To Be Argued by:
Lawrence A. Salvato, Esq.
(15 Minutes Requested)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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Leanza McLean, an Infant by her Mother and Natural Guardian Vilda Samerson and Vilda Samerson, Individually,

Petitioners-Respondents,

RADI No. 2006-11322

-against-

Valley Stream Union Free School District 30,

Respondent-Appellant,

-and-

Shaw Avenue School,

Respondent.

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RESPONDENTS' BRIEF

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PRELIMINARY STATEMENT

This is an appeal by the Valley Stream Union Free School District 30 ("the School District") from an Order by the Supreme Court, Nassau County (Tammy S. Robbins, A.J.S.C.), dated October 25, 2006 (R4-R7)[1], which granted a motion brought by Leanza McLean ("Leanza"), six years of age at the time, and Vilda Samerson, her mother and natural guardian ("her Mother"), for permission to file a

1. Unless indicated otherwise, the numbers in parentheses preceded by the capital letter "R" are references to pages in the Record on Appeal.

late notice of claim stemming from an accident that caused physical and mental damages.

The Order should be affirmed because, pursuant to General Municipal Law § 50-e(5), the School District had actual knowledge of the essential facts of the claim sounding in negligence for failing, *inter alia*, to hire and train its personnel properly and to supervise its students adequately. No prejudice would have resulted to the School District by allowing the late notice of claim that was filed two months after the ninety-day period specified in General Municipal Law § 50-i and three weeks after discovering that the wrong public entity had been served. In addition, the excuse for the brief delay was reasonable but, even if not, preclusion of the late notice of claim was not required. And, most importantly, the arguments by the School District have no merit and, in fact, border on the frivolous.

QUESTIONS PRESENTED

1. Did the School District have actual knowledge of the essential facts of the claim?

   The Supreme Court answered yes.

2. Would the School District be prejudiced if the late notice of claim was allowed?

   The Supreme Court answered no.

3. Did an excusable error cause timely service of the notice of claim on the wrong public entity?

The Supreme Court answered yes.

STATEMENT OF FACTS

A. The Incident

For the most part, the facts in this proceeding are not in dispute. The incident occurred on January 23, 2006, at about 2 p.m., when six-year-old Leanza was a first-grade student in a combined gym class with first and sixth graders taught by Nicholas Clark and Tom Rouse, respectively (R4, R72, R76).[2.] As described by Nicholas Clark, Leanza's teacher "[t]he sixth graders were doing 'peer mentoring' and working one-on-one with the first graders" (R72). He further admitted that, while "supervising a student dismounting from the balance beam … I heard a student crying. I turned and saw Leanza McLean on the mat near the other end of the balance beam crying" (R72).

Upon which, Leanza's teacher immediately brought Leanza to the office of Susan Lombardo ("the School Nurse") (R72, R74). She described in a subsequently-prepared incident report that, at approximately 2:10 p.m., Leanza came to her office where "[s]he complained of pain to her pinky" (R74). Examining her hand – and, apparently, nothing else – the School Nurse observed that Leanza could move her

2. The name Tom Rouse also appears as Mr. Ronsi in the incident report (R71).

finger (R74). As a result, Leanza was given an ice pack and, about 2:30 p.m., she was sent to her classroom since, in about twenty minutes, i.e., at 2:50 p.m., school would be dismissed (R74).

Ten minutes later, at about 3 p.m., Leanza was picked up by her babysitter, who immediately telephoned her Mother to report that she had been crying and in pain from when she was picked up from school until they arrived home (R38, R84). In addition, the babysitter told her Mother that, when Leanza went to the bathroom, she bled excessively from her vagina (R38, R84). Accordingly, Leanza was taken to her pediatrician who sent her to the emergency room at the Long Island Jewish Medical Center (R38, R84-R85). That evening, Leanza underwent surgery to repair damage to her vagina (R38, R84-R85).

The next day, January 24, 2006, Leanza's Mother went to the Shaw Avenue School to speak with the personnel involved in the incident (R38, R72, R74, R76, R85). During their conversation, she told the School Nurse that Leanza required stitches to repair the injury to her vaginal area (R74-R75). The School Nurse, in turn, provided Leanza's Mother and Mr. McLean with a description of the incident and explained that they had not been informed because the home room teacher "said Leanza's finger was fine and it was almost the end of the school day" (R85). In

addition, the home room teacher confirmed that Leanza had been crying when she returned to class after seeing the School Nurse (R38).

After speaking with Leanza's Mother and Mr. McLean, the School Nurse wrote an incident report (R71, R74-R75). It stated that, on January 23, 2006, in the large gym at the Shaw Avenue School, "Leanza was on the balance beam & slipped off – she fell on to [sic] a mat" (R71). In the section of the report used to describe the alleged injury, the following was written: "Leanza came to the n/o complaining of pain + holding her [left] pinky but her parents stated that when she went home she had blood in her underpants. The mother stated she had a cut on her vaginal area" (R71).

The incident report also provided that Mr. Clarke and Mr. Ronsi were present and that other witnesses to the incident were "older students (sixth grade) who were assisting" (R71). At the end of the report, in the section asking for an explanation of the failure to make an emergency contact, the School Nurse answered: "parents were not notified because Leanza c/o her pinky hurting; she was able to move her finger – she did not c/o any pain or tenderness anywhere else [sic]" (R71).

B. The Notice of Claim

On February 21, 2006, one month after the incident, the Law Offices of Adams & DiStefano (the "Law Office") sent a letter to the Shaw Avenue School by certified mail return receipt requested. It stated "our office represents Ms. Leanza McLean for

injuries sustained at your facility Shaw Avenue School. Please direct this letter to the proper legal department and forward all further communications to this office" (R40-R41). Next, on March 13, 2006, the Law Office arranged for personal service of two original notices of claim (R42) on the City of New York and the New York City Board of Education (R45-R55). Personal service was completed two days later on March 28, 2006 (R43, R44).

The proposed Notices of Claim for the School District and the Shaw Avenue School, which were enclosed in the Order to Show Cause (R30-R37), specifically alleged that Leanza was injured:

> as a result of the negligent conduct of the Valley Stream Union Free School District and Shaw Avenue School, its agents, servants and/or employees, which consisted of the following amongst other things: in the negligent hiring and supervision of the school operated under the name Shaw Avenue School; in failing to properly promulgate and comply with required rules and procedures; in failing to set up proper safeguards and barriers in the facility; in failing to set up proper and adequate training programs for all employees, agents and/or servants; in the negligent and careless training to the personnel of the Valley Stream Union Free School District of the school operated under the name Shaw Avenue School located at 99 Shaw Avenue, Valley Stream, New York 11580 (R30-R31, R35-R35).

On June 5, 2006, approximately nine weeks after its receipt of the notices of claim, the New York City Comptroller wrote to the Law Office with directions for

scheduling and attending a 50-h hearing mandated because the City of New York had been noticed as a defendant (R55-R58).

C. The Motion to File a Late Notice of Claim

Recognizing from the Comptroller's letter, dated June 5, 2006, that wrong entities were served with the notices of claim, the Law Office sought to correct the mistake almost immediately. On June 12, 2006, and June 16, 2006, an attorney's affirmation and an affidavit by Leanza's Mother were prepared in support of an application to file a late notice of claim (R10, R38). Then, on June 26, 2006, an order to show cause seeking permission to file late notices of claim against the School District and the Shaw Avenue School was filed (R8-R9).

In an Affirmation in Support of the motion seeking to file a late notice of claim, dated June 12, 2006 (the "Carollo Affirmation") (R10-R19), Christina Carollo, Esq. admitted that she "inadvertently brought a claim against The New York City Board of Education and The City of New York rather than the proper school district of Nassau County where the accident occurred … [O]n March 13, 2006, I sent a Notice of Claim against the Board of Education and one against The City of New York to our process service requesting that they serve the Notices of Claim upon the NYC Comptroller's Office" (R17). Then, upon receiving the 50-h hearing notice from the

NYC Comptroller on June 5, 2006, she immediately recognized her mistake and, consequently, moved to file a late notice of claim on the correct parties (R17-R18).

In opposition, the School District submitted an affirmation by Maureen Casey, Esq. (the "Casey Affirmation"), which first stated that the Shaw Avenue School was a building within the School District and not a legal entity (R59). Continuing, the Casey Affirmation emphasized that the affidavit by Leanza's Mother did not inform anyone, including the gym teacher who was at the scene of the incident, the School Nurse and the home room teacher, "that she believed her daughter was negligently supervised and as a result she was injured in gym class" (R62). Likewise, the Casey Affirmation summarized that, according to the gym teacher (R72-R73), the School Nurse (R74-R75) and the home room teacher (R76), Leanza's Mother never alleged negligence by the gym teachers in supervising the students (R63-R64). With respect to prejudice, the School District alleged having no knowledge of the claim by Leanza and her Mother "until this petition was served, therefore, until present, the School District did not have an opportunity to investigate any of the factors or circumstances surrounding this claim. A sixth month delay [sic] from the date of this incident to the filing of this petition will surely prejudice the School District in its ability to investigate this claim" (R68).

Next, as to prejudice, the Casey Affirmation incredibly claimed that the School District "was not apprised of this [Leanza's] claim until this petition was served" (R68). And, as a result, the School District "did not have an opportunity to investigate any of the factors or circumstances surrounding this claim" until the present – that is, at the time of the motion (R68). Finally, in a burst of sheer speculation without any evidence in support whatsoever, the Casey Affirmation suggested that the delay of six months from the incident to the motion "will surely prejudice the [School District] in its ability to investigate this claim" (R68).

