to emergency vehicles under section 1104(e) "represents a recognition that the duties of emergency personnel often bring them into conflict with the rules that are intended to regulate [general] conduct."[185] The court recognized that the importance of public safety and law enforcement justifies a

176. *Riley*, 742 N.E.2d at 104.
177. *Id.*
178. McDonald v. State, 673 N.Y.S.2d 512, 520 (Ct. Cl. 1998).
179. Gawelko v. State, 710 N.Y.S.2d 762, 764 (Ct. Cl. 2000); Cottingham v. State, 701 N.Y.S.2d 290, 292, 298 (Ct. Cl. 1999).
180. *Gawelko*, 710 N.Y.S.2d at 764.
181. *Id.*
182. *Cottingham*, 701 N.Y.S.2d at 298-99.
183. *Id.* at 299.
184. *Id.* at 300.
185. Riley v. County of Broome, 742 N.E.2d 98, 104-05 (N.Y. 2000).

qualified privilege afforded to emergency personnel where necessary to conduct their vital responsibilities that "will inevitably increase the risk of harm to innocent motorists and pedestrians."[186] Although it is unclear that the increased risk to the general public is similarly justified for all non-emergency vehicles engaged in road work, the legislature has clearly established that vehicles engaged in road work enjoy the same benefit of the reduced standard of care as emergency vehicles.[187] Any change in that standard, therefore, must come from the legislature.[188]

A. Emergency Vehicles Are Entitled to a Reckless Disregard Standard, Even During Non-Emergency Operations

In *Criscione v. City of New York*,[189] the Court of Appeals held that a police officer who was driving a patrol car in response to a *non-emergency* dispatch call to investigate a family dispute was engaged in the "emergency operation" of a vehicle as defined in New York State Vehicle and Traffic Law section 114-b.[190] Consequently, his actions should not have been measured by ordinary negligence standards, but rather by the "reckless disregard" standard of VTL section 1104(e).[191] Whether the police officer violated a New York City Police Department policy in responding to that type of call would be an important, but not dispositive, factor in determining whether he had acted recklessly.[192]

Plaintiff and defendant, both New York City police officers, were traveling in a police radio patrol car during a tour of duty.[193] Defendant officer was the driver of the vehicle, while plaintiff sat in the front passenger seat communicating with the police dispatcher and writing down the calls received.[194] While traveling to the location of a complaint, the patrol car entered an intersection and collided with a civilian vehicle, causing injuries to the plaintiff.[195]

During the trial, the defendant officer testified that, prior to the accident, he and the plaintiff received a "non-crime" dispute radio

186. *Id.*at 105.
187. *Id.*
188. *Id.*
189. 762 N.E.2d 342 (N.Y. 2001).
190. *Id.* at 345.
191. *Id.*
192. *Id.*
193. *Id.* at 343.
194. *Id.*
195. *Id.*

call from a dispatcher.[196] "In accordance with departmental policy regarding non-criminal calls, the defendant testified that he did not increase the speed of the vehicle or activate the siren or turret lights while driving to the scene, because the call did not fit the criteria for an emergency response."[197]

The court in *Criscione* held that the driver of an "authorized emergency vehicle" engaged in an "emergency operation" is exempt from certain rules of the road under VTL section 1104.[198] Vehicle and Traffic Law section 101 specifically designates a police vehicle as an "authorized emergency vehicle."[199] Additionally, included in the VTL section 114-b description of "emergency operation" of a vehicle is the operation of an authorized emergency vehicle, while responding to a police call.[200] This qualified privilege, however, does not relieve the driver "from the duty to drive with due regard for the safety of all persons," nor shall it protect the driver from the consequences of his "reckless disregard for the safety of others."[201]

The statutory analysis of the relevant VTL sections begins with determining the plain meaning of each word of the statutory provisions.[202] Although section 114-b does not define the phrase "police call," the court in *Criscione* determined that a radio call to officers on patrol by a police dispatcher regarding a 911 call falls squarely within the plain meaning of the term "police call."[203]

The court further held that there is no evidence of any "legislative intent to vary the definition of 'emergency operation' based on individual police department incident classifications," including, but not limited to, criminal, non-criminal, or emergency.[204] The requirements of VTL section 114-b were met in *Criscione* "as it is undisputed that [the Defendant] was operating a patrol vehicle while responding to a police dispatch to investigate a 911 call when he was involved in the traffic accident."[205] Therefore, the court

196. *Id.*

197. *Id.*

198. *Id.* at 344.

