

2023

# BUSINESS IN 2022

WEEKLY WEBINAR SERIES

2021

2020

2019



**BOND** SCHOENECK  
& KING ATTORNEYS

# An Introduction



## **Gabriel S. Oberfield**

Senior Counsel

[goberfield@bsk.com](mailto:goberfield@bsk.com)

New York, NY

# TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:10PM)

- Introduction
- COVID Update
- The Nuts and Bolts of Workplace Investigations – a Bond program on June 9, 2022

Seth Gilbertson – (12:10PM-12:20PM)

- Internships 2022: Get Your Own Coffee

Nicole Price – (12:20PM-12:30PM)

- Artificial Intelligence in Employment Decisions

Kevin Cope – (12:30PM-12:40PM)

- Special Duty Doctrine and Malicious Prosecution

Oberfield (12:40PM-12:45PM)

- Your Questions

# A Word About the Tragedy in Buffalo

Statement of Kevin Bernstein, Esq., Management Committee Chairman:

*“There are no words to fully describe the horror of the shootings in Buffalo this past weekend. Innocent lives were taken in what is believed to be a hate fueled act of extreme violence. Many pundits are speaking about the toughness of Buffalo’s citizens, and we here at Bond certainly know that to be true.*

*But an act of violence such as this, believed to intentionally target our Black neighbors at a grocery store - a place so many of us frequent without a second thought - can shatter a community’s sense of safety and place. For many residents of the Buffalo region and for Black communities across the country, this act of violence creates additional trauma well beyond the crime scene.*

*Grocery shopping while Black seems to be a dangerous experience. Taking the subway while Asian appears to be unsafe. Going to your synagogue while Jewish may be hazardous. Walking through your neighborhood as a member of the LGBTQ community can be perilous. The hate and the violence must stop. ...”*

May 16, 2022

# Your New Co-Host

## *Bond ... by way of the Greater New York Hospital Association family*

- SVP of Continuing Care Leadership Coalition (CCLC)
- Focused on ties between hospitals and health systems with healthcare delivery organizations
- Long term care and human services

## *Core Experience*

- Healthcare transformation and strategy
  - Healthcare and human services operations
    - Crisis management
- Legislative and regulatory affairs

## *Before GNYHA / CCLC*

- NYC gov't (Mayor's Office & agency Chief of Staff)
  - Nonprofit focused on policy reform

# One of My Focal Areas: Cybersecurity and Data Privacy

- Administration of a Citywide cybersecurity readiness exercise for c. 150 small and mid-size healthcare providers
- Key partnerships with government agencies including:

## Federal

- Cybersecurity and Infrastructure Security Agency (CISA)
- HHS's Assistant Secretary for Preparedness and Response (ASPR)

## New York State

- Executive Branch
- Dept. of Health

## New York City

- Mayor's Office
- Dept. of Health and Mental Hygiene
- Office of Emergency Management

# Cybersecurity and Data Privacy – The Context, Continued

Appointed (February 2022) to the Federal HHS ‘405(d)’ working group, a public-private partnership concerning healthcare cybersecurity and data privacy readiness

*“The 405(d) Program and Task Group is a collaborative effort between industry and the federal government, which aims to raise awareness, provide vetted cybersecurity practices, and move organizations towards consistency in mitigating the current most pertinent cybersecurity threats to the sector.”*

*New guides available ...*

*...And your Bond attorney can help you develop the underlying policies and procedures to stay safe & compliant.*

**How to Implement Data Security**  
Data Security for Small Healthcare Organizations



**What is data security?**  
A security breach is the loss or exposure of sensitive data, including information relevant to the organization's business and patient Protected Health Information (PHI). Impacts to the organization can be profound if data are corrupted, lost, or stolen. Thus, good data security practices protect the organization and its patients.

**Why is it important?**  
When security breaches of data occur, it can prevent your employees from completing work accurately or on time and could result in potentially devastating consequences to your patients' treatment and wellbeing. Secure organizational data is not only important for your patients, but also for your organization's financial wellbeing and reputation.

