



The Second Department recently took a deep dive into when municipal officials may be held liable for failing to protect a child from a parent subject to a Family Court order of protection. The case, at the intersection of tort law's special duty of care and governmental function immunity, is an important reminder that when the enforcement of orders of protection is involved, municipal officials and employees are not automatically immune from tort liability for failing to protect the individual who is the subject of the order. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

## FIRST DEPARTMENT

### MORTGAGE FORECLOSURE, STANDING

*Nationstar Mtge. LLC v Vassi, 2026 NY Slip Op 02375 (1st Dept Apr. 21, 2026)*

**Issue:** Does a defendant in a mortgage foreclosure action have standing to continue to oppose the foreclosure after he sells the property to another property while the action is pending?

**Facts:** Defendant executed a note and mortgage in favor of CitiMortgage, Inc. in the amount of \$400,000, "secured by [his] condominium property located at 520 East 81st Street, Apartment 2M, in Manhattan." Following a mortgage modification, CitiMortgage assigned the note and mortgage to plaintiff, and plaintiff commenced this mortgage foreclosure action against defendant upon his default in payment. After plaintiff obtained an order of reference, defendant "transferred his interest in the encumbered property to nonparty IPA Asset Management, LLC, a distressed property buyer, for \$620,000." After years of further litigation, defendant opposed plaintiff's fourth motion to confirm the referee's report and cross moved for an order tolling interest on the note and mortgage. In plaintiff's reply, it argued, for the first time, that defendant lacked standing to oppose the motion to confirm because defendant had sold his interest in the property.

"Supreme Court granted plaintiff's motion and denied defendant's cross-motion, finding that plaintiff's evidence substantially supported the referee's report of the amount due. The court further found that [defendant's] opposition and cross-motion were 'entirely defective' because [defendant] transferred his condominium to IPA during the foreclosure action which 'effectively divested him of standing to challenge the plaintiff's request for a judgment of foreclosure and sale.'"

**Holding:** The Appellate Division, First Department disagreed, and held that defendant continued to have standing to contest plaintiff's motion to confirm the referee's report, notwithstanding the transfer of his interest in the property during the pendency of the foreclosure action. The court explained, "a defendant lacks standing to defend the action where it transfers the mortgaged property to a third party during the foreclosure action *and* the plaintiff waives its right to a deficiency judgment." Here, however, defendant "retained his standing to challenge the judgment of foreclosure and sale because he remains a defendant in the foreclosure action and is potentially liable for a deficiency judgment. As [defendant] points out, plaintiff does not dispute that it did not waive its right to seek a deficiency judgment against him. Indeed, plaintiff sought a deficiency judgment under RPAPL 1371 in its complaint. The foreclosure judgment also provides that plaintiff 'may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable.' Because the property has not yet been sold, a deficiency judgment remains a possibility given that a plaintiff has 90 days from the sale of the property to make a motion for a deficiency judgment before losing that right." Therefore, defendant still had standing to oppose plaintiff's motion to confirm the referee's report. But, on the merits, the court rejected each of his arguments and confirmed the report.

## SECOND DEPARTMENT

### TORTS, MUNICIPAL SPECIAL DUTY OF CARE, FAMILY LAW

*Boyd v Village of Mamaroneck, 2026 NY Slip Op 02239 (2d Dept Apr. 15, 2026)*

**Issue:** When does a municipality assume a special duty of care with respect to a plaintiff for purposes of enforcing a Family Court temporary order of protection, subjecting the municipality to liability in negligence for breaching that special duty, and, relatedly, when may the municipality rely on the governmental function immunity defense?

**Facts:** In April 2018, plaintiff, the father of an almost three-year-old child, filed a custody petition and request for a temporary order of protection against the child's mother in Westchester County Family Court. Family Court granted the interim relief, awarded the plaintiff temporary custody and ordered that "the mother is hereby directed to stay away from the plaintiff and the minor child."