199. *Id.*

200. *Id.*

201. N.Y. VEH. & TRAF. LAW § 1104(e) (Consol. 2003); *Criscione*, 762 N.E.2d at 344.

202. *Criscione*, 762 N.E.2d at 345.

203. *Id.*

204. *Id.*

205. *Id.*

held that as a matter of law, the defendant was involved in an "emergency operation" at the time of the accident.[206]

"Given the legislative determination that a police dispatch call is an 'emergency operation,' it is irrelevant whether the officers believed that the call was an emergency or how the Police Department categorized this type of call."[207] "Whether [the defendant officer] violated a New York City Police Department policy in responding to this type of call would [merely] be an important, although not dispositive, factor in determining whether [he] had acted recklessly."[208] The defendant was involved in an "emergency operation" of an "authorized emergency vehicle" as a matter of law, and thus, pursuant to VTL section 1104(e) was entitled to a qualified privilege to disregard the ordinary rules of prudent and responsible driving, subject to a "reckless disregard" standard of liability.[209]

V. GOVERNMENTAL IMMUNITY FOR DISCRETIONARY ACTIONS UNLESS A SPECIAL RELATIONSHIP IS PROVEN

The State is protected by immunity for actions or decisions requiring the exercise of discretion. The Appellate Division recently confirmed that negligent performance of a governmental function, such as the protection and safety of the public, cannot result in liability without the demonstration of a "special relationship" between the injured party and the State.[210] In order for liability to attach, the plaintiff must demonstrate that the State, through direct

206. *Id.*

207. *Id.*

208. *Id.* (citing Saarinen v. Kerr, 644 N.E.2d 988, 992-93 (1994)).

209. *Id.*

210. Sebastian v. State, 720 N.E.2d 878, 880 (N.Y. 1999); De La Paz v. City of New York, 743 N.Y.S.2d 116, 117 (App. Div. 2002); Clark v. Town of Ticonderoga, 737 N.Y.S.2d 412, 414 (App. Div. 2002); Respass v. City of New York, 733 N.Y.S.2d 210, 211 (App. Div. 2001); Rogers v. State, 732 N.Y.S.2d 805, 806 (App. Div. 2001); Miller v. State, 716 N.Y.S.2d 762, 763 (App. Div. 2000); D'Avolio v. Prado, 715 N.Y.S.2d 827, 829 (App. Div. 2000); Pfaler v. Town of Friendship, 705 N.Y.S.2d 772, 772 (App. Div. 2000); McEnaney v. State, 700 N.Y.S.2d 258, 260-61 (App. Div. 1999); Haggerty v. Diamond, 673 N.Y.S.2d 331, 332 (App. Div. 1998); Clinger v. N.Y. City Transit Auth., 650 N.E.2d 855, 856 (1995); Mohamed v. Town of Greenbush, 646 N.Y.S.2d 424, 425 (App. Div. 1996); Gonzalez v. County of Suffolk, 643 N.Y.S.2d 651, 652 (App. Div. 1996); Cardona v. County of Albany, 728 N.Y.S.2d 355, 358 (Sup. Ct. 2001). Similarly, absent a special relationship, liability cannot be imposed on a governmental agency for failure to enforce a statute or regulation. Lindsay v. N.Y. City Hous. Auth., No. 99 Civ. 3315, 1999 U.S. Dist. LEXIS 1893, at *1 (E.D.N.Y. Feb. 24, 1999); Gonzalez v. Barbieri, 705 N.Y.S.2d 399, 400 (App. Div. 2000); Rickson v. Town of Schuyler Falls, 694 N.Y.S.2d 213, 215 (App. Div. 1999); Weiss v. City of New York, 688 N.Y.S.2d 533, 533 (App. Div. 1999); Josyln v. Village of Sylvan Beach, 682 N.Y.S.2d 781, 781 (App.

