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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF NEWCOMB,

Appellant,

-against-

No. 198

MIDDLE COUNTRY CENTRAL SCHOOL  
DISTRICT,

Respondent.

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20 Eagle Street  
Albany, New York  
November 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 198, Matter of Newcomb v. Middle  
3 Country Central School District.

4 MR. MONTUORI: Thank you, Your Honor; may it  
5 please the court, Paul Montuori for the petitioners-  
6 appellants Raymond Newcomb and Austin Newcomb. With me at  
7 counsel's table is Mr. William Burdo. May - - - may I  
8 reserve three minutes, please, Your Honor?

9 CHIEF JUDGE DIFIORE: Three minutes, sir?

10 MR. MONTUORI: Yes.

11 CHIEF JUDGE DIFIORE: You may.

12 MR. MONTUORI: Thank you, Your Honor. Your  
13 Honors, this case is exactly type of case that the  
14 legislature envisioned was deserving of relief under G.M.L.  
15 50-e(5) when the statute was amended to its present form in  
16 1972.

17 JUDGE PIGOTT: What's our - - - what's our  
18 standard of review?

19 MR. MONTUORI: It's an abuse of discretion  
20 standard, Your Honor, and within that standard, certain  
21 factors need to be addressed within that standard to show  
22 that each factor in the record is looked at and analyzed in  
23 the totality of the circumstances, in the mix of  
24 circumstances that this court in Williams deemed so  
25 important. And I would submit that in this case, the lower

1 courts abused their discretion by ignoring numerous factors  
 2 in the record and improperly weighing each factor against  
 3 the incapacitated minor Austin's, application. And I - - -  
 4 I believe the most helpful place to start, Your Honors, is  
 5 with the prejudice determination.

6 CHIEF JUDGE DIFIORE: Whose burden is it to prove  
 7 prejudice?

8 MR. MONTUORI: And that's - - - and that's what I  
 9 was going to address, Your Honor. I think that all - - -  
 10 all parties, both parties, can agree that the prejudice  
 11 determination has become somewhat imprecise and loose over  
 12 the course of time. And I believe the reason for that is  
 13 because there's sometimes a failure to recognize how each  
 14 factor relates to the other factor and they tend to be  
 15 compartmentalized.

16 So I believe the best standard to - - - to employ  
 17 - - - and - - - and I sort of look at it as a part one and  
 18 a part two. The first part, as in any motion, any - - -  
 19 any case, the petitioner bears a showing, must make a  
 20 showing, that the - - - for the petition to go forward,  
 21 it's consistent with the statutory intent. Now that  
 22 showing can't be highly specific because we're at an early  
 23 stage of the case. But once that showing is made, the  
 24 burden of production and persuasion on the issue of  
 25 prejudice falls squarely on the municipality.

1 JUDGE GARCIA: So what's the showing?

2 MR. MONTUORI: Well, the showing, Your Honor  
3 could be made in - - - in a few different ways. It could  
4 be made by showing there's a reasonable excuse. It could  
5 be made in showing that there's a short amount of time  
6 between when the incident occurred and when the late notice  
7 pet - - - application is filed. It could be shown by  
8 actual knowledge. And in this case, I believe, all those  
9 factors were, in fact, shown, but we also had the benefit  
10 of police pictures, which captured the scene precisely as  
11 it existed at the time of the accident. So perhaps, that's  
12 the only - - - certainly, the only fortunate thing that  
13 happened at the night of the accident is the Suffolk Police  
14 Department was there and capturing the scene at - - - at  
15 the time of the accident.

16 JUDGE RIVERA: But - - - but the statute lists  
17 those as three separate factors. It doesn't say that there  
18 has to be a showing or an - - - or a lack of a showing or  
19 substantial prejudice and here are the factors you  
20 consider.

21 JUDGE GARCIA: Right.

22 MR. MONTUORI: No. That - - - that's true, Your  
23 Honor, but I believe if it's looked at it in that way, it -  
24 - - it's best understood as to what kind of showing a  
25 petitioner needs to make. The petitioner needs to make

1           that threshold showing to show that statutory intent is  
2           being fulfilled and this is not a stale claim or a claim  
3           that is somehow incapable of being investigated by the  
4           municipality. Once that showing is made, then, at that  
5           point, is when the burden of production and persuasion on  
6           the substantial prejudice issue shifts over to the  
7           municipality.

8                         JUDGE RIVERA: So let - - - let's try it a  
9           different. So what - - - what does that mean? What - - -  
10          what did the claimant here have to show get past what  
11          you're calling - - - what it sounds like to me some initial  
12          burden that then shifts, I guess, to the government - - -

13                        MR. MONTUORI: Showing - - - showing - - -

14                        JUDGE RIVERA: - - - I think that's what you're  
15          saying.

16                        MR. MONTUORI: - - - showing that that, again,  
17          the statutory intent is preserved, that, in fact, this is  
18          not a stale claim. That, in fact, the - - - the ability to  
19          investigate the claim is, in fact, still available while  
20          information is still fresh. And all those things have  
21          been, in fact, shown, I believe in this case, through - - -  
22          through several different ways, again, the police pictures  
23          being the most notable one. We also argue that, in fact,  
24          actual knowledge was present. The police report that - - -  
25          that is in the record shows the matter in which the

1 accident happened, the time the accident happened, listing  
2 the witnesses that - - - that it happened.

