2021 Municipal Update

mdafp
MORRIS DUFFY ALONSO FALEY & PITCOFF

101 Greenwich Street, 22nd Floor
New York, New York 10006
Telephone: (212) 766-1888
Fax: (212) 766-3252

Table of Contents

Excessive Force

Qualified Immunity – Supreme Court and Second Circuit

Title VII of the Civil Rights Act of 1964

General Municipal Law § 50-e

§ 50-e. Notice of claim:

(2) Form of notice; contents. The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth:

(1) the name and post-office address of each claimant, and of his attorney, if any;

(2) the nature of the claim;

(3) the time when, the place where and the manner in which the claim arose; and

(4) the items of damage or injuries claimed to have been sustained so far as then practicable but a notice with respect to a claim against a municipal corporation other than a city with a population of one million or more persons shall not state the amount of damages to which the claimant deems himself entitled, provided, however, that the municipal corporation, other than a city with a population of one million or more persons, may at any time request a supplemental claim setting forth the total damages to which the claimant deems himself entitled. A supplemental claim shall be provided by the claimant within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be provided by the claimant.

Notice of Claim

Wiggins v. City of New York, 201 A.D.3d 22 (N.Y. App. Div.) [1st Dept 2021].

In 2008, plaintiff Reginald Wiggins was arrested, at the age of 16, in connection with a shooting. Prior to plaintiff's arrest, witnesses positively identified a different suspect, who was ultimately prosecuted for the shooting, and subsequent to plaintiff's arrest, witnesses failed to identity the plaintiff in a lineup. Nevertheless, plaintiff was incarcerated for six years at Rikers Island pending a criminal trial and approximately three of the six years were spent in solitary confinement. In 2014, plaintiff plead guilty to manslaughter and received a 12-year sentence. In 2018, the Court of Appeals overturned plaintiff's conviction, holding his constitutional right to a speedy trial had been violated and the plaintiff was released.

Subsequently, in March 2018, plaintiff filed a notice of claim against the City of New York. A year later, plaintiff sued the City of New York and the New York City Police Department ("NYPD"), however the City of New York moved to dismiss plaintiff's complaint against the NYPD, arguing the plaintiff failed to satisfy General Municipal Law § 50-e because he did not serve a notice of claim that named the NYPD defendants on or before March 2018.

Prior decisions in the First, Second, Third and Fourth Department have held that as a pre-requisite to suing individual municipal employee defendants pursuant to General Municipal Law § 50-e, employee defendants must be named in a notice of claim. General Municipal Law § 50-e requires a notice of claim to contain the following:

> "(1) the name and post-office address of each *26 claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable."

Reading the plain language of the statute, it does not include a requirement that the claimant name individual municipal employees. "Our precedents requiring the naming of particular municipal employees in the notice of claim were based solely on our interpretation of the statute, not on the statute itself." Further, it is well settled that a notice of claim is sufficient

so long as it includes enough information to enable the municipal defendant to investigate a plaintiff's allegations, and "[n]othing more may be required."

In summary the First Department reversed its prior cases and joined the Second, Third and Fourth Departments in holding that General Municipal Law §50-e does not mandate the naming of individual municipal employee defendants in the notice of claim. The Appellate Division ruled that naming individual employee defendants in the notice of claim is not required is now uniform in all departments.

Vehicle and Traffic Law § 1103

§ 1103. Public officers and employees to obey title; exceptions:

(a) The provisions of this title applicable to the drivers of vehicles upon the highways shall apply to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this title with reference to authorized emergency vehicles.

(b) Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety- two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others.

Section 1103 NYS Vehicle Traffic Law

Kaffash v. Village of Great Neck Estates, 190 A.D.3d 709 [2d Dept 2021].

In January 2016, the defendant was operating a snowplow vehicle owned by his employer, the defendant Village of Great Neck Estates. The snowplow vehicle was moving in reverse when its rear bumper allegedly struck the back of the plaintiff, who was walking in the middle of the street near an intersection. Subsequently, the plaintiff commenced an action for personal injuries against the driver of the snowplow and the Village (collectively the defendants). Following the completion of discovery, the defendants moved for summary judgment dismissing the complaint. The Supreme Court denied the motion and the defendants appealed.

A snowplow operator "actually engaged in work on a highway" is exempt from the rules of the road and may be held liable only for damages caused by an act done in "reckless disregard for the safety of others." (Vehicle and Traffic Law § 1103[b]). Reckless disregard requires more than a momentary lapse in judgment. It requires a showing that the operator acted in conscious disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.

Here, the defendants established their prima facie entitlement to summary judgment. In support of their motion, the defendants submitted deposition testimony that the snowplow driver was traveling in reverse at a speed of five to seven miles per hour with the lights and beeping alert of the snowplow vehicle initiated. The driver testified that he kept looking in the mirrors as the snowplow vehicle moved in reverse, but he did not see the plaintiff before the alleged impact.