personal contact, assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party and subsequently relied upon.[211] The critical element of the special relationship exception, and the one most difficult to prove, is the plaintiff's justifiable reliance on the government's assurances.[212] The plaintiff must prove that the defendant's conduct actually lulled her into a false sense of security, caused her to either relax her vigilance or forego other means of protection, and thereby placed her in a worse position than she would have been in otherwise.[213]

The State has always maintained its immunity for governmental actions requiring expert judgment or the exercise of discretion.[214] "This immunity . . . is absolute when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature."[215] This absolute immunity "reflects the value judgment that the public interest in having officials free to exercise their discretion unhampered by the fear of retaliatory lawsuits outweighs the benefits to be had from imposing liability."[216]

"It is a well-settled principle that an action of a governmental employee . . . is [protected by] . . . immunity . . . if the functions and duties of the . . . particular position . . . inherently entail[s] the exercise of . . . discretion and judgment.[217] "Discretion is indicated if the powers are to be executed or withheld according to a governmental agent's own view of what is necessary and proper [under the circumstances]."[218] Whether immunity applies to a discretionary act depends on whether the position entails making decisions based on an "exercise of reasoned judgment which could typically produce different acceptable results."[219] Judicial and quasi-judicial acts are even protected when the decision and results are incorrect or tainted by improper motives.[220] To hold otherwise would sub-

Div. 1999); Shahin v. City of Yonkers, 678 N.Y.S.2d 668, 669 (App. Div. 1999); Urbiera v. Hous. Now Co., 709 N.Y.S.2d 910, 913 (Sup. Ct. 2000).

211. *See* cases cited *supra* note 210.

212. *See* cases cited *supra* note 210.

213. *See* cases cited *supra* note 210.

214. Arteaga v. State, 527 N.E.2d 1194, 1196 (N.Y. 1988).

215. *Id.*

216. *Id.*; Mosher-Simons v. County of Allegany, 783 N.E.2d 509, 512-13 (N.Y. 2002); Davis v. State, 691 N.Y.S.2d 668, 671 (App. Div. 1999).

217. *Davis*, 691 N.Y.S.2d at 671 (internal citations ommitted).

218. *Id.* (internal citations ommitted).

219. *Id.*

220. Tarter v. State, 503 N.E.2d 84, 86-87 (N.Y. 1986); Semkus v. State, 708 N.Y.S.2d 288, 289 (App. Div. 2000).

ject the local and state municipalities to massive liability, placing an impossible burden on local and state government.

For example, determinations pertaining to parole and its revocation are strictly sovereign and quasi-judicial in nature and accordingly, the State, in making such determinations, is absolutely immune from tort liability.[221] The courts have also applied the special duty and governmental function analysis in dismissing claims by victims of escaped prisoners, holding that the duty to safeguard prisoners was a governmental duty owed to the public at large, not to individuals.[222]

A. Special Relationship Required to Overcome Governmental Immunity

Unless *precise assurances were made to the specific individual*, there can be no liability for the State's performance of a governmental function.[223] In *Clark*, the plaintiff sued to recover for injuries sustained by the decedent, which she claimed resulted from the failure of the town police department to provide her with adequate police protection from her estranged husband.[224] In an effort to avoid the operation of the general rule that a municipality may not be held liable for injuries resulting from a failure to provide police protection, the plaintiff asserted the existence of a "special relationship."[225] In order to establish a special relationship the plaintiff must prove: 1) an assumption by the municipality of an affirmative duty to act on her behalf; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) direct contact between the parties; and 4) the plaintiff's justifiable reliance on the assurances.[226]

In *Clark*, after a series of threatening events involving the plaintiff and her estranged husband, criminal charges were filed and a temporary protection order was issued.[227] When an officer delivered a copy of the temporary order of protection to plaintiff, the officer assured the plaintiff that the police would "keep an eye on"

221. *Tarter*, 503 N.E.2d at 85; *Semkus*, 708 N.Y.S.2d at 289.

222. McEnaney v. State, 700 N.Y.S.2d 258, 260 (App. Div. 1999); Cossano v. State, 514 N.Y.S.2d 431, 432 (App. Div. 1987).