**How will this keep my organization safe?**  
Properly securing data can prevent your organization from suffering major data losses during a cyber-attack. All staff of an organization, regardless of size, are the first line of defense when it comes to cyber-attacks. If you prepare your workforce to recognize and identify potential cyber threats, your patients, and your organization will be more secure.

**Data security mitigates:**

- Ransomware
- Loss or Theft of Equipment
- Insider, Accidental, or Intentional Data Loss

**Implementation Tips:**

**Train your workforce on your secure email processes.**  
Describe what actions users are permitted and not permitted to execute, including detailed descriptions of how emails will be used to complete work. Remind employees to be extra careful when sending and receiving emails that contain sensitive and private data, especially Protected Health Information (PHI).

**Train staff never to back up data on uncontrolled storage devices or personal cloud services.**  
For example, do not permit employees to configure any workplace mobile device to back up to a personal computer unless that computer has been configured to comply with your organization's encryption and data security standards.

**Establish a data classification policy.** Ensure that each data element is protected according to its classification, for example: Sensitive, Internal Use, or Public Use. The sensitive data category should include Protected Health Information (PHI), social security numbers (SSNs), credit card numbers, and other information that must comply with regulations, which may be used to commit fraud, or may damage the organization's reputation. Public use data would include flyers or newsletters that may not need such advanced protections as they do not pose an extreme threat to the organization.

**Train employees on your data classification procedures.**  
Set the expectation for how your workforce is expected to manage the sensitive data at their fingertips based on your organization's data classification policies. Most healthcare employees work with sensitive data daily, so it is easy to forget how important it is to remain vigilant about data protection. Organizational policies should address all user interactions with sensitive data and reinforce the consequences of lost or compromised data.

To learn more about how you can protect your patients, share other threats check out the Health Industry Cybersecurity Practices: Managing Threats and Minimizing Business Interruptions. Check out the available resource 405(d) here to offer by visiting our website at <https://www.hhs.gov>, and our social media pages: @HHS405d on Facebook, Twitter, LinkedIn and Instagram!

# COVID Infection Trends & Information

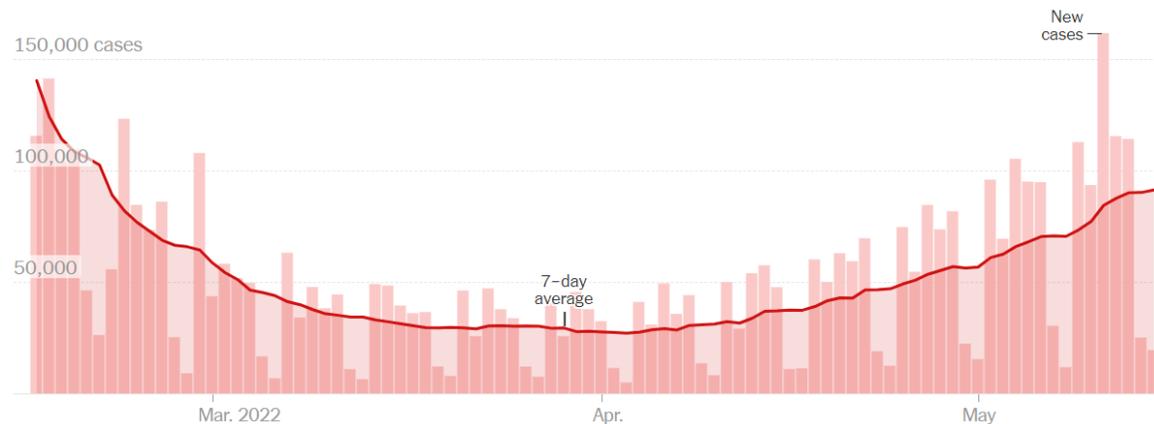
# Today's COVID Picture, Nationally

Source: New York Times

Updated May 16, 2022

## New reported cases

All time Last 90 days



	DAILY AVG. ON MAY 15	14-DAY CHANGE	TOTAL REPORTED
Cases	91,185	+61%	82,414,028
Tests	760,609	+28%	—
Hospitalized	21,547	+24%	—
In I.C.U.s	2,302	+15%	—
Deaths	311	-3%	998,352