"Later that day, the plaintiff went to the Village Police Department seeking help in serving the mother with the Family Court order and effectuating the temporary change of physical custody set forth therein. Thereafter, according to the plaintiff, he traveled with police officers to the mother's residence where he observed the police officers serve the mother with the Family Court order. The plaintiff then observed that the mother refused to relinquish custody of the child to the police officers in that she "slammed" the door on them.

Afterwards, the plaintiff and the police officers returned to the police station, where the officers allegedly called Assistant District Attorney Parab, who was employed by the Westchester County District Attorney's Office. Parab allegedly told the police officers, as well as the plaintiff, that the police officers were not authorized to enter the mother's residence to remove the child or to arrest the mother for violating the terms of the Family Court order. The plaintiff's Family Court attorney also allegedly spoke with another ADA at the District Attorney's Office, the defendant Mary Clark. Clark allegedly told the plaintiff's Family Court attorney that she could not advise the police officers in connection with the Family Court order because it did not relate to a criminal matter.

The next day, April 28, 2018, Village police officers were called to the mother's residence, where they discovered that the child was deceased. The mother was arrested at the scene and subsequently convicted of murder in the second degree related to the child's death."

Plaintiff served a notice of claim against the Village Police Department, and other Village officers and employees, and Westchester County and Child Protective Services, alleging that "the government defendants were negligent in failing to enforce the Family Court order, which was a proximate cause of the child's death." The government defendants moved to dismiss, arguing that they did not owe a special duty to the plaintiff or the child and that they were entitled to governmental function immunity. Supreme Court granted the motions, and plaintiff appealed.

**Holding:** The Appellate Division, Second Department reversed, holding that the plaintiff's amended complaint sufficiently alleged that the governmental defendants assumed a special duty of care to the plaintiff and the child, and did not conclusively establish, on the motions to dismiss, that they were entitled to governmental function immunity. The court explained, "when, as here, both the special duty requirement and the governmental function immunity defense are asserted in a negligence case, the rule that emerges is that 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 other words, in a negligence action where the municipality has raised the governmental function immunity defense, a plaintiff may only hold the municipality liable for actions taken in its governmental capacity where (1) a special duty exists and (2) the municipality's actions were ministerial in nature and not the result of discretionary decision-making."

"[A] special duty arises where the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally. In this context, which is often referred to as a 'special relationship' between the government entity and a plaintiff or plaintiffs, the government entity has a duty to use reasonable care for those persons' benefit, notwithstanding that absent its voluntary assumption of that duty, none would have otherwise existed. To establish the existence of a special relationship, a plaintiff is required to prove four elements, . . . namely: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." Importantly, the court noted, "[a]t the heart of a special relationship case is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him or her either to relax his or her own vigilance or to forego other available avenues of protection."

Here, the court held, relying on the Court of Appeals' precedent in *Mastroianni v County of Suffolk* (91 NY2d 198, 204 [1997]), the Family Court order of protection against the mother satisfied the first two elements of the special duty test. The court reasoned, "the Family Court order may properly be construed as a temporary order of protection under the Family Court Act (see Family Ct Act §§ 153-c, 168, 655) or, at the very least, for the purpose of determining whether a special relationship existed between the plaintiff and the government defendants, its equivalent . . . In evaluating whether the Family Court order constituted a temporary order of protection, we note, most importantly, that the language of the order specifically and clearly directed the mother 'to stay away from' the child and awarded the plaintiff temporary physical custody of the child pending the hearing scheduled for May 4, 2018. Both the form and the effect of the Family Court order hewed closely enough to the language more typically found in a temporary order of protection such that we discern no reason to diverge from the framework established in *Mastroianni*."

As to the third element, the court held that the amended complaint had sufficiently alleged "direct and immediate contact between the Village police officers, CPS, ADAs Parab and Clark, and the plaintiff or the plaintiff's Family Court attorney." The court emphasized that, where an order of protection is involved, the Court of Appeals has provided that a "flexible approach" when evaluating the third element, and thus concluded that "the allegations are sufficient in that the plaintiff alleged direct communication with each municipality in the amended complaint and the individual government defendant agencies coordinated a response amongst themselves."