223. D'Avolio v. Prado, 715 N.Y.S.2d 827, 829 (App. Div. 2000).

224. Clark v. Town of Ticonderoga, 737 N.Y.S.2d 412, 413 (App. Div. 2002)

225. *Id.* at 413-14; Grieshaber v. City of Albany, 720 N.Y.S.2d 214, 215 (App. Div. 2001).

226. *Clark*, 737 N.Y.S.2d at 414; *Greishaber*, 720 N.Y.S.2d at 215; *D'Avolio*, 715 N.Y.S.2d at 829.

227. *Clark*, 737 N.Y.S.2d at 414.

her.[228] Subsequently, the plaintiff's husband confronted her and was charged with violating the terms of the temporary order of protection, but was released on his own recognizance.[229] The plaintiff later saw her husband in the area, but she did not call the police because she realized that the police could not do anything at that time.[230] Tragically, her husband arrived shortly thereafter and repeatedly stabbed the plaintiff.[231]

B. Justifiable Reliance Necessary for Special Relationship

Although the plaintiff in *Clark* was able to prove that a special relationship existed, she was unable to prove that she had justifiably relied on the town's undertaking.[232] "Providing the essential causative link between the special duty assumed by the municipality and the alleged injury, the justifiable reliance requirement goes to the core of the special relationship exception."[233]

"The 'reliance' that is required is [more than a mere] hope or . . . belief that the defendants could provide her with adequate . . . police protection."[234] When the plaintiff's husband was released on his own recognizance, the plaintiff was aware that he was not in custody and that "the police were [unable] to take any [further] action against [him] unless he further violated the order of protection or committed an independent crime.[235]

The governmental function doctrine is based primarily upon separation of powers principles.[236] The legislative and executive branches of government, rather than the judiciary, have the unique responsibility to allocate scarce public resources.[237] Second-guessing of the discretionary priorities set and resources allocated by the other two branches of government is not appropriate.[238] "That the function has traditionally been assumed by police rather than by

228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 415.
233. *Id.*; *see* Greishaber v. City of Albany, 720 N.Y.S.2d 214, 216 (App. Div. 2001).
234. *Clark*, 737 N.Y.S.2d at 415.
235. *Id.*
236. *See* Kircher v. City of Jamestown, 543 N.E.2d 443, 445-46 (N.Y. 1999).
237. *Id.*; *Greishaber*, 720 N.Y.S.2d at 215.
238. Balsam v. Delma Eng'g Corp., 688 N.E.2d 487, 488-89 (N.E. 1997); Tarter v. State, 503 N.E.2d 84, 86-87 (N.Y. 1986); Weiner v. Metro. Transp. Auth., 433 N.E.2d 124, 127 (N.Y. 1982).

private actors is a tell-tale sign that the conduct is not proprietary in nature."[239]

The plaintiff must demonstrate that the State, through direct personal contact, assumed an affirmative duty to act on the injured party's personal behalf, which was conveyed to the injured party, and subsequently relied upon.[240] The most critical element of the special relationship is the injured party's justifiable reliance on the government's assurances.[241]

VI. COMPLAINT LETTERS OR CONFLICTING EXPERT OPINIONS REGARDING THE DECISION TO INSTALL A TRAFFIC CONTROL DEVICE DO NOT AFFECT A MUNICIPALITY'S QUALIFIED IMMUNITY

Recently the Court of Appeals confirmed that highway planning decisions are purely discretionary governmental functions, which are completely protected from liability by qualified immunity.[242] The court reiterated that a recommendation from a private engineering firm that a traffic signal be installed at a particular location does not create liability for a municipality.[243] "Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function."[244] The court in *Affleck* went further to hold that letters of complaint to a municipality regarding the necessity of installing a traffic control device do not alter the affect of the judgement by an authorized traffic planning authority.[245]

It is well settled that a municipality has a non-delegable duty to maintain its roadways in a reasonably safe condition.[246]

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239. *Balsam*, 688 N.E.2d at 489.

240. *Clark*, 737 N.Y.S.2d at 414.