[About this data](#)

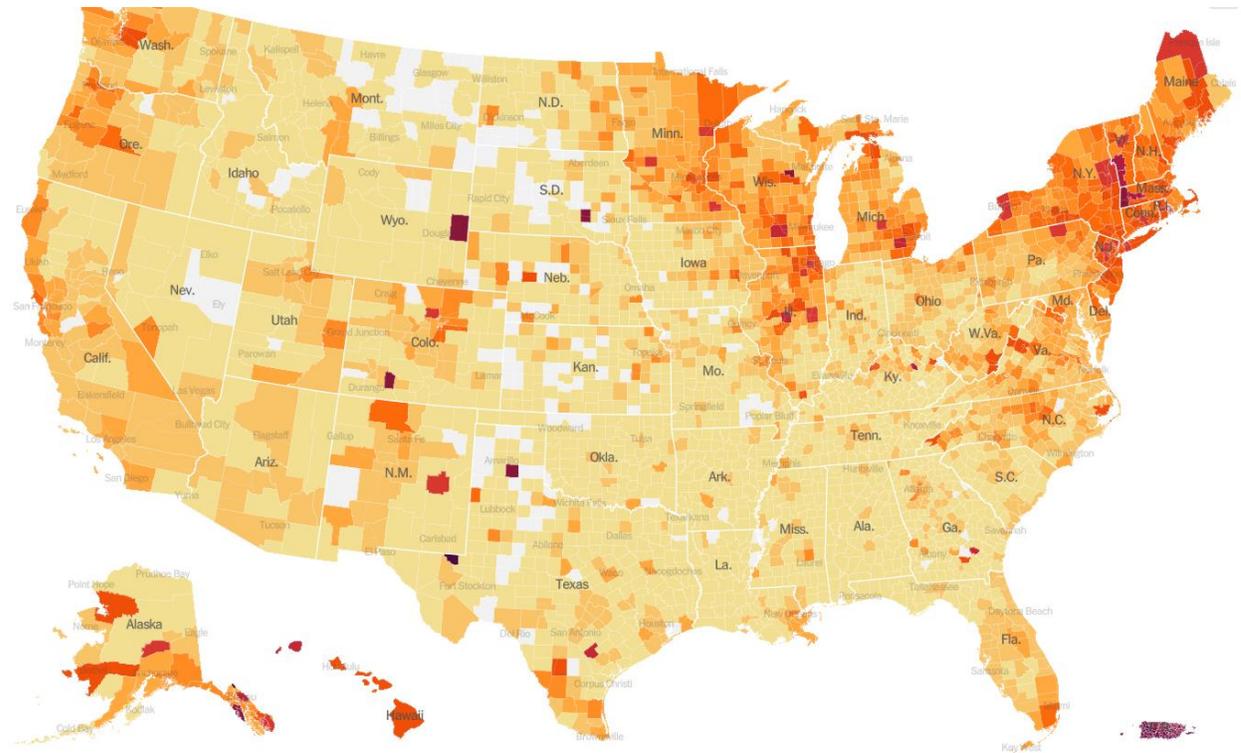
A grim milestone: c. 1M deaths nationally due to the pandemic  
 Reports that the PHE will be extended in July, rather than allowed to expire