Finally, the fourth element was satisfied, the court held, because the plaintiff sufficiently alleged justifiable reliance on the governmental defendants to enforce the Family Court order of protection. In particular, the amended complaint alleged that plaintiff "relied upon both the Village defendants and the County defendants to enforce the Family Court order to the extent permissible under the law. Significantly, the plaintiff alleged that he took the Family Court order directly to the Village police station, where he discussed with certain of the Village defendants the mother's 'violent tendencies,' that she was 'mentally unstable,' and that he believed that the child 'was in danger

as long as she remained' in the mother's residence. The plaintiff then traveled with Village police officers to the mother's residence and observed them serve the mother with the Family Court order. He also observed the Village police officers conferring with the District Attorney's Office about next steps in the investigation, after which the plaintiff spoke directly to an ADA regarding enforcement of the Family Court order. It is further alleged that later on the same evening, the Village Police Department conferred with, and gave a copy of the Family Court order to, CPS." This, the Court held, adequately alleged "a concerted course of conduct by the government defendants, centered around the Family Court order, which preceded the child's death by well under 24 hours. Moreover, viewing the allegations in the light most favorable to the plaintiff, it may be inferred that the plaintiff did not seek other means to enforce the Family Court order as a result of his reliance on the government defendants, for example, by reaching out to another law enforcement agency or by resorting to self help. In other words, the government defendants' conduct induced the plaintiff to relax his own vigilance or to forego other available avenues of protection. Specific to this point, according to the plaintiff, a member of the Village Police Department warned the plaintiff that if he attempted to remove the child from the mother's residence, on his own, he would be arrested." Having sufficiently alleged all four elements of a special duty of care assumed by the governmental defendants, the court held that the amended complaint should not have been dismissed.

Nor did the governmental defendants conclusively show that they were entitled to governmental function immunity, the court held. "Governmental function immunity, sometimes referred to as the professional judgment rule, is a defense that shields public entities from liability for discretionary acts taken during the performance of governmental functions even when the conduct is negligent. Discretionary or quasi-judicial 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. A municipality is not immune from liability based upon the exercise of discretionary authority unless the municipal defendant establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated. Moreover, such immunity . . . presupposes that judgment and discretion are exercised in compliance with the municipality's procedures, because the very basis for the value judgment supporting immunity and denying individual recovery becomes irrelevant where the municipality violates its own internal rules and policies, and exercises no judgment or discretion."

Although the decision whether to arrest an individual is cloaked in discretion and typically in governmental immunity, the court held, "in the face of what was, in effect, a temporary order of protection, the defendant police officers became, at a minimum, obligated to respond and investigate." Here, the court noted, the duty to arrest the mother for violating the Family Court order of protection was arguably statutorily mandated. In particular, "Criminal Procedure Law § 140.10(4)(b)(i) also directs that a police officer 'shall arrest' a person upon reasonable cause to believe that the person violated the 'stay away' provision of an order of protection. Similarly, the Family Court Act provides, in pertinent part, that the: 'presentation of a copy of an order of protection or temporary order of protection . . . to any . . . police officer shall constitute authority for him [or her] to arrest a person charged with violating the terms of such order of protection or temporary order of protection and bring such person before the court and, otherwise, so far as lies within his [or her] power, to aid in securing the protection such order was intended to afford' (Family Ct Act § 168[1])." In light of these statutory mandates and the Family Court order of protection, the court held, "Supreme Court, by focusing its analysis on the legality of a hypothetical warrantless entry into the mother's home, overlooked a 'reasonableness review' of the Village defendants' investigation as a whole. Such an inquiry may include whether the Village defendants should have lawfully arrested the mother at the entrance to her home, timely applied for an arrest warrant, or taken additional reasonable law enforcement actions. Under the circumstances, the Village defendants failed to conclusively establish that their response to, and investigation of, the plaintiff's amended complaint were entitled to governmental function immunity." Nor were the County defendants entitled to governmental function immunity because the allegations of the complaint did not relate to "their duties in initiating and pursuing a criminal prosecution and, therefore, was not subject to absolute immunity."

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