241. *Id.* at 415

242. Affleck v. Buckley, 758 N.E.2d 651, 652-54 (N.Y. 2001); McCabe v. Town of Brookhaven, 735 N.Y.S.2d 608, 609 (App. Div. 2001); Quigley v. Goldfine, 714 N.Y.S.2d 733, 734 (App. Div. 2000); Schuster v. Town of Hempstead, 692 N.Y.S.2d 721, 722 (App. Div. 1999); Onorato v. City of New York, 684 N.Y.S.2d 637, 638 (App. Div. 1999); O'Brien v. City of New York, 647 N.Y.S.2d 561, 562 (App. Div. 1996).

243. *Affleck*, 758 N.E.2d at 654.

244. *Id.*

245. *Id.* at 653

246. Vizzini v. State, 717 N.Y.S.2d 415, 416 (App. Div. 2000); Ciasullo v. Town of Greenville, 712 N.Y.S.2d 579, 581 (App. Div. 2000); Ring v. State, 705 N.Y.S.2d 427, 427 (App. Div. 2000); Schuster v. Town of Hempstead, 692 N.Y.S.2d 721, 722 (App. Div. 1999); Zecca v. State, 669 N.Y.S.2d 413, 414 (App. Div. 1998).

> It is [similarly] well [established] that a municipality is not an insurer of the safety of its roadways. The design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities and, so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied.[247]

A governmental entity may not be liable for highway planning decisions unless its study of traffic conditions is "plainly inadequate or there is no reasonable basis for its plan."[248] Additionally, "the State is not required to undertake expensive reconstruction of highways [merely] because the [highway] design standards have been [amended or] upgraded since the time of the original construction [of a highway]."[249]

If a municipality determines that a traffic control device is necessary to remedy a dangerous condition, the municipality should act within a reasonable time frame to correct the condition.[250] If there is an unjustifiable delay in implementing a remedial plan by the municipality, then the municipality may be subject to liability.[251] Even assuming that the State was negligent in highway design or maintenance, the State will not be liable for an accident unless its negligence was the proximate cause of the accident.[252]

The *Affleck* case involved an automobile accident where plaintiff's decedents were struck by an oncoming car, while attempting to make a left-hand turn into an entrance to a shopping center.[253] "In addition to instituting an action against the drivers and owners of the other cars involved in the accident, plaintiff . . . administrator . . . sued the County . . . alleging that the County negligently failed to conduct traffic studies of the area [in question], relying instead on a private[ ] . . . study."[254] The plaintiff further asserted

247. *Ciasullo*, 712 N.Y.S.2d at 581 (internal citations ommitted).

248. *Affleck*, 758 N.E.2d at 653 (internal citations ommitted); *see* McCabe v. Town of Brookhaven, 735 N.Y.S.2d 608, 609 (App. Div. 2001); Quigley v. Goldfine, 714 N.Y.S.2d 733, 734 (App. Div. 2000); Romeo v. State, 709 N.Y.S.2d 783, 784 (App. Div. 2000); Light v. State, 672 N.Y.S.2d 543, 544 (App. Div. 1998).

249. *Vizzini*, 717 N.Y.S.2d at 417.

250. *See Ring*, 705 N.Y.S.2d at 428-29.

251. *See id.*.

252. Hamilton v. State, 716 N.Y.S.2d 529, 530 (App. Div. 2000); *see Ring*, 705 N.Y.S.2d at 428; Dumond v. State, 689 N.Y.S.2d 898, 899 (App. Div. 1999).

253. *Affleck*, 758 N.E.2d at 652-53.

254. *Id.*

that the county's decision not to install a traffic signal at the intersection in question was unreasonable.[255]

> [I]n response to customer reports of difficulty exiting the parking lot, [the shopping center commissioned a private engineer] to conduct a study of traffic conditions at the intersection. Approximately nine months before the accident, the [private engineer] presented the study to the County with its recommendation that a traffic light be installed. Although the [private engineer's] report focused primarily on the difficulties faced by drivers attempting to exit the [shopping center's] parking lot, it also analyzed traffic conditions for drivers entering the parking lot from [the street where the accident occurred]. The [engineer's] report indicated that, at all times of the day, conditions for drivers making left-hand turns into the parking lot were within acceptable parameters as set by the Federal Highway Administration of the Department of Transportation. According to [undisputed] affidavits, the County relied on the [private] report, as well as its own [independent] studies of traffic conditions at the intersection, to determine [that] a traffic signal [at the intersection was unwarranted].[256]

The county did, however, take remedial measures to improve visibility for drivers exiting the driveway and installed warning signs for drivers approaching the driveway.[257] The court in *Affleck* held that the county adequately examined the need for a traffic signal.