The Second Department held that under the circumstances, the defendant demonstrated that the snowplow driver did not act with reckless disregard for the safety of others. In opposition, the plaintiff failed to raise a triable issue a fact. Accordingly, the Second Department reversed the Supreme Court holding, reasoning that the Court should have granted the defendants motion for summary judgment dismissing the complaint.

Vehicle and Traffic Law § 1104

§ 1104. Authorized emergency vehicles:

(a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits
for the purpose of calibrating such vehicles'1 speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.

Section 1104 NYS Vehicle Traffic Law

McElhinney v. Fitzpatrick, 193 A.D.3d 1409, 143 N.Y.S.3d 268 [4th Dept 2021].

The plaintiff commenced this action seeking damages for his injuries he sustained when his vehicle was struck by a patrol vehicle operated by the defendant, a deputy sheriff employed by Monroe County Sherriff's office. Defendant appealed from an order denying his motion for summary judgment dismissing the complaint.

Prior to the accident, the defendant had received a 911 dispatch regarding a possible "suicidal intoxicated driver." While on route, the defendant was traveling between 72 and 78 miles per hour on a road in a residential area that had a posted speed limit of 35 miles per hour. It was dark, the road was wet, and defendant had not activated his siren or his emergency lights. He also did not slow down before the impact, did nothing to try to avoid the accident, and was seemingly accelerating at the time of the collision. In the lower court's decision, plaintiff provided sufficient proof that route 441 is "heavily traveled" and "congested" roadway, especially at rush hour.

Although Vehicle and Traffic Law § 1104 authorizes the driver of an emergency vehicle to "[e]xceed the maximum speed limits," he or she may do so only "so long as he [or she] does *not* endanger life or property" (§ 1104 [b] [3]). It is incumbent of a defendant to also provide some evidence to indicate that his or her driving cannot be characterized as a "momentary lapse of judgement."

The Fourth Department held that that the evidence demonstrating that defendant did not take any precautionary measures raises triable questions of fact whether his conduct leading up to the accident endangered life or property. Furthermore, evidence establishing that the defendant did not activate his emergency lights or siren, even though he would have been justified in doing so and was reprimanded for not doing so, also raises an issue of fact with respect to defendant's recklessness. Thus, the Supreme Court properly denied the motion and the Fourth Department affirmed.

Holliday v. City of New Rochelle, 195 A.D.3d 1002, 146 N.Y.S.3d 806 [2d Dept 2021].

At or about 3:45 a.m. New Rochelle Police Officer Jimenez and his partner responded to a call regarding plaintiff's disruptive conduct. Plaintiff was arrested, handcuffed and placed in the back seat of the New Rochelle police vehicle with no seat belt on. The police vehicle was parked facing in the opposite direction, in a one-way street on Washington Avenue. Officer Jimenez decided to enter a semicircle driveway and exit at the other end of Washington Avenue, heading in the correct direction on the one-way street when the police vehicle came into contact with a yellow stationary pole. Plaintiff commence this action against Officer Jimenez and the City of New Rochelle to recover damages for personal injuries. The defendants moved for summary judgment dismissing the complaint, contending that the undisputed evidence demonstrated that they were entitled to immunity pursuant to Vehicle and Traffic Law § 1104.

Vehicle and Traffic Law § 1104 provides a qualified exemption to drivers of authorized emergency vehicles from certain traffic laws when they are involved in an emergency operation. "[T]he reckless disregard standard of care in VTL § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by VTL § 1104(b)." "Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence."

The Second Department found that while there is no dispute that Officer Jimenez was involved in an emergency operation of his vehicle, his injury-causing conduct did not fall within any of the categories of privileged conduct set forth in VTL §1104(b). Thus, the plaintiff's claim was governed by principles of ordinary negligence, and not the reckless disregard standard under VTL §1104(e). Since the evidence submitted in support of the defendants' motion presents a triable issue of fact as to whether Officer Jimenez was negligent in the operation of his vehicle, the Supreme Court's decision to deny the defendants motion for summary judgment was affirmed.

Village Law § 6-628

§ 6-628 Liability of village in certain actions:

No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

Prior Written Notice Statutes Concerning Trip and Falls

O'Brien v. Village of Babylon, 196 A.D.3d 494 (N.Y. App. Div.) [2d Dept 2021].

In June 2021, the plaintiff allegedly sustained injuries when he fell upon stepping into a gap in the brickwork around a tree well located in a public sidewalk owned by the defendants in the Village of Babylon. The tree well had been created by the Village in the late 1990's after a request that the tree be planted at the site with a memorial plaque in the tree well. The Supreme Court granted the defendant's motion for summary judgment dismissing the complaint and the plaintiff's appealed.