# Today's COVID Hotspots

Source: New York Times

Northeast and Midwest are seeing increasing concentration

NB: differences in surveillance methods due to much more in-home testing



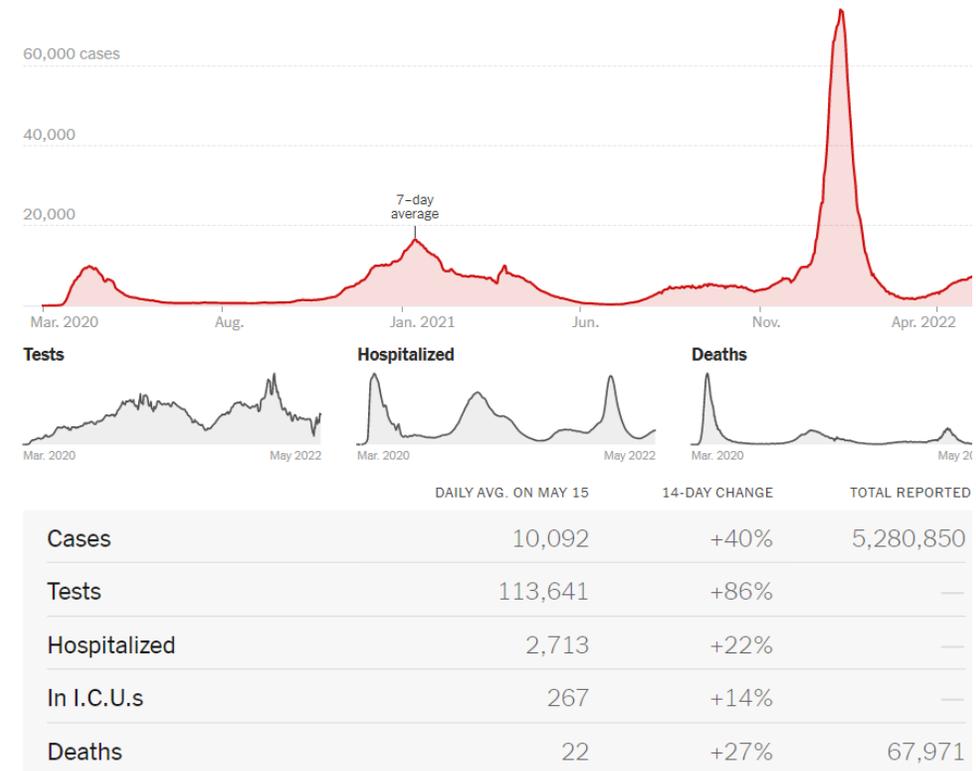
# Today's COVID Picture, in New York State

Source: New York Times

High transmissibility of new variants

Real-world implications: *recommendations* (not mandates) for indoor mask usage:

- Centers for Disease Control and Prevention
  - Most of NYS on 'high' alert
- New York State Dept. of Health
  - "...we recommend that all New Yorkers in high-risk COVID-19 counties and all New Yorkers at-risk of severe disease wear a mask in public indoor places, regardless of vaccination status," said State Health Commissioner Dr. Mary T. Bassett (5/13/22)
- New York City Dept. of Health and Mental Hygiene
  - New York City imminently to enter 'high' level – indicative of community spread & hospital pressure



# Two-Week Differentials in New York

Source: New York Times

## May 9, 2022

	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000
New York	9,460	49	+46%	13	+31%	18	0.09
Tompkins ›	77	76	+25%	27	+74%	0.1	0.14
Warren ›	45	70	+110%	9	+30%	0.1	0.17
Erie ›	641	70	+31%	17	+110%	1.9	0.2
Schenectady ›	94	60	+59%	7	+43%	0.3	0.18
Tioga ›	29	60	+3%	29	+76%	0.1	0.3
Saratoga ›	138	60	+51%	11	+74%	0.2	0.08
Oneida ›	135	59	-5%	16	+4%	0.6	0.27
Nassau ›	800	59	+75%	17	+18%	0.6	0.05
Steuben ›	54	57	+79%	12	+86%	0.3	0.3
Albany ›	167	55	+44%	15	+41%	0.2	0.07