The court in *Affleck* held that neither the letters urging the county to install a signal nor the recommendation by the private engineer that one be installed raises an issue of fact concerning the reasonableness of the county's determination.[258] "[Although] the letters may have alerted the county to a situation warranting study, [such letters] do not substitute for, nor do they cast doubt upon, the considered determination by a duly authorized traffic planning authority."[259]

"Something more than a mere choice between conflicting [expert] opinions is required before the State [or one of its agencies] may be charged with a failure [of] its duty to plan highways for the safety of the traveling public.[260] The plaintiff must show not

255. *Id.*
256. *Id.* at 653.
257. *Id.*
258. *Id.* at 653-54.
259. *Id.*
260. *Affleck*, 758 N.E.2d at 653-54; McCabe v. Town of Brookhaven, 735 N.Y.S.2d 608, 609 (App. Div. 2001); Romeo v. State, 709 N.Y.S.2d 783, 785 (App. Div. 2000) (quoting Weiss v. Fote, 200 N.Y.S.2d 409, 415 (N.Y. 1960)); Chary v. State, 696

merely that another option was available but also that the plan adopted lacked a reasonable basis.[261] Strong public policy considerations warrant that the qualified immunity doctrine shall be applied in circumstances where a governmental body has invoked the expertise of qualified employees.[262]

VII. LIABILITY TO THIRD PARTY PURSUANT TO A CONTRACT

On two separate occasions, the Court of Appeals recently addressed whether a contract can result in liability in tort to a third party. Generally, a contractual obligation standing alone will not give rise to tort liability to a third party. The court has recognized, however, three distinct exceptions where a party who enters into a contract to render services may assume a duty of care to persons outside the contract. A party to a contract may be liable to third persons where: (1) the contracting party creates or exacerbates a harmful condition or launches a force or instrument of harm; (2) the plaintiff detrimentally and reasonably relies on the continued performance of the contracting parties' duties; or (3) the contracting party completely assumes the other party's duty to maintain the premises safety.[263]

A. *Espinal v. Melville Snow Contractors*

In *Espinal v. Melville Snow Contractors*,[264] "the plaintiff brought a personal injury action against the defendant, a company that entered into a snow removal contract with a property owner."[265] The plaintiff alleged that she slipped and fell in the parking lot owned by her employer, due to an icy condition created by negligent snow removal by the defendant.[266]

Initially, the court indicated that a finding of negligence must be based upon the breach of a duty.[267] "[A] threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party."[268] In *Espinal*, the issue was whether any duty ran

N.Y.S.2d 331, 332 (App. Div. 1999); Light v. State, 672 N.Y.S.2d 543, 544 (App. Div. 1998); Monfiston v. County of Suffolk, 670 N.Y.S.2d 53, 54 (App. Div. 1998).

261. *Affleck*, 758 N.E.2d at 652-53.

262. *Romeo*, 709 N.Y.S.2d at 785.

263. Church v. Callanan Indus., Inc., 782 N.E.2d 50, 53 (N.Y. 2002); Espinal v. Melville Snow Contractors, 773 N.E.2d 485, 488 (N.Y. 2002).

264. *Espinal*, 773 N.E.2d at 485.

265. *Id.* at 486.

266. *Id.*

267. *Id.* at 487.