The prior written notice required by Village Law § 6–628 is a condition precedent to maintaining an action against the Village for a defective sidewalk condition, which a plaintiff is required to plead and prove. The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality. The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition.

Here, the Village established that it did not have prior written notice of a defective condition in the tree well area through the affidavit of the Village Clerk, who averred that her search of the Village's records revealed no prior written notice of any dangerous or defective condition at the subject location. Further, the Village established, prima facie, that it did not commit an affirmative act of negligence that immediately resulted in the existence of a dangerous condition. The affidavit of the plaintiffs' expert was insufficient to raise a triable issue of fact, as it was conclusory and speculative. Lastly, the Village did not make special use of the tree well, as it did not derive a special benefit from the tree well unrelated to the public use. Accordingly, the Second Department affirmed the Supreme Court's decision.

Roadway Design

Rodriguez v. Palacio, 199 A.D.3d 728 (N.Y. App. Div.) [2d Dept 2021].

In April 2011, at or around 4:00 a.m., the plaintiff's decedent was involved in a fatal single-vehicle accident on the exit ramp on the Queensboro Bridge Roadway. According to the police report, the defendant driver of the vehicle (hereafter the "driver") struck the curb while traveling on the exit ramp at an apparent high rate of speed, causing him to lose control of the vehicle, strike a guard rail and crash into several storefronts nearby. The driver admitted that he had consumed several alcoholic drinks in the hours preceding the accident, with a blood alcohol content of .15. This level impaired the driver's judgment, coordination, and ability to operate a vehicle. The plaintiff's decedent was asleep in the passenger seat and died as a result of the injuries she sustained in the accident.

The plaintiff, Roberto Rodriguez, individually and as the administrator of the decedent's estate, thereafter commenced this action against the driver, the City of New York, New York City Department of Transportation ("NYCDOT"), New York City Economic Development Corporation (hereafter collectively the "City defendants"), LiRo Engineers, and Triumph Construction Corp. to recover damages for wrongful death. The pleadings alleged that the City and NYCDOT were negligent in the planning and design of the "geometry" of the exit ramp. Additionally, it alleged that the City, Triumph, and LiRo were negligent in placing a concrete median divider, known as a "Jersey Barrier," on the exit ramp, which abruptly redirected the defendant's direction of travel. The plaintiff submitted evidence in which an engineer opined that the accident was caused by orange traffic barrels in the roadway, narrowing the lane of travel. The Supreme Court granted the defendant's motion for summary judgment dismissing the complaint, and the plaintiff appealed from the order.

A municipality owes to the public the absolute duty of keeping its streets reasonably safe. While this duty is nondelegable, it is measured by the courts with consideration given to the proper limits on intrusion into the municipality's planning and decision-making functions. Thus, in the field of traffic design engineering, the [governmental body] is accorded a qualified immunity from liability arising out of a highway planning decision. Under the doctrine of

qualified immunity, a governmental body may not be held liable for a highway safety planning decision unless its study of the traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan.

On appeal, the Second Department reasoned that in this case, the City defendants were entitled to immunity from liability arising out of the planning and design of the geometry of the exit ramp with evidence that the traffic plan for that area neither evolved without adequate study nor lacked a reasonable basis. Specifically, the evidence demonstrated that engineers had analyzed the geometry of the exit ramp with the NYCDOT in connection with a 1998 study to improve safety on the exit ramp by increasing sight distances for motorists and reducing traffic flow. Furthermore, the City defendants established, prima facie, that they neither created nor exacerbated any dangerous conditions on the exit ramp alleged to have caused the accident and that the driver's own negligence in operating his vehicle while intoxicated and at a high rate of speed was the sole proximate cause of the accident. Therefore, the Second Department affirmed the Supreme Court’s decision, granting the City defendant's motion for summary judgment dismissing the complaint.

Governmental Immunity

Santaiti v. Town of Ramapo, 197 A.D.3d 1191, 153 N.Y.S.3d 554 [2d Dept 2021].

In October 2015, Patricia Nigro, hereinafter the decedent, was physically assaulted by her husband, William Groesbeck. The decedent notified the Town of Ramapo Police Department who arrived at her home. The decedent notified the officers that Groesbeck had a handgun and that she feared for her life. The officers confiscated Groesbeck's gun, however the Town of Ramapo Police Department allegedly returned the firearm to Groesbeck after learning that he was a retired police officer, and did so even though Groesbeck was not licensed to possess the gun in the State of New York. In October 2015, Groesbeck used the same gun to fatally shoot the decedent, and subsequently took his own life.

The Second Department reviewed the lower court's decision in denying the Town's motion for summary judgment dismissing the complaint. The Second Department reasoned that the Town was not entitled to judgement as a matter of law based upon the governmental function immunity defense. Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.