ORDER BELOW

On October 25, 2006, the Supreme Court, Nassau County (Robbins, T.), granted the motion seeking leave to serve a late notice of claim (R4-R7). After summarizing the facts and arguments by the parties, the Court found that based upon its records, the School District had actual knowledge of the facts of the claim by Leanza and her Mother and also had notice that a further investigation was warranted based upon the letter received from their attorney (R6). The Court also found that the excuse for the delay was reasonable, especially considering that relief was sought "a matter of days after [their] attorney learn of their error" (R8-R7). Lastly, the claim of prejudice by the School District was dismissed as unpersuasive because no demonstration was made of an impairment to its ability to investigate the claim (R7).

ARGUMENT

ALLOWING SERVICE OF THE LATE NOTICE OF CLAIM PURSUANT TO GENERAL MUNICIPAL LAW § 50-E(5) WAS A PROVIDENT EXERCISE OF THE SUPREME COURT'S DISCRETION

A. The Purpose and Requirements of GML § 50-e(5)

A notice of claim must be filed seasonably in order to commence an action for personal injuries against a public entity in New York. *See* N.Y. Education Law § 3813 (2007); N.Y. General Municipal Law § 50-i(1) (2007).[3] Otherwise, leave to file a late notice of claim is required and, in the court's discretion, will be granted upon the consideration of several factors. *See* N.Y. General Municipal Law § 50-e(5) (2007). The most important factor – and, correspondingly, the one that should be afforded the greatest weight – is whether the public entity acquired "actual knowledge of the essential facts constituting the claim." GML § 50-e(5). *See also Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 535, 814 N.Y.S.2d 580 (2006); *Matter of Alexander v. Board of Educ. for the Village of Mamaroneck*, 18 A.D.3d 654, 654-655, 794 N.Y.S.2d 687 (2nd Dep't., 2005); *Matter of Dell'Italia v. Long Island R.R. Corp.*, 31

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3. Educ. Law § 3813(2) essentially provides that no court action may be brought against a school or its employee unless a notice of claim is served and filed in compliance with General Municipal Law § 50-i.

GML § 50-i(1) states that no action or special proceeding shall be prosecuted or maintained against a school district for personal injury resulting from its negligence or wrongful act unless a notice of claim is served and filed upon the School District in compliance with General Municipal Law § 50-e.

A.D.3d 758, 759, 820 N.Y.S.2d 81 (2nd Dep't., 2006); *Matter of Jasinski v. HB Ward Technical School*, 306 A.D.2d 347, 347, 760 N.Y.S.2d 676 (2nd Dep't., 2003).

In addition, GML § 50-e(5) requires a consideration of "all other relevant facts and circumstances" – including whether the claimant was an infant; whether the notice of claim was served on the wrong entity because of an excusable error; and "whether the delay in serving the notice of claim substantially prejudiced [the public entity] in maintaining its defense on the merits." GML § 50-e(5). *See also Williams v. Nassau County*, 6 N.Y.3d at 535 (recognizing that a "court must also consider a host of factors"); *Matter of Scolo v. Central Islip Union Free School Dist.*, 40 A.D.3d 1104, 1105, 838 N.Y.S.2d 577 (2nd Dep't., 2007); *Matter of Doyle v. Elwood Union Free School Dist.*, 39 A.D.3d 544, 545, 833 N.Y.S.2d 204 (2nd Dep't., 2007); *Matter of Alexander v. Board of Educ. for the Village of Mamaroneck*, 18 A.D.3d at 654; *Matter of Conroy v. Smithtown Central School Dist.*, 3 A.D.3d 492, 493, 770 N.Y.S.2d 428 (2nd Dep't., 2004); *Matter of Henriques v. City of New York*, 22 A.D.3d 847, 848, 803 N.Y.S.2d 194 (2nd Dep't., 2005).

Significantly, the exclusive and unequivocal purpose of GML § 50-e is to provide a public entity with an *adequate opportunity* to investigate a possible claim and to explore its merits in a timely and efficient manner before the information goes stale and while potential witnesses are still available. *See Teresta v. City of New York*,

304 N.Y. 440, 443, 108 N.E.2d 397 (1952). *See also 423 South Salina Street, Inc. v. City of Syracuse*, 68 N.Y.2d 474, 489, 510 N.Y.S.2d 507 (1986) (the opportunity to investigate should be *meaningful*); *Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709 (1983) (GML § 50-e provides a *meaningful opportunity* to investigate), *cert. denied*, 464 U.S. 1018, 104 S. Ct. 551 (1983); *Matter of Beary v. City of Rye*, 44 N.Y.2d 398, 412, 406 N.Y.S.2d 9 (1978) (the 1976 amendments to GML § 50-e ensure *a reasonably prompt investigative opportunity*); *Adrian v. Town of Oyster Bay*, 262 A.D.2d 433, 434, 692 N.Y.S.2d 140 (2nd Dep't., 1999) (holding that GML § 50-e affords an *adequate opportunity*). *Compare Puertas v. New York City Housing Auth.*, 199 A.D.2d 485, 486, 606 N.Y.S.2d 47 (2nd Dep't., 1993) (majority opinion) (where GML § 50-e provided the Housing Authority with a *reasonable opportunity* to investigate) *with Puertas v. New York City Housing Auth.*, 199 A.D.2d at 486 (minority opinion) (stating that the purpose of GML § 50-e is to provide an *adequate opportunity*).

In fact, the ability to conduct a prompt investigation and to preserve evidence has been described by the Court of Appeals as the sole legitimate purpose of GML § 50-e. *See Matter of Beary v. City of Rye*, 44 N.Y.2d at 412. *See also Sandak v. Tuxedo Union School Dist. No. 3, Town of Tuxedo*, 308 N.Y. 226, 232, 124 N.E.2d 295 (1954); *Matter of Narcisse v. Incorporated Village of Central Islip*, 36 A.D.3d

920, 920, 829 N.Y.S.2d 578 (2nd Dep't., 2007); *Johnson v. Katonah-Lewisboro School Dist.*, 285 A.D.2d 490, 490, 727 N.Y.S.2d 171 (2nd Dep't., 2001); *Markotsis v. Town of Oyster Bay*, 261 A.D.2d 451, 690 N.Y.S.2d 104 (2nd Dep't., 1999); *Steiger v. Board of Educ. for Connetquot Central School Dist. of Islip*, 192 A.D.2d 517, 517, 595 N.Y.S.2d 827 (2nd Dep't., 1993); *Zydyk v. New York City Transit Auth.*, 151 A.D.2d 745, 746, 542 N.Y.S.2d 768 (2nd Dep't., 1989); *Caselli v. City of New York*, 105 A.D.2d 251, 252, 483 N.Y.S.2d 401 (2nd Dep't., 1984).

Of course, GML § 50-e also attempts to achieve an equitable balance between the duty of a public entity to provide just compensation for an injured party with a meritorious claim and its reasonable expectation to receive prompt notification of pending claims. *See e.g. Fenton v. County of Dutchess*, 148 A.D.2d 573, 573-574, 539 N.Y.S.2d 42 (2nd Dep't., 1989); *Camarella v. East Irondequoit Central School Board*, 34 N.Y.2d 139, 356 N.Y.S.2d 553 (1974) (Breitel, J, concurring). Another fundamental purpose is to enhance the public entity's ability for settling claims early in the litigation process and to reduce the potential for corruption and fraudulent claims, thereby providing a direct benefit to the public fisc. *See e.g. Sandak v. Tuxedo Union School*, 308 N.Y. 226 at 232. *See also Matter of Brown v. Board of Trustees of the Town of Hamptonburg, School District No. 4*, 303 N.Y. 484, 486, 104 N.E.2d 866 (1952); *Thomann v. City of Rochester,* 256 N.Y. 165, 170, 176 N.E. 129 (1931)

(suggesting that, without a requirement for filing a notice of claim within thirty days after an injury, "[r]aids [of the public purse] by the unscrupulous will multiply apace"), *reh'ing denied*, 256 N.Y. 692, 177 N.E. 196 (1931).

And, since it is considered remedial in nature, GML § 50-e(5) always should be construed in a reasonable way to effectuate its purpose. *See e.g. Sweeney v. City of New York*, 225 N.Y. 271, 273, 122 N.E. 243 (1919) (citing the Laws of 1886, chapter 572). Correspondingly, it should never be allowed to serve as a trap for the unwary or to be wielded as a sword to summarily defeat a meritorious claim. *See e.g. Sandak v. Tuxedo Union School Dist. No. 3, Town of Tuxedo*, 308 N.Y. at 232 (quoting the Tenth Annual Report of N.Y. Judicial Council, 1944, at 265); *Teresta v. City of New York*, 304 N.Y. at 443.

In the present case, the evidence in the Record on Appeal conclusively established that Leanza and her Mother satisfied the requirements of GML § 50-e(5). Clearly, the School District had actual knowledge of the essential facts of the claim and the School District would not have been prejudiced by a late notice of claim. Additionally, the wrong entity was served because of an excusable error.

B. The School District Had Actual Knowledge of the Essential Facts of the Negligence Claim

1. GML § 50-e(5) Did Not Require the Establishment of a Particular Legal Theory

Initially, it must be emphasized that the School District has confused the language of GML § 50-e(5) and the arguments by the parties in the Supreme Court. Specifically, in the Appellant's Brief, the phrase – knowledge of the essential elements of a claim – is used instead of knowledge of the essential facts of a claim, which is the exact language of GML § 50-e(5). At first glance, the problem appears to be merely semantic but, upon further consideration, the misuse of language might have substantive implications.

Very briefly, the fundamental argument on appeal by the School District is repeated three times apparently for emphasis: "the School District had no notice of the essential elements of the claim as it merely knew that the incident occurred and that the infant petitioner was injured." Appellant's Brief at 1."Simply because the School District was made aware of an incident did not equate to it having knowledge of the essential elements of the claim." Appellant's Brief at 13. And "[w]hile the School District was aware of an incident, the record was devoid of evidence that it knew of the essential elements of the claim." Appellant's Brief at 17. Additionally, the School District argued that "[t]his Court has repeatedly ruled that incident reports that merely

noted that an incident occurred are insufficient to support a finding that a municipality had notice of the essential elements of a claim." Appellant's Brief at 16.