268. *Id.*; Darby v. Compagnie Nat'l Air Fr., 753 N.E.2d 160, 162-63 (N.Y. 2001).

from the contractor to the plaintiff, given that the snow removal contract was with the property owner.[269] "The existence and scope of a duty is a question of law requiring courts to balance . . . competing public policy considerations."[270]

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party."[271] "Imposing [tort] liability under such circumstances could render contracting parties liable in tort to an indefinite number of potential [plaintiffs]."[272]

The court in *Espinal*, discussed the decisions in *H.R. Moch Co. v. Rensselaer Water Co.*,[273] *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*,[274] and *Palka v. Servicemaster Management Services Corp.*,[275] which identify contractual situations involving possible tort liability to third persons.[276] In *Moch*:

> the defendant entered into a contract with the City of Rensselaer to supply water to the City for various purposes, including water at the appropriate pressure for fire hydrants. A building caught fire and, because the defendant allegedly failed to supply sufficient water pressure to the hydrants, the fire spread and destroyed the plaintiff's warehouse. Although the contract was valid and enforceable between the city and the defendant . . . the contract was not intended to make the defendant answerable to anyone who might be harmed as a result of the defendant's alleged breach. Because the plaintiff company was not a third-party beneficiary, it could not sue for breach of contract . . . [or tort]. 'Liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.'"[277]

Ultimately, the court in *Moch* held that tort liability to a third person may arise where the alleged wrongdoer launched a force or instrument of harm.[278]

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269. *Espinal*, 773 N.E.2d at 487.

270. *Id.*

271. *Id.* (internal citations ommitted).

272. *Id.* at 487 (citing H.R. Moch Co. v. Rensselaer Water Co., 158 N.E. 896, 898-99 (N.Y. 1928)).

273. 158 N.E. at 896.

274. 556 N.E.2d 1093 (N.Y. 1990).

275. 634 N.E.2d 189 (N.Y. 1994).

276. *Espinal*, 773 N.E.2d at 487.

277. *Id.* (quoting *Moch*, 158 N.E. at 896).

278. *Id.* at 487-88.

In *Eaves Brooks,* the court held that detrimental reliance is another basis for a contractor's liability in tort to third parties.[279] In *Eaves Brooks*:

> a commercial tenant sought to recover for property damage sustained when a sprinkler system malfunctioned and flooded the premises. The tenant sued the companies that were under contract with the property owner to inspect and maintain the sprinkler system. For policy reasons, [the court] refused to extend liability to encompass the defendant companies, noting that the building owners were in a better position to insure against loss.[280]

The court in *Eaves Brooks* held that tort liability may arise where performance of contractual obligations has induced detrimental reliance on continued performance and the defendant's failure to perform those obligations causes an injury to the plaintiff.[281]

In *Palka*, the court considered:

> whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient. The contract between the parties was "comprehensive and exclusive" and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The company's obligation to the hospital was so [comprehensive] that it entirely displaced the hospital in carrying out maintenance duties.[282]

Accordingly, the court held that the "contracting provider owed a duty to non-contracting individuals reasonably within the zone and contemplation of the intended safety services, including the plaintiff."[283]

By the express terms of the contract, the snow removal company was obligated to plow only when the snow accumulation had ended and exceeded three inches.[284] In addition, the company agreed that upon landowner's request, it would spread a mixture of salt and sand on certain areas of the property.[285] As for snow removal, the company contracted to plow during the late evening and early

279. *Id.* at 488.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 487-89.
285. *Id.* at 489.

morning hours, and not until all accumulations have ceased, on a one time plowing per snowfall basis.[286]

This contractual undertaking was not "comprehensive and exclusive" property maintenance.[287] The snow removal company "did not entirely absorb [the landowner's duty] to maintain the premises safely. Indeed, the contract stated that 'it is the responsibility of the property manager or owner to inspect the property and decide whether an icy condition warrants application[ ] of salt-sand. . . .'"[288]

Pursuant to the contract, the owner was required to communicate any defect in performance to the contractor immediately.[289]

> Although [the company] undertook to provide snow removal services under specific circumstances, [the landlord] . . . retained its . . . duty to inspect and safely maintain the premises. [The company] was under no obligation to monitor the weather to see if melting and re-freezing would create an icy condition.[290]

The plaintiff in *Espinal* failed to allege detrimental reliance on the company's continued performance of its contractual obligations.[291] "[A] defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury."[292] The snow removal company, however, simply cleared the snow as required by the contract.[293] "Plaintiff's fall on the ice was not the result of [the company] having launched a force or instrument of harm.[294] By merely plowing the snow, [the company] cannot be said to have created or exacerbated a dangerous condition."[295]

