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NEW YORK MUNICIPAL LAW UPDATE

In an effort to keep our municipal clients apprised of new case law, we have summarized the following cases and issues from the New York Court of Appeals.

An Action Against A Municipality Cannot Suffice as a Notice of Claim for Damages that Accrue After the Start of the Action

Varsity Transit, Inc. v. Board of Education of the City of New York, 5 N.Y.3d 532, 806 N.Y.S.2d 457 (2005).

Certain bus companies entered into a long-term contract with the New York City Department of Education to transport New York City school children. The contract provided a formula that calculated increases in the cost of providing benefits to bus monitors.

The bus companies and the Department of Education eventually fell into a dispute over how the Department applied the formula. The companies claimed that the Department had underpaid them for the 1995–96 school year and for the first three months of the 1996–97 school year. As a result, the companies filed a notice of claim against the Department pursuant to Education Law section 3813(1) (requiring that a notice of claim must be filed within three months after the accrual of such claim in order to proceed in an action against the Department). They then sued the Department seeking damages for breach of contract and an injunction compelling the Department to apply the formula according to the companies' interpretation.

As the parties litigated the dispute in the Supreme Court, the Department continually applied its version of the formula. The plaintiff-companies eventually moved for summary judgment, and also submitted a supplemental complaint seeking damages for the misapplication of the formula in the years subsequent to the original action.

The Court of Appeals reversed a decision by the Appellate Division, First Department to accept the supplemental complaint. The Court held that an action against a municipality does not constitute sufficient notice pursuant to Education Law §3813(1), and that a new notice of claim must be filed within three months after every action's accrual.

In reaching its decision, the Court explained that statutory requirements regarding the filing of claims against a governmental entity must be strictly construed. Since Education Law §3813(1) makes no exception to the notice of claim requirement, the plaintiffs should have filed a new notice of claim within three months after each misapplication. The Court further added that compromising the notice of claim requirement "would lead to uncertainty and vexing disputes," and that the issue of whether an action provides sufficient notice, in lieu of a notice of claim, is for the legislature to decide.

Proposed Amendments to The Recreational Use Statute (General Obligations Law section 9-103)

Legislators in Albany are currently examining a number of bills in both the Senate and the Assembly which seek to amend General Obligations Law §9-103, otherwise known as the Recreational Use Statute. Essentially, the Recreational Use Statute protects landowners, lessees and occupants from liability against recreationists who sustain injuries on their property while participating in an activity enumerated in the statute.

To date, the covered activities are hunting, fishing, canoeing, boating, trapping, cross-country skiing, sledding, speleological activities (cave exploration), snowmobile operation, cutting or gathering wood for non-commercial purposes, motorized vehicle operation for recreational use, horseback riding, bicycle riding, hang gliding, tobogganing, organized gleaning, hiking, and training dogs.

Three statutory exceptions include 1) willfully or maliciously failing to guard or to warn against a dangerous condition, use, structure or activity, 2) situations where permission to pursue any of the enumerated activities was granted for consideration, other than consideration paid out by state or federal authorities, and 3) situations where the person receiving permission to pursue an enumerated activity injures another person to whom the landowner, lessee or occupant owed the other person a duty to the keep the premises safe or to warn of danger.

Many of the proposed amendments to the Recreational Use Statute essentially seek to expand the statute's grant of immunity. Some bills suggest inserting a catch-all provision alongside the enumerated activities. For example, one bill inserts the phrase ". . . or other recreational activities[,] " at the end of the activity list. Another bill inserts the phrase "any recreational use, including but not limited to. . . [,]" before the activity list.

As of early January 2006, these catch-all amendments are circulating through Albany. One such bill has passed the Senate and is awaiting examination by the Assembly's Insurance Committee, while another is awaiting examination by the Senate's Judiciary Committee. If any of the prospective amendments is enacted into law, we will advise you and will also keep you updated if the Court of Appeals interprets the meaning of the new amendment and the vastly broadened immunity categories.

Snow Plows, While On Their Way From One Plowing Destination to Another, Retain the Recklessness Standard Set Forth in Vehicle & Traffic Law section 1103(b)

Vehicle & Traffic Law Section 1103(b) sets forth that any vehicle engaged in work on a highway is held to a standard of reckless disregard as opposed ordinary negligence (reasonable care). Courts have continually applied the recklessness standard to snow plows pushing snow, but there has been much debate over whether the standard applies to a snow plow moving from one plowing destination to another with the actual plow raised.

Recently, two cases held that a snow plow moving from one plowing destination to another was protected by the recklessness standard set forth in Vehicle & Traffic Law §1103(b). In *Oliveria v. City of Mount Vernon*, 2005 WL 3T71944 (S.D.N.Y. 2005), a pedestrian was hit in the back by a snow plow owned by

the City of Mount Vernon. The defendant-city argued that since the snow plow was performing work on the highway, the standard of recklessness set forth in V.T.L. §1103(b) applied. The plaintiff countered with the argument that since the snow plow had been raised at the time of the accident, ordinary negligence was standard of care.

The court in *Oliveria* ruled in favor of the defendant-city, holding that the recklessness standard applied. The court explained:

> . . . even if the plow was raised[,] [defendant's] snow plow was actually engaged in hazardous operation – "as a matter of law" – at the time of the alleged incident. [Defendant] was engaged in plowing snow (his authorized activity) in his designated area. His supervisor directed him to go to a different area to plow[,] and he did so using as his route the very street he was responsible for plowing. [Defendant] was not traveling to or from work at the beginning or the end of his shift; he was not using his vehicle while on break or during off duty hours; and he was not engaged in unauthorized activity. . . [Defendant] was therefore exempt from the "rules of the road."

In *McLeod v. State of New York*, 8 Misc. 3rd 1009(a), 801 N.Y.S.2d 778, 2005 WL 1552696 (N.Y.S.Ct. Cl. 2005), the plaintiff's vehicle was struck by a New York State snow plow as the plow attempted to make a left hand turn in front of the plaintiff's vehicle. The snow plow did not have its plow down at the time of the accident because he was on his way from one designated snow plow area to another when the accident occurred. Defendant moved for summary judgment, citing V.T.L. § 1103(b)'s recklessness standard. The plaintiff opposed the motion by arguing that the defendant was not "actually engaged in work on a highway" when the accident occurred, and therefore was not entitled to the qualified privilege of the aforesaid statute.

The Court of Claims granted the defendant's motion for summary judgment. In doing so, the Court affirmatively held that despite the fact that the defendant's plow was not down when the accident occurred, the defendant was "actually engaged in work on a highway" and, as such, the recklessness standard applied.

Accordingly, it has now been settled that the reckless disregard standard set forth in V.T.L §1103(b) applies to snow plows moving from one plowing destination to another with the plow raised, not just snow plows in the process of pushing snow.