Thus, even though the School District's argument does not reflect the exact language of GML § 50-e(5), it bears a strong resemblance to the well-settled rule that GML § 50-e(5) requires notice of a claim and not knowledge of the wrong. And, considering the language used and the cases cited,[4.] the School District apparently has attempted to apply the well-settled rule to the facts in the present case. As will be discussed in detail below, however, GML § 50-e(5) did not require Leanza and her Mother to establish a legal theory on their motion to file a late notice of claim but, rather, they were required to establish that the School District had actual knowledge of the essential facts of the claim. Accordingly, while the School District should not have substituted knowledge of the essential elements of a claim for knowledge of the essential facts of a claim, its substantive argument also was wrong on the law and facts.

Seventy-five years ago, in *Thomann v. City of Rochester,* Justice Cardozo wrote: "[w]hat satisfies the statute is not knowledge of the wrong. What the statute

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4. *Matter of Doyle v Elwood Union Free School Dist.*, 39 A.D.3d 544, 545, 833 N.Y.S.2d 204 (2nd Dep't., 2007); *Matter of Padovano v. Massapequa Union Free School Dist.*, 31 A.D.3d 563, 818 N.Y.S.2d 274 (2nd Dep't., 2006); *Matter of Scott v. Huntington Union Free School District*, 29 A.D.3d 1010, 816 N.Y.S.2d 165 (2nd Dep't., 2006); *Matter of Acosta v. City of New York*, 39 A.D.3d 629, 834 N.Y.S.2d 267 (2nd Dep't., 2007); and *Rabanar v. City of Yonkers*, 290 A.D.2d 428, 736 N.Y.S.2d 93 (2nd Dep't., 2002).

exacts is notice of the claim." *Thomann v. City of Rochester,* 256 N.Y. at 170 (internal quotation marks omitted). The rule in *Thomann* consistently has been followed by this Court. *See e.g. Matter of Henriques v. City of New York*, 22 A.D.3d at 848; *Matter of Pico v. City of New York*, 8 A.D.3d 287, 288, 777 N.Y.S.2d 697 (2nd Dep't., 2004); *Matter of Termini v. Valley Stream Union Free School District No. 13*, 2 A.D.3d 866, 867, 769 N.Y.S.2d 596 (2nd Dep't., 2003), *appeal denied,* 2 N.Y.3d 705, 780 N.Y.S.2d 310 (2004); *Pappalardo v. City of New York*, 2 A.D.3d 699, 700, 768 N.Y.S.2d 660 (2nd Dep't., 2003); *Matter of Morrison v. New York City Health and Hosp. Corp.*, 244 A.D.2d 487, 488, 664 N.Y.S.2d 342 (2nd Dep't., 1997); *Matter of Sica v. Board of Educ. of the City of New York*, 226 A.D.2d 542, 640 N.Y.S.2d 610 (2nd Dep't., 1996); *Matter of Brown v. County of Westchester*, 293 A.D.2d at 748; *Matter of Shapiro v. County of Nassau*, 208 A.D.2d 545, 616 N.Y.S.2d 786 (2nd Dep't., 1994).

Notably, in *Williams v. Nassau County*, this Court denied leave to file a late notice of claim because, even though in possession of the relevant medical records, the hospital did not have "notice of the specific claim" and a "municipality must have notice or knowledge of the specific claim and not general knowledge that a wrong has been committed." *Williams v. Nassau County Med. Ctr.*, 13 A.D.3d 363, 364, 786 N.Y.S.2d 207 (2nd Dep't., 2004) (citing *Matter of Brown v. County of Westchester*,

293 A.D.2d at 749 and *Matter of Sica v. Board of Education*, 226 A.D.2d at 543), *rev'd*, *Williams v. Nassau County*, 6 N.Y.3d at 531.

The Court of Appeals in *Williams v. Nassau County*, however, disagreed with this Court. There, the infant plaintiff argued very emphatically that GML § 50-e(5) "contemplates actual knowledge of the essential facts constituting the claim [and] not knowledge of a specific legal theory." *Williams v. Nassau County*, 6 N.Y.3d at 537 (internal quotations omitted). Therefore, according to the infant plaintiff, "the Appellate Division erred by requiring that the [Hospital] have actual knowledge of the specific claim." *Id*. (internal quotations omitted). And, significantly, the Court of Appeals agreed – pronouncing quite clearly that "[t]he relevant inquiry [was] whether the hospital had actual knowledge of the facts – as opposed to the legal theory – underlying the claim." *Id*.

Accordingly, pursuant to the holding by the Court of Appeals in *Williams v. Nassau County*, GML § 50-e(5) required Leanza and her Mother to prove that the School District had actual knowledge of the facts constituting their claim. They were not, however, required to prove that the School District had knowledge of their

specific claim – that is, their legal theory.[5.] And, ultimately, Leanza and her Mother satisfied their burden.

2. The Incident Report Prepared by the School Nurse

Critically, in order to establish actual knowledge of the essential facts constituting a claim, the information in a report must establish a causal connection between the incident and any alleged negligence. In the present case, the incident report prepared by the School Nurse definitely established actual knowledge of the essential facts of the claim by Leanza and her Mother that the School District was negligent for failing to provide competent and properly-trained supervisors to monitor her relatively unsafe activity – that is, her unsupervised use of one end of the balance beam while the gym teacher was supervising another student at the other end.

In *Matter of Carpenter v. City of New York*, 30 A.D.3d 594, 595, 817 N.Y.S.2d 155 (2nd Dep't., 2006), the New York City Housing Authority was informed that a person slipped on ice in its parking lot. There, this Court explained that GML § 50-e(5) required both knowledge of the fall and a description of how the facts

5. Similalry, just like the argument by the School District in the present case, in *Matter of Andreyev v. Town of Babylon*, the Supreme Court held that GML § 50-e(5) required knowledge of the specific claim and not knowledge of the wrong. This Court, however, reversed. *See Matter of Andreyev v. Town of Babylon*, 9 Misc. 3d 1113A, 808 N.Y.S.2d 916 (Sup. Ct., Suffolk Co., 2005), *rev'd*, 28 A.D.3d 653, 812 N.Y.S.2d 381 (2nd Dep't., 2006).

related to the asserted negligence claim. *Id*. at 595. Since no connection existed between the two, the application to file a late notice of claim was denied. *Id*.

Likewise, in *Matter of Henriques v. City of New York*, 22 A.D.3d at 847, reports described how the injury occurred but did "not suggest any causal connection between the happening of the accident and any alleged negligence by the [City]." *Id*. at 848. Accordingly, actual knowledge of the essential facts of the claim was not established. *Id*. *See also Pappalardo v. City of New York*, 2 A.D.3d at 700 (holding that even though an accident investigation report and an incident witness statement detailed how the infant plaintiff was injured, "neither form suggested any connection between the happening of the accident and any alleged negligence"); *Matter of Guiliano v. Town of Oyster Bay*, 244 A.D.2d 408, 409, 664 N.Y.S.2d 314 (2nd Dep't., 1997) (where the accident report stated, without more, that the petitioner allegedly tripped and fell on a concrete walk). *Cf. Bovich v. East Meadow Public Library*, 16 A.D.3d 11, 20, 789 N.Y.S.2d 511 (2nd Dep't., 2005) (holding that the "library received contemporaneous actual notice of the facts underlying the plaintiffs' claim" because of, *inter alia*, the incident report).

Interestingly, when an incident occurs in a school, claims often involve the negligent hiring or supervision of personnel and/or the failure to supervise students adequately. *See e.g. Conte v. Valley Stream Central High School Dist*., 23 A.D.3d

328, 328, 804 N.Y.S.2d 101 (2nd Dep't., 2005) (where the "accident claim form processed by the [school] two months after the accident failed to apprise the [school] of the plaintiff's claim that the [school] was negligent in supervising and managing its students and in failing to provide adequate safety equipment"); *Matter of Vitale v. Elwood Union Free School Dist.*, 19 A.D.3d 610, 611, 797 N.Y.S.2d 540 (2nd Dep't., 2005) (where the school had immediate notice of the school yard incident because eyewitnesses were interviewed and an accident report was prepared). *Cf. Matter of Brown v. County of Westchester*, 293 A.D.2d 748, 749, 741 N.Y.S.2d 281 (2nd Dep't., 2002) (in an action alleging physical abuse of an infant placed in foster care, holding that although "the records in question contain information germane to the claim, they do not apprise the [public entities] of the specific allegation that they were negligent in their supervision of the infant's custodial arrangement").

A good example is *Matter of Bird v. Port Byron Central School Dist.*, 231 A.D.2d 916, 916, 647 N.Y.S.2d 627 (4th Dep't., 1996). There, the infant was injured in the hallway of a school while changing classes. *Id.* The school nurse promptly examined her, called an ambulance and completed an accident report. *Id.* As a result, leave to serve a late notice of claim was granted because the school "acquired actual knowledge of the essential facts constituting the claim shortly after their occurrence." *Id.* In contrast, the student in *Matter of Doyle v. Elwood Union Free School Dist.*, 39

A.D.3d at 545, was injured at school while playing ping-pong and, shortly thereafter, an accident claim form and a student incident report were completed. *Id*. A late notice of claim was not allowed, however, because neither report "suggested a connection between the accident and the alleged negligence in putting together the table or supervising the students."*Id*.