In this case, returning the firearm to Groesbeck was not a discretionary function. Groesbeck did not have a license to possess the gun and did not produce proper identification under the Law Enforcement Officers Safety Act. Thus, returning the confiscated firearm to Groesbeck was a ministerial act, envisioning direct adherence to governing rules or standards, which, under the circumstances, clearly required the Town to withhold the gun from Groesbeck.

Further, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created. Here, the evidence demonstrated the existence of triable issues of fact as to whether the Town, through its police officers, voluntarily assumed a duty on behalf of the decedent when they confiscated Groesbeck's gun in response to the decedent's alleged report that Groesbeck had physically assaulted her. The case does involve issues of triable fact as to whether the harm to the decedent was foreseeable upon the return of the gun to Groesbeck, and whether the decedent justifiably

relied upon the Town's continued withholding of the gun from Groesbeck. Accordingly, the Second Department affirmed the Supreme Court's decision.

Feldman v. Port Authority of New York, 194 A.D.3d 137, 144 N.Y.S.3d 701 [1st Dept 2021].

This case involves several wrongful death actions that arose from plaintiff's decedent suicides by jumping off the George Washington Bridge ("GWB"). On July 26, 2017, Lael Feldman, a 24–year–old jazz singer, walked along the south walkway of the GWB and jumped over the four-foot railing into the Hudson River, resulting in her death. The next day, Andrew Donaldson, a 49–year–old architect and father of two children, also walked along the south walkway of the GWB and jumped over the railing to his death.

In April 2018, plaintiff Donaldson, individually and as Administrator of the Estate of Andrew Donaldson, and Plaintiffs Feldman, individually and as Voluntary Administrator of the Estate of Lael Feldman commenced an action against the Port of Authority of New York and New Jersey ("Port Authority").

In each case, plaintiffs allege that the GWB was unreasonably dangerous because the low four-foot railing on the south walkway facilitated suicides and that the Port Authority had long been aware that the bridge had become a "suicide magnet" based upon hundreds of deaths that had occurred at the bridge over the decades preceding these cases. The complaints allege that suicide attempts at the GWB have occurred at the rate of approximately 1 every 3 1/2 days, and that about 93 deaths occurred from 2009 up to 2016. The complaints assert that the Port Authority, as the owner of the GWB, owed a duty to the public from foreseeable harm and "failed to exercise reasonable care in constructing, operating, and maintaining the [GWB]" and were negligent "in falling to provide for the safety and protection for vulnerable or impulsive individuals."

When the liability of a governmental entity is at issue, the court must ascertain whether the governmental entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the governmental entity's actions fall within the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. It is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability,

not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred.

Here, the act complained of was the failure of the Port Authority to maintain the GWB and its pedestrian walkway in reasonably safe condition for those who foreseeably use it, which does not implicate its policing function. There are no allegations that the Port Authority failed to provide protection and security. Rather, the allegation is that it failed to maintain the GWB in a reasonably safe condition by negligently failing to install suicide barriers along the walkways to prevent suicides. As such, the Port Authority is subject to suit under the ordinary rules of negligence. The scope of its duty is shaped by the foreseeability of harm. The intentional acts of plaintiffs' decedents in jumping from the bridge were "itself the foreseeable harm that shapes the duty imposed," and in such circumstances, "the defendant who fails to guard against such conduct will not be relieved of liability when that act occurs."

The First Department held that the complaints sufficiently alleged that the low railing of the bridge, and Port Authority's awareness of the frequent suicide attempts on the bridge over previous decades, give rise to a duty to install fencing to protect against foreseeable harm to withstand a motion to dismiss.

Special Duty Defense – Discretionary Immunity

Ferreira v. City of Binghamton, NY Slip Op 01953 [Court of Appeals 2021].

In August 2011, a police officer employed by defendant Binghamton Police Department obtained information that Michael Pride, an alleged armed and dangerous felony suspect, resided in an apartment in that city. Subsequently, the police obtained a no-knock search warrant for the residence. On the night of the raid, Police Officer Kevin Miller, led a SWAT team into the apartment where they first encountered the plaintiff, a visitor, who was sleeping on the living room couch. Upon entry, Miller shot plaintiff who was unarmed, in the stomach causing plaintiff to suffer serious injuries.

Plaintiff commenced this action in federal court against, among others, Miller, the police department, and the City of Binghamton (the City). The plaintiff won a verdict at trial, but in post-trial motions, the trial verdict was overturned, and the case made its way to the Second Circuit on the issue of whether plaintiffs injured by a municipality must show that the municipality owed them a special duty. The plaintiff argued that no such "special" duty was required because, on the facts of the case, an ordinary, common-law duty was enough. The Second Circuit sent the question to the New York Court of Appeals to decide.