## May 17, 2022

	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000
New York	10,092	52	+40%	14	+22%	22.1	0.11
Erie ›	613	67	-3%	17	+110%	2.1	0.23
Nassau ›	903	67	+54%	17	+18%	1.3	0.09
Warren ›	42	66	+14%	9	+30%	0.1	0.17
Niagara ›	137	66	+25%	16	+97%	0.7	0.32
Washington ›	39	63	+54%	9	+58%	0.1	0.23
Saratoga ›	143	62	+14%	11	+74%	0.6	0.27
Schenectady ›	93	60	+25%	7	+43%	0.4	0.24
Broome ›	113	60	+7%	32	+77%	0.3	0.13
Columbia ›	35	58	+50%	20	+62%	0.1	0.24
Tompkins ›	59	58	-11%	27	+74%	0.1	0.14

# Workplace Investigations

Thursday, June 9, 2022

DoubleTree by Hilton Hotel, Syracuse

Register here: <https://t.co/L4wi3TS64N>

# Internships 2022: Get Your Own Coffee



## Seth F. Gilbertson

Senior Counsel

[sgilbertson@bsk.com](mailto:sgilbertson@bsk.com)

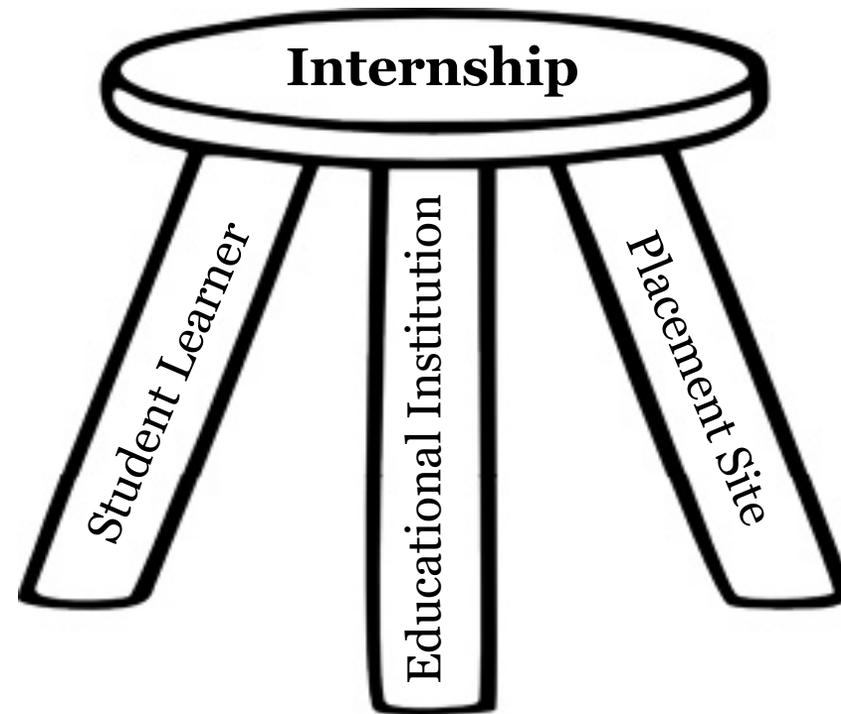
Buffalo, NY

# Types of Programs

- Internships
- Clinical Rotations
- Externships
- Service Learning
- Cooperative Education
- International internships
- Clerkship
- Teleternships



# What's Your Role?



# To Pay or Not To Pay?

## Feds = Primary Beneficiary Test

- Promise or expectation of compensation?
- Provides training that would be similar an educational environment, including the clinical and other hands-on training?
- Tied to the intern's formal education program by integrated coursework or the receipt of academic credit?

# To Pay or Not To Pay?

## Primary Beneficiary Test (cont)

- Accommodates the intern's academic commitments by corresponding to the academic calendar?
- Duration is limited to the period in which the internship provides the intern with beneficial learning?
- Complements, rather than displaces, the work of paid employees?
- Entitlement to a paid job at the conclusion of the internship?

# To Pay or Not To Pay?

NYS\* = Employment Relationship?