Likewise, in *Matter of del Carmen v. Brentwood Union Free School Dist.*, 7 A.D.3d 620, 621, 777 N.Y.S.2d 152 (2nd Dep't., 2004), an accident report merely indicated that the injured student "fell off a table in the technology room." As a result, the school district did not have notice of the essential facts of the negligence claim alleging that its employees were not trained properly and its students were not supervised adequately. *See also Matter of Scott v. Huntington Union Free School*, 29 A.D.3d at 1011 (the child injured his knee during school recess, but the accident report failed to notify the school district of its alleged negligence in failing to supervise or equip the tackle football game); *Matter of Conroy v. Smithtown Central*, 3 A.D.3d at 493 (the student lost control and was injured while carrying a chair over his head from one classroom to another,); *Corrales v. Middle Country Central School Dist.*, 307 A.D.2d 907, 980-909, 762 N.Y.S.2d 908 (2nd Dep't., 2003) (the student "hopped off the back of the bus" during an emergency drill); *Matter of Price v. Board of Educ. of City of Yonkers*, 300 A.D.2d 310, 311, 751 N.Y.S.2d 286 (2nd Dep't.,

2002) (while running from a child, the student "tripped over another child" and was injured); *Johnson v. Katonah-Lewisboro School Dist.*, 285 A.D.2d at 490 (the student fell after she stepped off the school bus and began to walk away); *Matter of Dunlea v. Mahopac Central School Dist.*, 232 A.D.2d 558, 648 N.Y.S.2d 673 (2nd Dep't., 1996) (the student was intentionally assaulted and, therefore, the school did not receive notice that its students were supervised negligently), *appeal denied*, 89 N.Y.2d 812, 657 N.Y.S.2d 404 (1997).

Many cases involving incidents in school also occur during athletics. In *Matter of Scolo v. Central Islip Union Free School Dist.*, 40 A.D.3d at 1105, for example, two students collided during gym class. One required sutures above her lip and, subsequently, she developed a scar that allegedly required plastic surgery to repair. *Id*. at 1105. In the accident report prepared the day of the accident, the school nurse indicated that the injured student "was trying to pick up a ball when another student did not see her and ran into her." *Id*. The accident report also "merely indicated that the [student] had been injured during a gym class as a result of an accident." *Id*. at 1106. Therefore, it failed to establish actual knowledge of the essential facts of the claim alleging negligent supervision by the school of the other student in the collision who supposedly had violent propensities. *Id*. at 1105-1106.

Actual knowledge of the facts constituting the claim of negligent supervision by school personnel also was not established in *Matter of Ryder v. Garden City School Dist.*, 277 A.D.2d 388, 716 N.Y.S.2d 97 (2nd Dep't.,2000). There, the accident form prepared by the athletic director stated nothing more than the student "was hit and injured by another player during supervised football practice." *Id*. at 388-389. And in *Matter of Rusiecki v. Clarkstown Central School Dist.*, 227 A.D.2d 493, 494, 643 N.Y.S.2d 132 (2nd Dep't., 1996), the contemporaneous incident report prepared by the school nurse stated that, during volleyball practice, "the student fell and banged her knee on the floor." Likewise, a student accident report in *Matter of Baldi v. Mt. Sinai School Dist.*, 254 A.D.2d 414, 679 N.Y.S.2d 80 (2nd Dep't., 1998), stated that the student's knee appeared to lock-up while running a blocking drill during football practice. Therefore, this Court held that the school was not provided with "knowledge of the specific claim" alleged by the injured student. *Id*.[6.]

Sometimes students also are involved in relatively unsafe activities in school. For example, in *Matter of Hayes v. Peru School Dist.*, 281 A.D.2d 794, 794, 722 N.Y.S.2d 104 (3rd Dep't., 2001), a fifteen-year-old student was in the school's technology classroom without any supervision but with the permission of his teacher. As he was cutting a piece of sheet metal, the shearing machine began to fall from its

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6. Pursuant to the holding by the Court of Appeals in *Williams v. Nassau County*, knowledge of a "specific claim" no longer is required. *See supra* at ?-19, 27.

table and he tried to catch it. Recognizing the gravity of the situation, the school nurse called an ambulance right away. Luckily, only four fingers of his left hand were lacerated, albeit severely. In addition, several tendons were torn and one of his fingers was fractured. There, the late notice of claim was allowed. *Id*. *See also Matter of Mahan v. Board of Educ. of Syracuse City School Dist.,* 269 A.D.2d 834, 834-835, 703 N.Y.S.2d 627 (4th Dep't., 2000) (where a twelve-year-old student was dangled by another student outside an open window at their school, and the proposed notice of claim alleged that "the students were left unsupervised with the classrooms doors locked because the teachers had been kept late in a team meeting"); *Matter of Andersen v. Brewster Central School Dist.*, 189 A.D.2d 1068, 1069, 593 N.Y.S.2d 91 (3rd Dep't., 1993) (where a five-year-old child fell from the top of a twelve-foot slide at the school).

Finally, it should be mentioned that, when deciding whether a report provides actual knowledge of the essential facts of the claim, some courts will look to see whether *an actionable wrong* has been described. *See e.g. Matter of James v. City of New York Dep't. of Environmental Protection,* 37 A.D.3d 832, 830 N.Y.S.2d 593 (2nd Dep't., 2007); *Matter of Padovano v. Massapequa Union Free School Dist.*, 31 A.D.3d 563, 564, 818 N.Y.S.2d 274 (2nd Dep't., 2006) (where the accident report "failed to provide reasonable notice that an actionable wrong had been committed by

the School District); *Matter of Baldi v. Mt. Sinai School Dist.*, 254 A.D.2d at 414-415 holding that "the accident report does not even provide reasonable notice that an actionable wrong had been committed").

In the present case, the School District first examined the proposed notice of claim by Leanza and her Mother which alleged that "the School District was negligent in hiring its personnel and in supervising the students …. [and] the School District failed to follow internal rules and regulations." Appellant's Brief at 13. According to the School District, however, "the incident report never referenced such allegations. Simply because the School District was made aware of an incident did not equate to it having knowledge of the essential elements of the claim." *Id*.

Continuing, the School District next argued that the incident report contained "no facts … that would have alerted the School District to a potential claim …. [and] made no specific reference to any potential claim." *Id*. at 15. Furthermore, "the incident report did not provide any indication that any wrong had been committed by the School District. This Court has repeatedly ruled that incident reports that merely noted that an incident occurred are insufficient to support a finding that a municipality had notice of the essential elements of a claim." *Id*. at 16. Finally, the School District repeated that "[w]hile the School District was aware of an incident, the record was devoid of evidence that it knew of the essential elements of the claim." *Id*. at 17.

The School District, however, is wrong on the law and the facts. Clearly, GML § 50-e(5) did not require Leanza and her Mother to establish that the School District had knowledge of the elements of their claim or their legal theory. Paraphrasing the Court of Appeals in *Williams v. Nassau County*, 6 N.Y.3d at 537, whether the School District had actual knowledge of the legal theory was irrelevant. The relevant question was whether it had actual knowledge of the essential facts underlying the claim. Thus, its claim that the incident report or the subsequent discussions by Leanza' Mother with school personnel failed to include any mention of negligent hiring or supervision is without any merit whatsoever.

Moreover, the rule in *Thomann* – that GML § 50-e(5) requires notice of the claim and not knowledge of the wrong – was inapplicable. In the present case, the incident report showed that at about 2 p.m., on January 23, 2006, in the gymnasium of the Shaw Avenue School (R70), Leanza was on the balance beam. Sixth-grade older students "were assisting." Leanza slipped off, fell to the mat and was brought to the School Nurse complaining of pain (R71). Therefore, the incident report did not record the occurrence of an accident without more as argued by the School District. Here, without a doubt, the incident report provided on its face that Leanza's injuries were caused by the accident and that the negligence of the School District's gym teacher caused the accident by his inadequate training that allowed a first grader on

the balance beam without competent adult supervision, together with his inadequate supervision of the students in his class.

Significantly, the affidavit by the gym teacher (R72-R73) – which represented information known by the School District at the time – corroborated and added to the information in the incident report.[7.] As described therein, the combined gym class had about 45-50 students from the first and sixth grades (R72). In addition, at the time and place of the incident, "[t]he sixth graders were doing "peer mentoring" and working one-on-one with the first graders" (R72). Meanwhile, he was at one end of the balance beam supervising a student who, significantly, was dismounting (R72). At which point, he heard a student crying whereupon he turned away from the supervised student only to see Leanza "on the mat near the other end of the balance beam crying" (R72).

Thus, the incident report in the present case did not suffer from a failure to establish a causal connection between Leanza's injuries and the negligence claims. Obviously, the gym teacher was not supervising Leanza while she was on the balance beam. And, although not definite, the incident report indicates that a sixth grader

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7. In *Matter of Hayes v. Peru School Dist.*, 281 A.D.2d 794, 795, 722 N.Y.S.2d 104 (3rd Dep't., 2001), the Third Department considered an affidavit of the school principal that was submitted in opposition to the application for permission to file a late notice of claim in order to demonstrate that the school had actual knowledge of the essential facts surrounding the incident.

might have been spotting her. Regardless, the simple fact is that Leanza fell solely because her gym teacher allowed her on the balance beam either by herself or with a six-grader acting as a spotter. This was just as unsafe as allowing a student to cut sheet metal by himself as in *Matter of Hayes v. Peru School*; or leaving students alone in a locked classroom as in *Matter of Mahan v. Board of Educ. of Syracuse City School*; or allowing a five-year-old child on the top of a twelve-foot slide as in *Matter of Andersen v. Brewster Central School*.[8.]

In sum, the incident report gave the School District actual knowledge of the essential facts of the negligence claim by Leanza and her Mother.