The Court of Appeals has recognized that a special duty can arise in three situations: **(1)** the plaintiff belonged to a class for whose benefit a statute was enacted; **(2)** the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or **(3)** the municipality took positive control of a known and dangerous safety condition. Where the claimed negligent acts or omissions involved a governmental function, it is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself.

The majority held that the plaintiff did in fact need to establish a special duty when suing a municipality in negligence. The majority ruled that plaintiff had established a special duty. Specifically, the majority found that plaintiff had established a special duty by showing that the police "took positive control of a known and dangerous safety condition," the third method in establishing special duty. The Court relied largely on one of the few Court of Appeals cases that have addressed the third method: *Smullen v. City of New York*, 28 NY2d 66. There, the Court

determined that a special duty could be established where a municipal inspector on a work site informed the decedent that a trench did not need to be shored just before it collapsed, killing the decedent.

Consistent with their approach in *Smullen*, the majority reasoned that a special duty may be established where the police plan and execute a no-knock search warrant on a targeted residence. Although the Court had not yet had an occasion to address application of the special duty rule to the execution of no-knock search warrants, that situation fits within the existing parameters of the Court's special duty precedent.

The execution of a no-knock warrant is a charged and volatile situation undertaken at the direction and supervision of municipal actors, who plan and execute the warrant and who can reasonably foresee and take steps to avoid many of the risks occasioned by uncertain reactions to chaotic events when the police forcefully cross the threshold of someone's home. In a no-knock warrant situation, the police exercise extraordinary governmental power to intrude upon the sanctity of the home and take temporary control of the premises and its occupants. In such circumstances, the police direct and control a known and dangerous condition, effectively taking command of the premises and temporarily detaining occupants of the targeted location. As a result, the municipality's duty to the individuals in the targeted premises, a limited class of potential plaintiffs, exceeds the duty the municipality owes to the members of the general public. A special duty, therefore, arises when the police plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed. In other words, in those circumstances, the police take positive control of a known and dangerous condition, creating a special duty under the third situation recognized by this Court.

Accordingly, the certified question should be answered by the Second Circuit in accordance with this opinion. The importance of this Court of Appeals decision is that it appears to have broadened the third method of establishing special duty, a method that had rarely been alleged or litigated because of its narrowly limited circumstances.

Devlin v. City of New York, 193 A.D.3d 819, 148 N.Y.S.3d 149 [2d Dept 2021].

On February 11, 2011, police officers responded to an alleged domestic disturbance at the home of Elizabeth Devlin, who resided there with her adult sons, Matthew and John. It was alleged that an altercation had occurred between Matthew and his mother, however, no arrest was made, as the officers determined that no crime had been committed. The following day, Matthew allegedly attacked his mother and brother with a baseball bat, injuring both of them. On February 17, 2011, Elizabeth Devlin allegedly died due to the injuries she sustained during the attack.

John Devlin and his sister, as executor of their mother's estate, commenced this action against the City of New York and the NYC Police Department (hereafter the defendants) to recover damages for personal injuries and wrongful death. In Supreme Court, Queens County, the defendants moved for summary judgment dismissing the complaint on various grounds, including governmental immunity. The Supreme Court denied their motion and defendants appealed.

As a general rule, a municipality may not be held liable for injuries resulting from a simple failure to provide police protection. The common-law doctrine of governmental immunity shields public entities from liability for discretionary acts taken during the performance of governmental function. Under this doctrine, a municipal defendant cannot be held liable for the negligent acts of its employee police officers where it establishes that the alleged negligent acts involved the exercise of discretionary authority. Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."

Here, the defendants did establish that the City was entitled to judgment as a matter of law. The defendants demonstrated that the police officers' actions were discretionary and they did not fail to follow the police department's rules and policies in deciding not to arrest Matthew. Since the officers determined that no crime had been committed, the officers were not compelled to arrest Matthew. Accordingly, the Second Department held that the lower court should have granted the defendants motion for summary judgment, reasoning that the governmental immunity defense precluded municipal liability.

Excessive Force

Torres v. Madrid, 141 S. Ct. 989, 209 L. Ed. 2d 190 (2021).

In 2014, New Mexico State Police officers went to an apartment complex in Albuquerque to arrest a woman. The officers saw two individuals standing in front of the woman's apartment next to a vehicle. As the officers approached the vehicle, one of the individuals ran into the apartment, while the other individual, plaintiff Roxanne Torres, got inside the vehicle and started the engine. As soon as the vehicle creeped an inch or two, the officers fired at the plaintiff and two bullets struck plaintiff.

In October 2016, plaintiff filed a civil-rights complaint in federal court against the two officers, asserting that the intentional discharge of a firearm exceeded the degree of force which a reasonable, prudent law enforcement officer would have applied. The district court construed plaintiff's complaint as asserting the excessive-force claims under the Fourth Amendment, and the court concluded that the officers were entitled to qualified immunity. It reasoned that the officers had not seized plaintiff at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation. Plaintiff appealed.