Because the mere plowing of snow by an outside contractor did not rise to the level of any of the specific exceptions, the defendant owed no duty to the plaintiff and therefore cannot be held liable in tort.[296]

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286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* (internal quotations ommitted).
296. *Id.*

B. *Church v. Callanan Industries, Inc.*

In *Church*, an infant plaintiff received catastrophic spinal injuries when the driver of the car, in which he was a rear passenger, fell asleep at the wheel. The vehicle veered off the highway and into a ditch.[297] The site where the vehicle left the highway was within a substantial resurfacing and safety-improving project, which was completed years earlier, pursuant to an agreement between the Thruway Authority and Callanan Industries, as the general contractor.[298]

The project plans and specifications called for the removal and replacement of existing guiderail with a longer guiderail system.[299] In a related agreement, the Thruway Authority engaged a construction-engineering firm (engineer) to inspect and supervise the contractor's compliance with the plans and specifications.[300] "Under the . . . agreement with [the contractor], the engineer's recommendation was required before final acceptance of the contractor's work."[301]

The contractor entered into a subcontract for the installation of the guiderail system, which incorporated the general contract by reference.[302] Pursuant to the subcontract, "all drawings, certifications and approvals of the Subcontractor shall be submitted for approval of the Architect or Engineer."[303] "In addition, [the contractor] reserved the right to demand at any time that [subcontractor] furnish evidence of its ability to fully perform the subcontract in the manner and within the time specified in the subcontract."[304]

"The gravamen of the action was both the negligent failure to complete the full [installation] of new guiderailing called for by the general contract and . . . subcontract, and [the engineer's] negligent inspection and approval of the installation, despite such non-completion."[305] The contractor and the subcontractor moved for summary judgment, arguing that, "as purely contracting parties with respect to installation of the guiderailing, they owed no duty to the

297. Church v. Callanan Indus., Inc., 782 N.E.2d 50, 51 (N.Y. 2002).
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* (internal quotations ommitted).
304. *Id.*
305. *Id.*

plaintiffs."[306] The plaintiff's submitted opinion evidenced that, had the guiderailing been completed in accordance with the contracts, the car would have been prevented from traveling down the embankment.[307]

The subcontractor "had no preexisting duty imposed by law to install guiderailing at that point on the Thruway."[308] "There was no evidence in the record that the incomplete performance of [the] contractual duty to install [ ] guiderailing . . . created or increased the risk of [the car's] divergence from the roadway beyond the risk which existed, even before . . . any contractual undertaking."[309] The plaintiff did not contend that the loss of control of the car occurred because the driver detrimentally relied on the continued performance of the contractual duties when she failed to remain awake and alert at the wheel.[310] Finally, "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation."[311] If liability invariably follows non-performance of some safety-related aspect of a contract, the exception would assume the general rule against recovery in tort, based merely upon the failure to act as promised.[312] There are limitations on the imposition of liability based upon a defendant's assumption of its promisee's duty to safeguard third persons.[313]

The court in *Church* found that the subcontractor:

> did not comprehensively contract to assume all the Thruway Authority's safety-related obligations with respect to the guiderail system. Instead, the Thruway Authority retained a separate project engineer to provide inspection and supervision of all aspects of the project, including contract compliance with respect to the stipulated length of the guiderail system.[314]

Conversely, the contractor "assumed significant obligations to assure that the construction complied with the project specifications and . . . in a timely fashion, thus undertaking an obligation to inspect and oversee all aspects of the subcontractor's work."[315]

306. *Id.* at 52.
307. *Id.*
308. *Id.*
309. *Id.* at 53.
310. *Id.*
311. *Id.* at 54.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*

The subcontractor "had no reason to foresee the likelihood of physical harm to third persons as a result of reasonable reliance by the Thruway Authority on it to discover" any alleged safety defects, and therefore did not assume the corresponding potential tort liability.[316]

CONCLUSION

A substantial portion of significant decisions by the Court of Appeals during the past year may have a profound impact on civil litigation, specifically with regard to municipal liability. Given the complexity and potential impact of several of the key rulings, the court may be required to provide further guidance and interpretation in the same areas in the coming years.

316. *Id.* at 55.