3. The Presence of the Gym Teacher at the Scene of the Incident

Not unexpectedly, the presence of an employee at the scene of an incident works to establish actual knowledge of the essential facts of a claim just like incident reports.[9.] Moreover, when both conditions are true – that is, an employee is present at the scene and an incident report is prepared – actual knowledge of the essential facts of a claim almost always is established. For example, in *Bovich v. East Meadow Public Library*, 16 A.D.3d at 12, the plaintiff fell in the library and an unidentified staff member assisted her by bringing a chair. Since an incident report also was

8. See supra, at 24-25.

9. For analytical purposes, the classification also is the same.

prepared, the library had contemporaneous actual notice of the facts underlying the plaintiff's claim. *Id*. at 20. Another example is *Matter of Wade v. City of New York*, 65 A.D.2d 534, 409 N.Y.S.2d 404 (2nd Dep't., 1978). There, city employees were present in the city institution where the plaintiff was injured. *Id*. Medical records also were available from a hospital operated under the aegis of the city and, therefore, "the city had actual notice of the injury." *Id*.

Of course, the presence of an employee at the scene without the preparation of an incident report often is sufficient enough, as demonstrated in *Mestel v. Bd. of Educ. of the City of Yonkers*, 90 A.D.2d 809, 455 N.Y.S.2d 667 (2nd Dep't., 1982). There, two supervisory employees of the city were present at the incident and, even though and incident report apparently was not prepared, actual knowledge of the essential facts constituting a claim still was established. An incident report also apparently was not prepared in *Whitehead v. Centerville Fire Dist.*, 90 A.D.2d 655, 655-656, 456 N.Y.S.2d 450 (3rd Dep't., 1982), but the defendants' employees were present and involved in the collision. And in *Matter of Lamica v. Malone Central School Dist.*, 180 A.D.2d 885, 886, 580 N.Y.S.2d 93 (3rd Dep't., 1992), the school district had actual notice of the accident that injured twenty-six students because the bus was driven by its employee.

In contrast, NYCHHC did not have actual notice of the facts of the claim *Matter of Morrison v. New York City Health and Hospitals Corp.*, 244 A.D.2d at 488, where two hospital employees did nothing more than assist the plaintiff at the time and place of the accident and the emergency room records stated simply that the plaintiff was injured. Likewise, an office worker employed by a city agency who simply was present at the incident did not give the city actual knowledge of the claim. *See Matter of Bruzzese v. City of New York*, 34 A.D.3d 577, 578, 824 N.Y.S.2d 653 (2nd Dep't., 2006).

Turning to incidents that occur in school in the presence of an employee, in *Matter of Zimmet v. Huntington Union Free School Dist.*, 187 A.D.2d 436, 436, 590 N.Y.S.2d 734 (2nd Dep't., 1992), a school aide observed that a student was injured on school grounds and a school nurse tended the injury. The school principal also prepared in accident report. *Id*. Therefore, this Court held that the school district "had actual notice of the accident on the day it occurred." *Id*. *See also Matter of Vitale v. Elwood Union*, 19 A.D.3d at 611 (where eyewitnesses were interviewed about the school yard accident and an accident report was prepared) *Friedman v. Syosset Central School Dist.*, 154 A.D.2d 337, 337, 545 N.Y.S.2d 814 (2nd Dep't., 1989) (where a defendant's employee witnessed the incident and a detailed incident report was prepared); *Matter of Isereau v. Brushton-Moira School Dist.*, 6 A.D.3d 1004,

1006, 776 N.Y.S.2d 129 (3rd Dep't., 2004) (the school district's head custodian and clerk of the works were at the scene);

Matter of Hayes v. Peru School Dist., 281 A.D.2d at 794 (the nurse gave the school immediate notice followed by the school's principal filed in opposition to the motion for leave to serve a late notice of claim); *Matter of Ambrosiano v. Canajoharie Central School Dist.*, 174 A.D.2d 914, 571 N.Y.S.2d 612 (3rd Dep't., 1991) (where the school superintendent conceded that he was present at the scene); *Matter of Frazzetta v. Rondout Valley Central School Dist.*, 166 A.D.2d 843, 844, 563 N.Y.S.2d 533 (3rd Dep't., 1990) (where the presence of an employee specifically was alleged); *Matter of Strevell v. South Colonie Central School Dist.*, 144 A.D.2d 733, 734, 535 N.Y.S.2d 147 (3rd Dep't., 1988) (a fifteen-year-old slipped on ice in front of the school; a school janitor carried her to the school nurse; and an incident report was prepared and signed by the school's principal); *Matter of De Groff v. Bethlehem Central School Dist.*, 92 A.D.2d 702, 702, 460 N.Y.S.2d 630 (3rd Dep't., 1983) (where the school's principal and bus driver were present at or shortly after the accident's occurrence); *Matter of Matey v. Bethlehem Central School Dist.*, 63 A.D.2d 807, 807, 405 N.Y.S.2d 156 (3rd Dep't., 1978) (where a school employee was present when the accident occurred).

Like the incident in the present case, the last category of cases includes accidents that occur during athletics and in school. *See e.g. Rossi v. South Country Central School Dist.*, 152 A.D.2d 557, 557, 543 N.Y.S.2d 487 (2nd Dep't., 1989) (where the school's physical education teacher was present at the scene of the student's injury); *Pepe v. Somers Central School Dist.*, 108 A.D.2d 799, 799, 485 N.Y.S.2d 315 (2nd Dep't., 1985) (where a student was injured during gym class and the gym teacher sent the student to the school nurse); *Matter of Welch v. Bd. of Saratoga Central School Dist.*, 287 A.D.2d 761, 761, 731 N.Y.S.2d 94 (3rd Dep't., 2001) (a fourteen-year-old student was injured during football practice which was witnessed by three coaches); *Matter of Esposito v. Carmel Central School Dist.*, 187 A.D.2d 854, 855, 589 N.Y.S.2d 1009 (3rd Dep't., 1992) (where, immediately after the injury, the baseball coach observed the student and knew that he was taken to the hospital by an assistant coach); *Coonradt v. Averill Park Central School Dist.*, 75 A.D.2d 925, 427 N.Y.S.2d 531 (3rd Dep't., 1980) (a football coach was present when a student was injured and written insurance claim forms were submitted).

In the present case, obviously, the School District's gym teacher was present at the time and place of the incident. Specifically, he was supervising a dismounting student at one end of the balance beam while Leanza was falling off of the other end. He also brought Leanza to the School Nurse and, subsequently, he prepared an

affidavit in opposition to the motion for leave to file a late notice of claim. Thus, the facts in this case are almost identical to the facts presented in *Pepe v. Somers Central School*, 108 A.D.2d at 799, where this Court held that the late notice of claim should have been allowed because the student was injured during gym class and the gym teacher sent the student to the school nurse.

The facts in the present case are also similar to those in *Rossi v. South Country Central*, 152 A.D.2d at 557, where the school's physical education teacher was present at the scene of the student's injury; in *Matter of Zimmet v. Huntington Union Free School*, 187 A.D.2d at 436, where a school aide observed the accident; the school nurse tended the injury; and the school principal prepared an accident report; in *Matter of Strevell v. South Colonie Central*, 144 A.D.2d at 734, where the student slipped on ice; the school janitor carried her to the school nurse; and the school principal signed off on an incident report; and in *Matter of Hayes v. Peru School Dist.*, 281 A.D.2d at 794, where the school had immediate notice through its nurse.

The School District, on the other hand, challenges the claim by Leanza and her Mother that the presence of its gym teacher and School Nurse at the scene gave notice of the essential facts of their claim. *See* Appellant's Brief at 14. This Court's holding in *Matter of Hubbards v. City School Dist. of Glen Cove*, 204 A.D.2d 721, 721, 613

N.Y.S.2d 29 (2nd Dep't., 1994), also is relied upon in support. Its arguments, however, are totally misplaced.

Basically, the School District premises its argument on the understanding that the petitioner in *Hubbards v. City School*, "argued that the school district knew of the incident because its employees witnessed it." Appellant's Brief at 14. According to the School District, however, "[t]his Court rejected this assertion" and held that the school district there did not have actual knowledge of the essential facts constituting the claim. *Id*.

A plain reading of the brief decision in *Hubbard v. City School* shows nothing of the sort. There, the accident report stated that the student felt his knee go out of place when attempting a jump shot while playing basketball at the school. *See Hubbards v. City School*, 204 A.D.2d at 721-722. In contrast, the proposed notice of claim alleged that he fell on a liquid substance on the floor of the basketball court. *Id*. at 722. Therefore, this Court held that the school did not have prior notice of the claim regarding an unsafe condition on the basketball court. *Id*. Accordingly, even though the petitioner had argued that the school would not be prejudiced by allowing the late notice of claim because its employees witnessed the accident, the holding in *Hubbard v. City School* has no impact at all on the argument by Leanza and her Mother that the

presence of the gym teacher and School Nurse gave the School District actual knowledge of the essential facts of their claim.

In addition to the incident report and the presence of the School District's employees at the scene of the incident, two more facts contributed to the School District's actual knowledge of the essential facts of the claim by Leanza and her Mother. The day after the accident Leanza's Mother went to the school to speak with, among others, the gym teacher, the School Nurse and the home room teacher. Although the School Nurse previously believed that the accident caused a very slight injury to Leanza's pinky finger, she admittedly was told by Leanza's Mother that Leanza had sustained a serious injury to her vaginal area requiring sutures to repair (R74). She also was told by Mr. McLean "that Leanza refers to her vaginal area as her pinky" (R74) (internal quotation marks omitted).

Thus, the visit by Leanza's Mother caused the School Nurse to prepare an incident report based upon the serious nature of the injuries sustained by Leanza whereas, previously, an incident report would not have been prepared due to the initial assessment that the injuries were minor. As a result, the facts in the present case closely resemble the facts in *Tortorici v. East Rockaway Public School Dist. No.19*, 191 A.D.2d 495, 594 N.Y.S.2d 335 (2nd Dep't., 1993). There, the father of a ten-year-

old student notified the school and its nurse about an accident that occurred a few days earlier. *Id*. at 495.

