

Appellate Division Panel Clarifies Petitioner's Burden in Late Notice Of Claim Cases Against School Districts.

By: Gregory A. Cascino, Esq.

Holding that none of the elements identified in General Municipal Law 50-e(5) were satisfied, the Appellate Division, Second Department, reversed a ruling by the Suffolk County Supreme Court which had allowed the Petitioner to file a late notice of claim against her school, seven and a half months after she fell during a cheerleading practice.

On December 14, 2005, the then 15 year old Petitioner was injured when she fell during a varsity cheerleading practice. Following this incident, she was taken to the hospital where x-rays were taken and she was diagnosed with a fractured talus bone. Approximately one week later, she was examined by an orthopedist who informed her that the fracture was displaced, and required internal fixation surgery. The surgery was performed at or about this time and Petitioner was casted and walked with crutches for three months. On July 19, 2006, Petitioner was informed by her orthopedist that there was a 10% chance she would have problems with the blood flow to her foot, and require future surgeries.

On December 15, 2005, Petitioner's mother contacted the District to inform it that her daughter had been hurt. The District then prepared the School Report section of its pupil benefit claim form, and forwarded it to Petitioner's parents to complete. In the section of the report where it asked for a description of how the incident occurred, the cheerleading coach wrote "The student was dismounting in a vertical position from an extended stunt and landed awkwardly on her right foot. She broke her talus bone in the foot and required 2 screws in surgery after accident". Petitioner's parents subsequently completed the remainder of the pupil benefits form, and forwarded it to the District's medical insurance carrier.

By Order to Show Cause dated July 26, 2006, Petitioner made an application to file a late Notice of Claim against the District, based on the December 2005 fall. In the proposed notice of claim, Petitioner alleged that the District was negligent because its coach assigned girls of insufficient height, weight and experience to catch her.

In the accompanying attorney affirmation, Petitioner argued that although she was nearly four and a half months past the 90 day Notice of Claim period, she should nevertheless be permitted to file a late notice because all the requirements in General Municipal Law §50-e(5) were met. Specifically she argued that the District had knowledge of the essential elements of her claim within 90 days because it completed the School Report section of its pupil benefits claim form. She also argued that her delay was excused because she was an infant, and did not initially think her injuries were serious. Lastly, she argued that the District would not be prejudiced by the delay because all the individuals who were present in the gym were still employed by or enrolled at the District.

The Supreme Court granted the application, finding that the District received actual notice of the essential facts constituting the claim, and would not be substantially prejudiced. The District subsequently appealed, and the Appellate Division, Second Judicial Department,

unanimously reversed, and denied the petition. See Matter of Felice v. Eastport/South Manor Central School District, 50 A.D.3d. 138, 851 N.Y.S.2d 218 (2d Dept. 2008). In a lengthy Opinion & Order with great significance for school districts and other municipal corporations, the Second Department set forth in great detail the relevant standards to be applied on late notice of claim cases, and found that they had not been met.

Preliminarily, the Court stated that although none of the factors listed in the General Municipal Law are determinative, whether a district had actual notice of the essential facts constituting the claim is the most important factor. It also made clear that a district's mere awareness of the accident and injury do not satisfy this requirement, "at least where the incident and the injury do not necessarily occur only as the result of fault for which it may be liable".

The Court then went on to find that the District's admitted knowledge of Petitioner's accident and injury did not amount to actual knowledge of the essential facts constituting her claim, because there was no allegation in the injury report that the cheerleaders assigned to catch Petitioner were too small or inexperienced, or that Petitioner made her dissatisfaction known to her coach.

The Second Department next rejected all of Petitioner's excuses for her delay, finding that her claimed unawareness of the severity of her injuries was unavailing without supporting medical evidence explaining why the possible permanent effects of the injury took so long to become apparent and be diagnosed. The Court also rejected Petitioner's proffered excuse based on her infancy, finding that there was no evidence that it made it more difficult to diagnose the possible permanence of her injuries.

With regard to prejudice, the Second Department definitively stated that a petitioner bears the burden of demonstrating the lack of substantial prejudice to the district, because they are the ones who are seeking to excuse their non-compliance with the statute. This is extremely helpful for school districts and other municipal corporations because the General Municipal Law does not actually state whether the burden to show the presence or absence of prejudice is on the district or the petitioner. Moreover, the Supreme Court often places this burden on the district.

The Second Department also stated that substantial prejudice to the district can still exist even where all the eyewitnesses to the event are known and can still be interviewed. It then found that in this case memories may have faded in the more than 180 days between the incident and the petition. Therefore at the point the District received the petition, it may already been prejudiced in its ability to determine whether the fall occurred because of its own negligence, or because of the risks inherent in cheerleading. This is excellent for school districts inasmuch as the Supreme Court often finds that districts will not be prejudiced because they are still able to interview the witnesses.

Petitioner was promptly served with the Opinion & Order, and did not seek either reargument or leave to appeal to the Court of Appeals within the statutory time period. Thus, the Order is now final, and reflects the current state of the law in the Second Department.