At issue in the case was whether the application of physical force is a seizure, if the force, despite hitting its target, fails to stop a person? The Supreme Court held that the application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person. Chief Justice John Roberts authored the majority opinion.

Under the Court's precedents, common law arrests are considered seizures under the Fourth Amendment, and the application of force to the body of a person with intent to restrain constitutes an arrest even if the arrestee escapes. The use of a device, in this case, a gun, to effect the arrest, makes no difference in the outcome; it is still a seizure. The majority reasoned that there is no reason to draw an "artificial line" between grasping an arrestee with a hand and using some other means of applying physical force to effect an arrest. The key consideration is whether the conduct objectively manifests the *intent to restrain*; subjective perceptions are irrelevant. Additionally, the requirement of intent to restrain lasts only as long as the application of force. In

this case, the officers' conduct clearly manifested intent to restrain Torres and was thus a seizure under the Fourth Amendment.

Justice Neil Gorsuch authored a dissenting opinion, in which Justices Clarence Thomas and Samuel Alito joined, arguing that "neither the Constitution nor common sense" support the majority's definition of a seizure. They argue that the common law limited arrests by force to the literal placement of hands on the suspect, because no court published an opinion discussing a suspect who continued to flee after being hit with a bullet or some other weapon.

Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 211 L Ed 2d 164 (2021).

A 911 operator received a call from a crying 12-year-old girl reporting that she, her mother and her older sister had shut themselves into a room at their home because her mother's boyfriend, Ramon Cortesluna (Plaintiff), was trying to hurt them and had a chainsaw. The Union City Police Department in California responded to the 911 call. The Officers confirmed that the victims were trapped in the house, so they commanded Cortesluna to exit the home and get on the ground. Officers observed a knife in Cortesluna's left pocket. They then ordered him to keep his hands in the air. However, he lowered them towards the knife. The officers shot him twice with a beanbag shotgun. While removing the knife and handcuffing Cortesluna, Officer Daniel Rivas-Villegas (Defendant) placed his knee on the left side of Cortesluna's back. Within eight seconds, the Rivas-Villegas removed his knee.

Cortesluna filed a §1983 action for excessive force. The District Court granted summary judgment to the defendants, but the Ninth Circuit affirmed in part, reversed in part, and remanded, holding that Rivas-Villegas was not entitled to qualified immunity. They reasoned that existing case precedent (*LaLonde v. County of Riverside*, 204 F.3d 947) put Rivas-Villegas on notice that his conduct constituted excessive force. The issue for the Supreme Court to consider was whether Rivas-Villegas is entitled to qualified immunity because he did not violate clearly established law.

The Supreme Court of the United States reversed reasoning that *LaLonde* in fact did not put Rivas-Villegas on notice as it is materially distinguishable from the case at bar. In *LaLonde*, police were responding to a mere noise complaint. The plaintiff there was unarmed, and the

officer there deliberately drove his knee into the plaintiff's back even though he made no threat when approached by police. Here, the Supreme Court held that an officer's conduct in placing their knee on a suspect's back for no more than eight seconds, and only on the side of the back near a knife the officers are attempting to retrieve, does not constitute excessive forced.

Ketcham v. City of Mount Vernon, 992 F.3d 144 [2d Cir. 2021].

In March 2017, Ketcham, a retired federal probation officer, was walking near his home in New Rochelle, New York. Hutchins and Patterson, police officers assigned to the Mount Vernon Police Departments warrant squad, were in the area searching for an individual with an outstanding warrant for a misdemeanor offense of forcible touching. The officers were in plain clothes in an unmarked vehicle with neither the emergency lights nor the sirens activated at the time. The officers saw Ketcham who fit the physical description of the individual with the active arrest warrant.

Ketcham and the officers have greatly different versions of what occurred after Ketcham was approached by the officers. Ketcham claims that because he did not see Patterson wearing a badge or other identifying information, he thought he was being mugged abducted and called bystanders to "get a uniformed police officer to the scene." Ketcham claims that his arm was twisted behind his back, thrown against a chain linked fence and was placed in handcuffs snapped too tightly causing him substantial pain. Ketcham claims that although he told Patterson the handcuffs were hurting his wrists, the officer ignored his complaints. Lastly, Ketcham alleges that his head was slammed against the cars' door frames. While in the police car, Ketcham realized that the two men were officers and quickly told them that he was a former law enforcement officer as well. After hearing this, Patterson examined Ketcham's driver's license, and confirmed that he was not the subject of the outstanding warrant. Shortly after, Ketcham was released.