The school nurse in *Tortorici v. East Rockaway Public School* prepared a report describing "when and how the incident allegedly occurred, the injury, and the name of a witness." *See Tortorici v. East Rockaway Public School*, 191 A.D.2d at 495. Accordingly, the order granting the motion for permission to serve a late notice of claim was affirmed. *Id*. *See also Matter of Urban v. Waterford-Halfmoon Union Free School Dist.*, 105 A.D.2d 1022, 1024, 483 N.Y.S.2d 463 (3rd Dep't., 1984) (where actual knowledge of the facts constituting the claim was established when the father of the injured student informed the school principal by telephone about the accident five days after its occurrence).[10.]

Moreover, by visiting the School District and speaking with its various personnel, Leanza's Mother undoubtedly caused sufficient buzz to propel the incident into its highest administrative offices. Furthermore, additional interest in the incident surely came one month later when the attorney for Leanza and her Mother notified the School District that the Law Office was representing them and to forward all

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10. In the Appellant's Brief, the School District mentions that "[t]his Court has even considered the scenario where a student's parent has gone to the school the day after the incident to notify the school" and *Matter of Termini v. Valley Stream*, 2 A.D.3d at 866 is cited. *See* Appellant's Brief at 18. The School District, however, does not attempt to apply either the facts or law in *Matter of Termini v. Valley Stream* to the present case and its synopsis is erroneous.

correspondence to its legal department. To be sure, every school is aware of lawsuits and, when a child is injured while in its care, liability takes center stage.

And the School District is no different. After receiving the notification from the Law Office, certainly, it had actual knowledge of claims by Leanza and her Mother. She had sustained serious injuries as a direct result of its negligence in hiring and supervising a gym teacher who did not know or chose to ignore a basic rule of safety – that a first grader should not be on a balance beam by herself or with a sixth grader as a spotter. Likewise, it knew that because of improper supervision of its students in gym class, Leanza was injured as she was allowed to work the balance beam without proper safety precautions in place.

C. The School District Will Not Be Prejudiced by Allowing Service of a Late Notice of Claim

1. The Burden to Establish Prejudice or the Lack Thereof

GML § 50-e provides that a factor for consideration on a motion for leave to file a late notice of claim is "whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits." According to the Third Department, "[t]he substantial prejudice envisioned by the statute arises from circumstances which directly impact the ability to defend the potential claim on the merits." *Matter of Isereau v. Brushton-Moira School*, 6 A.D.3d at 1006.

One example is a diminished ability to conduct an accurate reconstruction of an incident due to the passage of time and changed conditions. *See e.g. Rabanar v. City of Yonkers*, 290 A.D.2d 428, 429, 736 N.Y.S.2d 93 (2nd Dep't., 2002). Another is a deprivation of the opportunity to conduct a prompt and thorough investigation resulting from an untimely notification of injuries caused by an incident. *See e.g. Matter of Scolo v. Central Islip*, 40 A.D.3d at 1106 (holding that the school district would be prejudiced if compelled to prepare a defense because the incident report provided no reason to conduct a prompt investigation) *Matter of Spaulding v. Cobleskill-Richmondville Central School Dist.*, 289 A.D.2d 860, 861, 734 N.Y.S.2d 700 (3rd Dep't., 2001).

With respect to the question of which party must prove prejudice or a lack thereof, the plaintiff has the initial burden to show a lack of prejudice. *See e.g. Jordan v. City of New York*, 41 A.D.3d 658, 660, 838 N.Y.S.2d 624 (2nd Dep't., 2007); *Matter of Narcissi v. Inc. Village of Central Islip*, 36 A.D.3d 920, 922, 829 N.Y.S.2d 578 (2nd Dep't., 2007); *Matter of Andrew T.B. v. Brewster Central School Dist.*, 18 A.D.3d 745, 748, 795 N.Y.S.2d 718 (2nd Dep't., 2005); *Flores v. County of Nassau*, 8 A.D.3d 377, 378, 777 N.Y.S.2d 739 (2nd Dep't., 2004). *Accord Williams v. Nassau County*, 6 N.Y.3d at 538 (rejecting the argument by the plaintiff that "the Appellate Division incorrectly burdened him with the responsibility of showing lack of

substantial prejudice to the [city] as a result of late service of the notice of claim"). *But see Matter of DeGennaro v. Nassau University Med. Ctr.*, 233 N.Y.L.J. 59, 2005 N.Y. Misc. LEXIS 3279 (Sup. Ct., Nassau Co., March 29, 2005) (holding that "[t]he burden of proof on the topic of prejudice falls on the [hospital] as the party raising its spectre").

If actual knowledge is established, the public entity has the burden to substantiate its claim of substantial prejudice. *See e.g. Matter of Haeg v. County of Suffolk*, 30 A.D.3d 519, 520, 817 N.Y.S.2d 125 (2nd Dep't., 2006); *Matter of March v. Town of Wappinger*, 29 A.D.3d 998, 816 N.Y.S.2d 534 (2nd Dep't., 2006); *Bovich v. East Meadow Public Library*, 16 A.D.3d at 21-22; *Medley v. Cichon*, 305 A.D.2d 643, 645, 761 N.Y.S.2d 666 (2nd Dep't., 2003) (after the plaintiffs demonstrated a lack of prejudice by establishing actual notice of the facts of the claim, the burden shifted to the hospital "to show how they were prejudiced").

Even if actual knowledge is not established, nevertheless, the public entity must establish substantial prejudice. *See Matter of Bensen v. Town of Islip*, 99 A.D.2d 755, 756, 471 N.Y.S.2d 670 *appeal dism'd* 62 N.Y.2d 798, 477 N.Y.S.2d 330 (1984). *See also Matter of Dell'Italia v. Long Island Railroad*, 31 A.D.3d at 758; *Matter of Haeg v. County of Suffolk*, 30 A.D.3d at 519; *Matter of McHugh v. City of New York*, 293 A.D.2d 478, 739 N.Y.S.2d 449 (2nd Dep't., 2002) (same); *Mc Bee v. County of*

Onondaga, 34 A.D.3d 1360, 1360, 826 N.Y.S.2d 531 (4th Dep't., 2006) (same). *Cf. Frith v. New York City Housing Auth.*, 4 A.D.3d 390, 393, 771 N.Y.S.2d 392 (2nd Dep't., 2004) (where NYCHA failed "to make a compelling showing" that the delay in serving a notice of claim caused substantial prejudice).

Then, if prejudice is substantiated by the public entity, the burden shifts back to the plaintiff to rebut the claim that the delay in filing the notice of claim caused prejudice by diminishing the ability to investigate and defend. *See Matter of White v. New York City Housing Auth.*, 38 A.D.3d 675, 676, 831 N.Y.S.2d 515 (2nd Dep't., 2007) (holding that NYCHA's claim of prejudice was rebutted); *Conte v. Valley Stream*, 23 A.D.3d at 328-329 (where the plaintiff failed to rebut the school's claim of prejudice); *Matter of Pico v. City of New York*, 8 A.D.3d at 288 (where the plaintiff's burden was not satisfied).

2. Establishing Prejudice or the Lack Thereof

A lack of prejudice may be established if the public entity has actual knowledge of the essential facts constituting the claim. *See e.g. Jordan v. City of New York*, 41 A.D.3d at 660; *Matter of Andreyev v. Town of Babylon*, 28 A.D.3d 653, 654, 812 N.Y.S.2d 381 (2nd Dep't., 2006); Gibbs v. City of New York, 22 A.D.3d 717, 719, 804 N.Y.S.2d 393 (2nd Dep't., 2005); *Matter of Andrew T.B. v. Brewster Central*, 18 A.D.3d at 748; *Montero v New York City Health & Hospitals Corp.*, 17 A.D.3d 550,

550, 793 N.Y.S.2d 160 (2nd Dep't., 2005); *Medley v. Cichon*, 305 A.D.2d at 645; *Gomez v. City of White Plains*, 300 A.D.2d 282, 750 N.Y.S.2d 870 (2nd Dep't., 2002); *Matter of Ryder v. Garden City*, 277 A.D.2d at 389 (holding that the school would be prejudiced if compelled to prepare a defense since, having no knowledge of the claim that its personnel negligently failed to supervise students, there was no reason to conduct a prompt investigation).

In order to substantiate a claim of prejudice, conclusory assertions are insufficient, especially if based solely on an untimely notice of claim. *See Medley v. Cichon*, 305 A.D.2d at 645. *See also Jordan v. City of New York*, 41 A.D.3d at 660; *Matter of Andrew T.B. v. Brewster Central*, 18 A.D.3d at 748; *Matter of Speed v. A. Holly Patterson Extended Care Facility*, 10 A.D.3d 400, 781 N.Y.S.2d 135 (2nd Dep't., 2004); *Matter of National Surety Corp. v. Town of Greenburgh*, 266 A.D.2d 550, 551, 699 N.Y.S.2d 128 (2nd Dep't., 1999) (holding that because the town acquired actual knowledge of the essential facts of the claim, its conclusory assertions of prejudice caused by the delay were not substantiated); *Matter of Tomlinson v. New York City Health and Hospitals Corp.*, 190 A.D.2d 806, 807, 593 N.Y.S.2d 565 (2nd Dep't., 1993); *Matter of Kurz v. New York City Health and Hosp. Corp.*, 174 A.D.2d 671, 671, 571 N.Y.S.2d 533 (2nd Dep't., 1991); *Matter of Herman v. Village of Chester*, 125 A.D.2d 469, 471, 509 N.Y.S.2d 818 (2nd Dep't., 1986); *Walter v. State*,

235 A.D.2d 623, 625, 651 N.Y.S.2d 704 (3rd Dep't., 1997) (where no substantial prejudice accrued because the state had an opportunity to investigate the incident).