- Training similar to training provided in an educational program
- Training is for the benefit of the intern
- The intern works under close supervision of knowledgeable employees
- No immediate advantage to the employer
- No job entitlement

\*different rules for not-for-profits

# To Pay or Not To Pay?

## Employment Relationship (cont)

- Intern does not displace employees
- Notified of no compensation in writing
- No benefits
- Training not tied to specific employer
- Screening process different from hiring process – only relevant to educational purpose
- Any promotional materials clearly differentiate from employment

# To Pay or Not To Pay?

## Notable Exceptions

- Volunteers
  - Focus on ensuring there is a civic, charitable, or humanitarian component
  - Can not be paid
    - Can cover expenses
  - Can not displace employees
  - Can not be employee performing same or similar work
- Educational Exception
  - Structure any support provided to offset costs of education
  - Integrate with academic program

# Insurance

- Workers' Compensation (NYS)
  - **Coverage is required** for paid or **unpaid** student interns who provide services to a for-profit business, a nonprofit organization, or a government agency
  - Exception: Student interns who are engaged in a *non-manual* capacity in or for a religious, charitable or educational institution
- Liability
  - Professional?
  - Who provides?
- Auto
  - Make sure covered as authorized agent or employee under policy

# Regulation/Compliance

- Title VII
  - Coverage turns on compensation
- NYS Human Rights Law
  - Paid and unpaid covered
  - Same protections as employees
- ADA
  - Acceptance, then accommodation
  - Case by case - individual assessment
- Title IX
  - IHE should consider how it will apply procedures
  - Does it apply to site?

# Final Points & Take Aways

- Relationship will be defined by:
  1. The area of law that governs
  2. The attributes of the internships
- Getting all three “legs” on the same page is crucial
- The time to review your program is now
  - Do not assume your program is legal because it has been around for a long time
  - No grandfathering in for noncompliance

# The Use of AI in Employment Decisions



## Nicole Elizabeth Price

Associate

[nprice@bsk.com](mailto:nprice@bsk.com)

New York, NY

# NYC Enacted New Law Regulating Automated Decision Tools

- Effective January 1, 2023
- The new law regulates employers and employment agencies' use of "Automated Employment Decision Tools" to make "Employment Decisions" regarding candidates and employees residing in New York City.
- Two Main Components: (1) Bias Audit; and (2) Notice

# Automated Employment Decision Tools

Any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.

The term “automated employment decision tool” does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

# The Bias Audit

- An employer may only use AEDTs to make employment decisions if:
  - (1) the AEDT has undergone a bias audit within the last year, and
  - (2) a summary of the results of the most recent audit and distribution data are publicly available on the employer's website.
- A “bias audit” is “an impartial evaluation by an independent auditor,” which must include testing of the AEDT to assess its disparate impact

# Notice to Applicants/Employees

1. At least 10 business days before using an AEDT, an employer must notify an applicant (or an employee in the context of a promotion) of the following:
  - an AEDT will be used in assessing the candidate or employee; and
  - the job qualifications and characteristics that the AEDT will use in the assessment.
2. The employer must disclose the following to applicants/employees:
  - information about the type of data collected by the AEDT;
  - the source of the collected data; and
  - the employer's data retention policy.

# Civil Penalties

- There is a civil penalty for each violation of the City's new law.
  - First Penalty: up to \$500
  - Following Penalties: \$500 to \$1,500
- Each day the AEDT is unlawfully used constitutes a separate violation.
- Failing to provide any of the required notices constitutes a separate violation.

# EEOC Guidance on AI

- In October 2021, the EEOC launched a new initiative aimed at ensuring AI and other technologies used in making employment decisions comply with the federal civil rights laws.
- On May 12, 2022, the EEOC published *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*
  - Uses of Software, Algorithms and AI that violates the ADA:
    - Failing to provide a reasonable accommodation to an applicant or employee so they are fairly and accurately scored by an algorithm
    - Relying on a decision tool that “screens out” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation
    - Using a decision tool that violates the ADA’s restrictions on disability-related inquiries and medical examinations
  - “[E]mployers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer’s behalf.”