The police officers claim that they approached Ketcham with shields visible around their necks and identified themselves as members of the police department. They claim that they

informed Ketcham about the warrant and requested identification, to which Ketcham refused to provide. Both officers did testify that Ketcham was screaming he was being robbed and that they were fake cops trying to rob and kidnap him. Patterson testified that Ketcham was putting a fight to resist arrest and in the process of the struggle, they had to push Ketcham against a chain link fence and due to Ketcham's flailing, it resulted in him bumping his own head into the door frame. The officers testified that upon them securing Ketcham in the back seat, Ketcham became cooperative and provided his name and identifying information.

Ketcham sued the Mount Vernon and two officers for excessive force and unlawful search and seizure pursuant to §1983. The district court granted the officers summary judgment motion reasoning that any reasonable factfinder could conclude that the officers use of force was reasonable due to the limited force used and minimal injuries that Ketcham suffered. Ketcham appealed.

All claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its reasonableness standard." Examining the reasonableness of the force used "requires careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."

Here, the Court of Appeals reasoned that the district court adopted a version of the circumstances that was proffered by the officers. While the Court of Appeals has acknowledged that not every push or shove violates a person's constitutional rights, "we have also held that both unnecessary handcuff tightening and pushing an arrestee's head into a police car door can constitute excessive force." Ketcham's statement that he continued to scream for help throughout the encounter is an "important" factor in an excessive force analysis. Here, Ketcham testified that he complained that the handcuffs were causing him pain, putting Patterson on notice that the force was excessive. The fact that Ketcham's injuries were not severe is insufficient to merit summary judgment. The Court of Appeals rejected the defendants qualified immunity defense as to the handcuffing allegations and head slamming conduct. As such, the Court of Appeals held

that Ketcham's testimony raised questions of material fact and Ketcham is entitled to an opportunity to prove his case before a jury. The district court's judgement was vacated.

Qualified Immunity

City of Tahlequah, Oklahoma v. Bond, 142 S. Ct. 9, 211 L. Ed. 2d 170 (2021).

The Supreme Court reversed a Tenth Circuit decision that had denied qualified immunity to two police officers who shot and killed a suspect after the suspect raised a hammer "behind his head and took a stance as if he was about to throw the hammer or charge at the officers." Dominic Rollice's ex-wife called 911 to report that Rollice was in her garage, intoxicated, and would not leave. Three officers responded to the call. They encountered Rollice at the side entrance to the garage and began speaking to Rollice who "appeared nervous" and was "fidgeting with something in his hands." Rollice was also concerned that he was going to be taken to jail. The officers asked if they could pat Rollice down for weapons, but he refused. When Officer Girdner gestured with his hands and took a step forward, Rollice took a step back and then turned around and walked toward the tools at the back of the garage. Disobeying an order to stop, Rollice kept walking and grabbed a hammer. He held it with both hands and pulled it up to shoulder level. Disobeying orders to drop the hammer, Rollice moved to where he had a clear view of Officer Girdner, "then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers." The officers fired their weapons, killing Rollice.

Rollice's estate filed a § 1983 suit against the officers, alleging they violated his Fourth Amendment right to be free from excessive force. The district court granted the officers' motion for summary judgment, but the Tenth Circuit reversed. It explained that its precedent "allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force." And it concluded "that a jury could find that Officer Girdner's initial step toward Rollice and the officers' subsequent 'cornering' of him in the back of the garage recklessly created the situation that led to the fatal shooting." The Tenth Circuit found that several cases, particularly *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), clearly established that the officers' conduct was unlawful. Through a *per curiam* opinion, the Court reversed.

The Court concluded that none of the cases upon which the Tenth Circuit relied "clearly established" that the officers' "conduct was reckless or that their ultimate use of force was unlawful." The Court found that "the facts of *Allen* are dramatically different from the facts here." In *Allen*, the officers "responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands." Here, by contrast, the officers "engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer." The Court found that the "other decisions relied upon by the Court of Appeals are even less relevant." Because "[n]either the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances[,] [t]he officers were entitled to qualified immunity." Thus, the Supreme Court reversed the Court of Appeals decision.

Vasquez v. Maloney, 990 F.3d 232 [2d Cir. 2021].

In January 2015, police officers stopped Kim Vasquez as he and his daughters walked out of a Target store. Vasquez claimed that the Officers surrounded him and "demanded that he freeze, with his hands in the air, turn around to face a pillar, and keep his hands up on the pillar." Vasquez claimed that the Officers then frisked him, rubbing and touching his body, "including [his] private parts," while his family watched "this humiliating experience." Vasquez sued the Clarkstown police officers pursuant to 42 U.S.C. § 1983, alleging that they violated his rights under the Fourth Amendment of the United States Constitution when they stopped and frisked him without a warrant or probable cause. The case was presented to the Second Circuit on denial of the officer's summary judgment motion.