Conclusory assertions also are insufficient when the claim of substantial prejudice is based on an inability to conduct a proper investigation. *See Matter of Dell'Italia v. Long Island Railroad*, 31 A.D.3d at 759-760 (where the town failed to demonstrate its inability to defend itself or to investigate the incident by interviewing witnesses and employees); *Matter of De Groff v. Bethlehem Central School Dist.*, 92 A.D.2d at 703 (holding that without a demonstration of witnesses "suffer[ing] from faulty recollection, serious prejudice to [the school] is unapparent" and the school's "claim of prejudice appear[ed] to be founded on little more than mere speculation").

Moreover, a long delay – i.e., between the incident or deadline for filing a notice of claim and the actual application seeking leave to file the untimely motion – neither results in a presumption of prejudice nor mandates a finding of prejudice. *See Matter of Doyle v. Elwood Union Free School Dist.*, 39 A.D.3d at 545 (holding that the one-year delay prejudiced the school); *Matter of Henriques v. City of New York*, 22 A.D.3d at 848 (where the one-year delay after the incident prejudiced the city's ability to maintain a defense); *Matter of del Carmen v. Brentwood Union*, 7 A.D.3d at 621 (a five- month delay after the deadline for filing a notice of claim); *Pappalardo v. City of New York*, 2 A.D.3d at 700 (a fifteen-month delay between the accident and

the motion seeking to serve the notice of claim); *Matter of Bensen v. Town of Islip*, 99 A.D.2d at 756.

On the other hand, acting somewhat like a presumption, courts are in agreement that if a public entity has actual knowledge of the essential facts, substantial prejudice is unlikely to result from allowing a late notice of claim. *See Matter of Beary v. City of Rye*, 44 N.Y.2d at 412-413. *See also Rechenberger v. Nassau County Med. Ctr.*, 112 A.D.2d 150, 490 N.Y.S.2d 838 (2nd Dep't., 1985) (citing *Matter of Beary v City of Rye*); *Kavanaugh v. Memorial Hosp. and Nursing Home of Greene Co.*, 126 A.D.2d 930, 511 N.Y.S.2d 188 (3rd Dep't., 1987) 931-932; *Matter of Herman v. Village of Chester*, 125 A.D.2d at 470-471.

In any event, a short delay almost never results in substantial prejudice. *See e.g. Gomez v. City of White Plains*, 300 A.D.2d at 282 (holding that the delay of about seventeen days "was relatively short"); *Rosenblatt v. City of New York*, 160 A.D.2d 927, 928, 554 N.Y.S.2d 800 (2nd Dep't., 1990) (eighteen days after the expiration of the ninety-day period); *Matter of Chatman v. White Plains Housing Auth.*, 101 A.D.2d 838, 839-840, 475 N.Y.S.2d 500 (2nd Dep't., 1984) (nineteen days after the statutory period expired or about three and one-half months after the occurrence of the accident); *Monge v. City of New York Dep't. of Social Services*, 95 A.D.2d 848, 849,

464 N.Y.S.2d 207 (2nd Dep't., 1983) (where leave to serve a late notice of claim was made "within a reasonable time" after the plaintiff's attorney was consulted).

In the present case, the School District mistakenly proclaims that "it was not the School District's burden to prove it was not prejudiced. It was [Leanza and her Mother] that were saddled with the burden of proof." Appellant's Brief at 19-20. As detailed above, however, Leanza and her Mother had the initial burden of going forward to show a lack of prejudice. And, by establishing that the School District had actual notice of the essential facts of their claims, they satisfied their burden and the School District was required to substantiate any claimed prejudice.

Alternatively, even if Leanza and her Mother failed to satisfy their initial burden – which they adamantly do not concede – the School District still was required to substantiate any claim of prejudice. But, significantly, a careful examination of the Appellant's Brief demonstrates that sole argument by the School District with respect to any alleged prejudice was – it "has been effectively 'cheated' of investigation into these claims and injuries" – that is, the "the School District failed to supervise its teachers, negligently trained and hired its teachers and failed to follow unidentified internal procedures …. [and] that the infant petitioner suffered serious injuries." Appellant's Brief at 20.[11.]

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11. The School District cited this Court's decision in *Matter of Traylor v. Comsewogue School Dist.*, 265 A.D.2d 332, 696 N.Y.S.2d 219 (2nd Dep't., 1999), to support its argument of

The conclusory assertions by the School District – that it was cheated of an investigation – should be rejected summarily. There is absolutely nothing in the record to indicate what, if any, investigation was attempted or even intended. Moreover, the two-month period – between the expiration of the ninety-day deadline for filing a notice of claim on April 23, 2006, and on June 26, 2006, when Leanza and her Mother sought relief – was relatively short (R4, R8-R9, R72, R76). Likewise, upon learning of their error, Leanza and her Mother by their attorney prepared an attorney's affirmation and an affidavit within eleven days (R10, R38). And the order to show cause was brought ten days later, on June 26, 2006 (R8-R9), which was three weeks after June 5, 2006, when the notification letter from the New York City Comptroller was dated (R55-R57).

In sum, the School District could not substantiate any alleged prejudice because, in fact, none existed. Whether its hypothetical investigation began on April 23, 2006, or June 26, 2006, the information would have been the same. None of its witnesses were unavailable and nothing suggests that any conditions would have been different.

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being "cheated" of a proper investigation. There, the school district did not have actual notice of the claim for the decedent's conscious pain and suffering where, on a Friday night, the decedent was murdered and the body was left in its elementary school yard. *Id.* at 332.

Finally, the last point with respect to the circumstances affecting the ability of a public entity to conduct a prompt and thorough investigation is the relative severity of the injuries caused by an incident. Essentially stated, if a public entity receives information that an incident has caused serious injuries, either by a report or otherwise, and an investigation is not conducted, then the public entity cannot legitimately claim prejudice, since the failure to conduct an investigation would not be the result of any delay in filing the notice of claim but, rather, the sole cause of the failure most certainly would be of its own making. *See e.g. Bovich v. East Meadow Public Library*, 16 A.D.3d at 12, 20 (where the eighty-seven-year-old plaintiff fell and fractured her right hip); *Matter of Hayes v. Peru School Dist.*, 281 A.D.2d at 794-795 (severe lacerations on four fingers, several torn tendons and a fractured finger); *Matter of Zimmet v. Huntington Union Free School Dist.*, 187 A.D.2d at 436 (fractured wrist); *Matter of Urban v. Waterford-Halfmoon*, 105 A.D.2d at 1024 (two front fractured teeth, facial bruises and lacerations); *Matter of Welsh v. Berne-Knox-Westerlo Central School Dist.*, 103 A.D.2d 950, 951, 479 N.Y.S.2d 567 (3rd Dep't., 1984) ("a blow of force sufficient to cause hemorrhaging of the eye"); *Matter of De Groff v. Bethlehem Central*, 92 A.D.2d at 702 (a broken leg and a fractured pelvis); *Matter of Bird v. Port Byron Central*, 231 A.D.2d at 916.

Conversely, if the public entity receives information that an incident has caused insignificant or no injuries, and an investigation is not conducted, prejudice may result from a late notice of appeal if the public entity demonstrates that, in fact, a prompt and thorough investigation would have been conducted had the true nature of the injuries been known. *See e.g. Matter of Rusiecki v. Clarkstown Central*, 227 A.D.2d at 494 (2nd Dep't., 1996) (banged knee); *Matter of Katz v. Rockville Centre Union Free School Dist.*, 131 A.D.2d 574, 575, 516 N.Y.S.2d 289 (2nd Dep't., 1987); *Matter of Isereau v. Brushton-Moira School*, 6 A.D.3d at 1006; *Matter of Spaulding v. Cobleskill-Richmondville Central School Dist.*, 289 A.D.2d 860, 734 N.Y.S.2d 700 (3rd Dep't., 2001).

In the present case, an argument could be made that the School Nurse's cursory examination of Leanza was negligence in and of itself, especially considering that dismissal for the day was only a matter of minutes away. Indeed, knowing that Leanza had fallen off of the balance beam, was upset and still crying, a prudent course of action by the School Nurse would have included a thorough examination and a telephone call to her parents at the very least. Nevertheless, a fair assumption is that the School Nurse sincerely believed that the injuries were very minor.

The next day, however, the School Nurse was informed that Leanza's injuries were very serious, certainly as serious as the fractured hip in *Bovich v. East Meadow*

Public Library, 16 A.D.3d at 12, 20; the fractured wrist in *Matter of Zimmet v. Huntington Union*, 187 A.D.2d at 436; the fractured teeth and bruises in *Matter of Urban v. Waterford-Halfmoon*, 105 A.D.2d at 1023; and the bleeding eye in *Matter of Welsh v. Berne-Knox-Westerlo*, 103 A.D.2d at 951.

Therefore, the School District should have been "alerted to the advisability of conducting a thorough and immediate investigation of the incident."*Matter of Urban v. Waterford-Halfmoon*, 105 A.D.2d at 1023. Having failed to do anything, the School District "cannot now be heard to complain that the late filing of [the] claim [by Leanza and her Mother] will prejudice its preparation of a defense. Further, [the School District] has failed to state how the lateness of the claim will, in fact, prejudice it." *Id*. at 1024.

D. Excusable Error Caused the Timely Service of the Notice of Claim on the Wrong Public Entity

A factor for consideration on an application for leave to serve a late notice of claim is whether an excusable error was made concerning the identity of the public entity against which the claim should be asserted. *See* GML § 50-e(5) (2007). An error will be considered excusable, in turn, if an application for relief is made *promptly* after discovering that the wrong public entity was served with a timely notice of claim even though a less than diligent effort was the cause for not serving the public entity that actually owned the property where the incident occurred. *See e.g. Matter of Flynn v.*

Town of Oyster Bay, 256 A.D.2d 341, 341, 681 N.Y.S.2d 337 (2nd Dep't., 1998); *Matter of Farrell v. City of New York*, 191 A.D.2d 698, 698, 595 N.Y.S.2d 531 (2nd Dep't., 1993); *Matter of Morris v. County of Suffolk*, 88 A.D.2d 956, 956, 451 N.Y.S.2d 448 (2nd Dep't., 1982).