# Courts Clarify Elements of Special Duty Doctrine and Malicious Prosecution



## Kevin G. Cope

Associate

[kcope@bsk.com](mailto:kcope@bsk.com)

Buffalo, NY

# Background - Special Duty Doctrine

- Applies to negligence actions against municipalities
- Proprietary function of governmental function?
  - Proprietary function – acting as traditional private enterprise (landlord, operation of public parks, etc.)
  - Governmental function – acting for the protection and safety of the public pursuant to general police powers (fire protection, issuing permits, garbage collection, policing, etc.)
- Proprietary function - normal rules of negligence apply
- Governmental function - special duty doctrine applies

# Special Duty Doctrine Defined

- General duty owed to public vs. Special Duty
- Special Duty: 1) plaintiff belongs to a class for whose benefit a statute was enacted; 2) government voluntarily assumed a duty beyond that owed to the general public; 3) government took positive control of known and dangerous safety condition
  - Voluntary assumption of a duty is most common
- Governmental Function Immunity Defense (exercise of discretionary authority)

# *Ferreira v. City of Binghamton*, 2022 N.Y. Slip. Op. 01953

- Facts: Plaintiff shot during a no-knock warrant (also called dynamic or surprise entry)
- Key holdings:
  - Special Duty doctrine applies both to a municipalities failure to protect resulting in injury and the municipality's active infliction of injury
    - “[A]n agency of government is not liable for the negligent performance of a governmental function unless there existed ‘a special duty.’”
  - In general, a no-knock warrant does not create the voluntary assumption of a duty
  - However, “[a] special duty [] 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.”
  - Holding appears to establish the special duty doctrine is satisfied whenever there is a no-knock warrant

# Background – Malicious Prosecution

- Three elements: (1) suit or proceeding instituted without probable cause; (2) malicious motive; (3) favorable termination
- Favorable termination element has been subject of circuit split
- Second Circuit has required that plaintiffs demonstrate an affirmative indication of innocence to support a malicious prosecution claim against a municipality

## *Thompson v. Clark*, 142 S. Ct. 1332

- Facts: Plaintiff arrested after sister-in-law falsely reported plaintiff had sexually abused his one-week-old daughter
  - Court granted prosecution's motion to dismiss charges; however, neither the prosecution nor the judge explained why charges were being dismissed
  - Plaintiff could not establish affirmative indication of innocence

## *Thompson v. Clark, Cont.*

- Holding: “A plaintiff need only show that the criminal prosecution ended without conviction.”
  - 2 notes on this holding:
    - Analyzed under Fourth Amendment
    - Looked towards the law on malicious prosecution as it existed in 1871
- Dissent: Malicious prosecution has not place in the Fourth Amendment
  - Court should not have created a “hybrid” claim under the Fourth Amendment, but allowed plaintiff to resort to state law to protect his rights

# Questions



## **Gabriel S. Oberfield**

Senior Counsel

[goberfield@bsk.com](mailto:goberfield@bsk.com)

New York, NY

## Introduction and COVID Update

Gabriel Oberfield, [goberfield@bsk.com](mailto:goberfield@bsk.com)

## Internships 2022: Get Your Own Coffee

Seth Gilbertson, [sgilbertson@bsk.com](mailto:sgilbertson@bsk.com)

## The Use of AI in Employment Decisions

Nicole Price, [nprice@bsk.com](mailto:nprice@bsk.com)

## Courts Clarify Elements of Special Duty Doctrine and Malicious Prosecution

Kevin Cope, [kcope@bsk.com](mailto:kcope@bsk.com)

## **New York Employment Law: The Essential Guide**

Bar Association Members can buy the book from the bar [here](#).

Non-Bar Association Members can purchase through Amazon [here](#).

The information in this presentation is intended as general background.  
It is not to be considered as legal advice.  
Laws change often and information becomes rapidly outdated.

All rights reserved.

This presentation may not be reprinted or duplicated in any form, without  
the written authorization of Bond, Schoeneck & King PLLC.