The officers claim that they were conducting an investigation into the passing of counterfeit money at a Target store. One detective in the store's office monitoring the security camera's recognized Vasquez from a prior arrest. He communicated by radio to officers in the parking lot that "he [Cruz] believed that there might be a judicially issued warrant for [Vasquez's] arrest."

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions, preserving a balance between "vindication of citizens' constitutional rights and ... public officials' effective performance of their duties." The dispositive inquiry "is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Defendants moving for summary judgment on the basis of qualified immunity bear the burden of "demonstrating that no rational jury could conclude (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct."

The Second Circuit reasoned that the Supreme Court long ago held in *Terry v. Ohio* that police officers may in appropriate circumstances approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. The reasonable suspicion threshold is not high and a court must evaluate the circumstances surrounding the stop "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training."

Here, the officers did not satisfy the low threshold that would satisfy an investigative *Terry* stop. That is, they offered no specific and articulable facts—at all—supporting an inference that Vasquez was (1) involved in or (2) wanted in connection with a crime. There is well-settled case law since 1977 that seeing a person with a criminal record and nothing more does not give rise to reasonable suspicion that the person is engaged in criminal activity. Further, the officers claim that Vasquez was wanted in connection with a completed crime was not offered with "specific or articulable facts" that could have reasonably warranted such a belief. The officers contend that denying them qualified immunity amounts to a requirement that "police exhaust all available means of technology to determine whether an arrest warrant was open before conducting a basic safety search." However, the Second Circuit reasoned that the officer's did not even purport to have any basis for believing that there was a warrant outstanding for this arrest in the first place.

In sum, the Second Circuit held that it was clearly established law in January 2015 that an officer's unconfirmed hunch that an arrest warrant might possibly exist, coupled with nothing more than the officer's recognition of a suspect from prior arrests, does not constitute reasonable

suspicion justifying a *Terry* stop or frisk. For the reasons stated, the officers were not entitled to qualified immunity.

Title VII of the Civil Rights Act of 1964: ***Disparate Impact.***

Mandala v. NTT Data, Inc., 988 F.3d 664 [2d Cir. 2021].

In 2017, George Mandala ("Mandala") and Charles Barnett ("Barnett"), both African American, were offered jobs with NTT Data, Inc. ("NTT"), a global information technology services provider. After they each received job offers, NTT withdrew the offers of employment upon discovering, pursuant to routine background checks, that Mandala and Barnett had felony convictions. NTT justified their decisions by merely stating that it had a policy of not hiring individuals with felonies on their records.

Mandala and Barnett sued NTT on the basis that the company's hiring practices violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, which prevents employers from discriminating against employees or job applicants based on race, color, religion, sex, or national origin, as well as several New York antidiscrimination laws. Mandala and Barnett argued that national statistics, which they used as evidence to support their claims, show that African Americans are arrested and incarcerated more than Caucasians in the national population. They further argued that employers tend to put more weight on criminal history for African American candidates as opposed to Caucasian candidates.

At the pleading stage, a Title VII disparate impact complaint must plausibly allege that (i) a specific employment practice or policy exists, (ii) a disparity exists, and (iii) there is a causal connection between the two. While reference to statistics frequently satisfies this pleading burden, both caselaw and common sense make clear that not just any statistics will do. In the disparate impact context, this means, among other things, that a plaintiff's chosen statistics must focus on disparities between appropriate comparator groups – that is, the individuals holding the jobs at issue and "the qualified population in the relevant labor market."

Despite the Plaintiffs proffering the statistical data demonstrating the higher rate of arrest and incarceration of African Americans, when pleading their case, "the district court dismissed the complaint for failure to state a claim." In a 2-1 decision in September 2020, the Second Circuit Court of Appeals, affirmed the dismissal of a lawsuit indicating that Plaintiffs couldn't use statistics showing national racial disparities in arrests and convictions to back up their claim

that NTT's policy against hiring workers with felony convictions disproportionately impacts people of color.

Mandala and Barnett's brought an *en banc* petition challenging the Second Circuit's September ruling. In February 2021, the Second Circuit denied rehearing this case *en banc*, holding that the general population statistics were not relevant to NTT's labor pool for the positions the plaintiff's sought. Potential job applicants in NTT's labor pool have higher education levels than the general public, and common sense dictates that conviction and education rates are inversely related, according to the concurrence. Put plainly, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."

The dissent argued that the majority was willing to make "inferences favoring the Defendants while declining to make obvious inferences for Plaintiffs that would rebut the central basis of the panel majority's reasoning," thus incorrectly applying Federal Rule of Civil Procedure 12(b)(6).[13] The dissents fear was that this decision created a higher than usual standard for pleading that threatens to founder valid civil rights litigation for failure to state a claim.