In addition, the true owner should have actual knowledge of the essential facts constituting the claim and substantial prejudice should be absent. For example, in *Bertone Commissioning v. City of New York*, 27 A.D.3d 222, 222, 810 N.Y.S.2d 183 (2nd Dep't., 2006), the plaintiffs mistakenly served a notice of claim on the City of New York only to learn in a subsequent hearing that the grate on the sidewalk where the accident occurred was owned by the New York City Transit Authority, which was served with a notice of claim the next day.

In *Bertone Commissioning v. City of New York*, even though the Transit Authority was served two months after the expiration of ninety-day period, this Court held that "given the Transit Authority's actual knowledge within a reasonable time and the resulting lack of prejudice, plaintiff's unexplained delay in seeking leave to serve a late notice is of minimal significance." *Bertone Commissioning v. City of New York*, 27 A.D.3d at 224. *See also Matter of Flynn v. Town of Oyster Bay*, 256 A.D.2d at 341 ("promptly"); *Matter of Farrell v. City of New York*, 191 A.D.2d at 698 ("as soon as"); *Matter of Harris v. Dormitory Authority of the State of New York*, 168

A.D.2d 560, 560, 562 N.Y.S.2d 781 (2nd Dep't., 1990) ("as soon as"); *Baldeo v. City of New York*, 127 A.D.2d 809, 511 N.Y.S.2d 937 (2nd Dep't., 1987); *Matter of Cannistra v. Town of Putnam Valley*, 124 A.D.2d 801, 801-802, 508 N.Y.S.2d 524 (2nd Dep't., 1986) (five months after the expiration of the ninety-day period).

Of course, if the true owner is not served promptly, then any error in serving the wrong entity will not be considered reasonable. *See e.g. State Farm Mutual Auto. Ins. Co. v. New York City Transit Auth.*, 35 A.D.3d 718, 718, 828 N.Y.S.2d 416 (2nd Dep't., 2006) (five-months after discovery of the error was unreasonable); *Matter of Dell'Italia v. Long Island Railroad*, 31 A.D.3d at 759 (four months after the ninety-day period was too long); *Matter of Goldberg v. County of Suffolk*, 227 A.D.2d 482, 483, 642 N.Y.S.2d 928 (2nd Dep't., 1996) (one and one-half months after learning that the state was the wrong party was not a reasonable excuse); *Pagan v. New York City Housing Auth.*, 175 A.D.2d 114, 115,572 N.Y.S.2d 18 (2nd Dep't., 1991) (three months passed after the true owner of the property was ascertained); *Pavone v. City of New York*, 170 A.D.2d 493, 566 N.Y.S.2d 71 (2nd Dep't., 1991); *Matter of Morris v. County of Suffolk*, 88 A.D.2d at 956-957 (four and one-half months after the rightful owner of the roadway was discovered); *Matter of v. East Rochester Schools*, 291 A.D.2d 922, 924, 737 N.Y.S.2d 202 (3rd Dep't., 2002); *Santana v. Western Regional Off-Track Betting Corp.*, 2 A.D.3d 1304, 1305, 770 N.Y.S.2d 258 (4th Dep't., 2003)

appeal den'd, 2 N.Y.3d 704, 778 N.Y.S.2d 774 (2004) (nine months after the wrong party was served).

In the present case, the School District had actual knowledge of the essential facts of the claim and Leanza and her Mother established its lack of prejudice. In addition, the error in serving New York City and the New York City Board of Education was discovered on or about June 5, 2006, when the New York City Comptroller mailed their attorney a notice for a 50-h hearing. Eleven days later, an attorney's affirmation and an affidavit were prepared, and ten more days later, Leanza and her Mother moved by order to show cause seeking to file a late notice of claim. Therefore, the delay was minimal and the excuse for serving the wrong public entity was reasonable pursuant to GML § 50-e(5).

E. The Presence or Absence of Any One Factor in GML § 50-5(5) is Not Decisive

Twenty-five years ago, this Court held in its seminal decision that, on a motion for leave to file a late notice of claim pursuant to GML § 50-e(5), "the presence or absence of any one factor is not determinative." *Matter of Morris v. County of Suffolk*, 88 A.D.2d at 957 (where the county failed to demonstrate significant prejudice). Rather, as stated by the Court of Appeals, "it all goes into the mix." *Williams v. Nassau County*, 6 N.Y.3d at 538. In other words, all relevant factors must be considered. *See Morgan v. New York City Housing Auth.*, 181 A.D.2d 890,891, 581

N.Y.S.2d 425 (2nd Dep't., 1992). *See also Reisse v. County of Nassau*, 141 A.D.2d 649, 651, 529 N.Y.S.2d 371 (2nd Dep't., 1988) (where the reasonableness of the excuse for the delay was debatable); *Rechenberger v. Nassau County*, 112 A.D.2d at 152-153 (where a reasonable explanation was not presented for the delay in serving the notice of claim); *Matter of Bensen v. Town of Islip*, 99 A.D.2d at 755.

Thus, the failure to establish the essential facts underlying a claim is not fatal if the public entity, in turn, "fail[s] to demonstrate how it was prejudiced by the lack of timely notice." *Matter of Haeg v. County of Suffolk*, 30 A.D.3d at 520. *See also Mc Bee v. County of Onondaga*, 34 A.D.3d at 1360; *Matter of McHugh v. City of New York*, 293 A.D.2d at 478. Conversely, a failure by a public entity to demonstrate significant prejudice also is not fatal. *See Matter of Morris v. County of Suffolk*, 88 A.D.2d at 957.

And the cases are legion holding that "the existence or absence of a reasonable excuse for any delay is but one of the factors to consider. If there is timely notice and the absence of prejudice, even the absence of a reasonable excuse for failing to timely serve a notice of claim will not bar the granting of leave to serve a late notice of claim." *Medley v. Cichon*, 305 A.D.2d at 645. For example, in *Matter of March v. Town of Wappinger*, 29 A.D.3d at 999, this Court held that the absence of a reasonable excuse for the delay of eleven months was not fatal to the application for leave to

serve a late notice of claim because the municipality lacked prejudice and had actual knowledge of the facts constituting the claim.

The same result obtained in *Fenton v. County of Dutchess*, 148 A.D.2d at 574, holding that the proffered explanation for the delay in consulting an attorney was troublesome but not fatal "when weighed against all the other relevant factors to be considered." *See also Jordan v. City of New York*, 41 A.D.3d at 659 (holding that "even the absence of a reasonable excuse is not necessarily fatal"); *Gibbs v. City of New York*, 22 A.D.3d at 720; *Saafir v. Metro-North Commuter R.R. Co.*, 260 A.D.2d 462, 463, 688 N.Y.S.2d 224 (2nd Dep't., 1999); *Wetzel Services Corp. v. Town of Amherst*, 207 A.D.2d 965, 965, 616 N.Y.S.2d 832 (4th Dep't., 1994) (where no excuse was offered for not filing a timely notice of claim, yet the town had actual notice of the essential facts of the claim and "made no particularized or persuasive showing that the delay caused [it] substantial prejudice").

In the present case, Leanza and her Mother state with full confidence that the School District had actual knowledge of the essential facts of their claims sounding in negligence and resulting from its failure to hire and train its personnel properly and to supervise its students adequately. Considering the totality of the circumstances, there is no doubt that, based upon the incident report; the presence of its personnel at the scene of the incident; the several meetings the next day between Leanza's Mother

and its employees; and the letter from the Law Office, the School District knew that the gym teacher allowed Leanza on the balance beam without his supervision and, in fact, when his total attention was devoted to another student at the other end of the balance beam who was dismounting at the time of the accident.

Moreover, the School District offered nothing to substantiate its claim of being "cheated" out of investigating the claims of negligence by Leanza and her Mother and her injuries. Critically, having known that Leanza in fact suffered serious injuries and that she was represented by counsel within one month of the incident, the School District nevertheless failed to conduct a prompt and thorough investigation at the time and, therefore, its belated claim of possible prejudice should not be heard since any prejudice was the direct result of its choices. And last, but not least, although Leanza and her Mother by their attorney inadvertently served the wrong public entity, upon learning of the error, they moved with great dispatch to seek relief.

But, if this Court should find that one of the factors of GML § 50-e(5) was not established, the Supreme Court's exercise of its discretion in granting Leanza and her Mother leave to serve a late notice of claim should, with all due respect, be left undisturbed. While the fact of her infancy was not a point raised below or on the appeal, obviously, if she was an adult and not a first grader, Leanza could have picked an attorney best able to protect her rights and, having done so, she could have

monitored her case to prevent any problems. That not being the case, however, Leanza should not be held responsible for the acts and omissions of the adults who presently are in control of her life. In the final analysis, she should not be nonsuited as a consequence of an error by her attorney in serving the wrong public entity where, as conclusively demonstrated by the Record on Appeal, the School District will suffer no prejudice and, in fact, could not even articulate how its defense might be affected by a late notice of claim.

CONCLUSION

The Order below should be affirmed with full costs and disbursements.

Dated: New York, New York
December 3, 2007

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 600.10(d)(1)(v), I certify that the Respondent's Brief in *McLean v. Valley Stream Union Free School District 30*, RADI No. 2006-11322 was prepared on a computer using the Microsoft XP operating system and the WordPerfect 12 processing system, Times New Roman typeface and 14 point size.

Exclusive of the table of contents, the table of citations and the authorized addenda, the word count of all printed text on each page of the body of the brief is 13,628 and the number of pages are 56.

Dated: New York, New York
December 3, 2007

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