3 And I think there was another important point,  
4 Your Honors, that was overlooked in this determination.  
5 And this irre - - - irrespective of the debate that - - -  
6 the parties may have with respect to actual knowledge,  
7 irrespective of that debate, the fact that the respondent  
8 in this case placed the sign and they had the sign also  
9 speaks to the prejudice issue because it shows a complete  
10 ability to investigate the facts and circumstances as they  
11 existed, again, at the time of the accident. And I believe  
12 that's something that - - - that, in fact, the lower courts  
13 also - - -

14 JUDGE FAHEY: Could - - - could - - -

15 JUDGE STEIN: Aren't - - - aren't there other  
16 questions that could arise as to whether somebody had moved  
17 the sign or, you know, or - - -

18 MR. MONTUORI: Your Honor, that is information  
19 that is exclusively in the knowledge and purview of the  
20 district. And of course, the district, there's no evidence  
21 in the record that that happened. And one presumably, if,  
22 in fact, that there was evidence, it would have been put  
23 forward already on a special term. And there's simply no  
24 evidence of that case. And I think that - - - that, in  
25 fact, Your Honor, is a - - - is a theme of the error in

1           this case that - - - that Austin - - -

2                   JUDGE STEIN: Well, the actual - - - would you  
3 agree that actual knowledge really is sort of a super  
4 factor here?

5                   MR. MONTUORI: I believe it's also true, Your  
6 Honor, that the actual knowledge - - -

7                   JUDGE STEIN: Well, I - - - I know what your  
8 position is it on it, but my first question is do you agree  
9 that that - - - that influences the question of prejudice?

10                  MR. MONTUORI: Certainly. Certainly. And I  
11 think - - - and I think, Your Honor, the reason that actual  
12 knowledge has become important, and again it's, I would  
13 submit, not because there's some magic words in the  
14 beginning of the statute. The reason we consider actual  
15 knowledge important is because, in fact, that's the gateway  
16 to the determination of if the statutory intent was  
17 preserved. When we have actual knowledge, we know, in  
18 fact, that most likely - - - not always, but most likely  
19 there's not going to be substantial prejudice.

20                  JUDGE STEIN: Tell me when there - - - when there  
21 would be a situation in which there was not actual  
22 knowledge and there was not prejudice.

23                  MR. MONTUORI: And - - - and the claim would be  
24 allowed to go forward in that case? I think that that's  
25 the tough case, Your Honor, and I think - - - I would first

1 point to the Law Review article that we cited, which was  
2 written roughly around the same time as these things were  
3 happening with the statute with respect to when there is  
4 not actual knowledge but when there is no prejudice, the  
5 strong inclination of the court is, in fact, to grant the  
6 petition. And I believe Your Honor is asking what happens  
7 when there is no actual knowledge and there is no  
8 prejudice? What - - - what may those other factors be?

9 JUDGE STEIN: Well, no. I - - - I'm - - - I  
10 guess what I'm asking you is is when - - - give me some  
11 examples of when there would not be actual knowledge but  
12 yet, there would also not be prejudice.

13 MR. MONTUORI: I believe the best example that I  
14 can come up with about the - - - the tough case is, for  
15 example, if there's some sort of culpable conduct on the  
16 part of the petitioner where - - - where there's, perhaps,  
17 no actual knowledge but - - - but there's, perhaps, unclean  
18 hands where there's no prejudice but the claim should not  
19 be allowed to - - - to continue. Be - - - besides that, I  
20 can - - -

21 JUDGE STEIN: But that - - - does that relate to  
22 prejudice or does that relate to some other - - - some  
23 other factor?

24 MR. MONTUORI: Well, I think that relates to the  
25 situation, Your Honor, where there's no actual knowledge

1 and no prejudice but perhaps the case shouldn't continue.

2 JUDGE STEIN: Okay. I see.

3 JUDGE RIVERA: Well, but isn't that - - - isn't  
4 that why these are separate factors because the government  
5 might not have actual knowledge but all of the evidence is  
6 completely preserved and available?

7 MR. MONTUORI: And I think, Your Honor, in that  
8 case, the strong tendency is to grant the petition simply  
9 because - - -

10 JUDGE RIVERA: But where's the prejudice when all  
11 of the - - - you're basically saying you had no actual  
12 knowledge, but you're in the same position you would have  
13 been if they had filed this in a timely fashion because all  
14 of the evidence is still available to you. Using your  
15 language of stale, but evidence has been destroyed, et  
16 cetera, and so forth. Isn't that the answer, in part, to  
17 Judge Stein's question - - -

18 MR. MONTUORI: I - - - I believe that - - -

19 JUDGE RIVERA: - - - that - - - that's why  
20 they're separate - - -

21 MR. MONTUORI: I believe that - - -

22 JUDGE RIVERA: - - - elements.

23 MR. MONTUORI: I believe that is, Your Honor.  
24 There is an interrelation but yet - - - yet a distinct  
25 inquiry that needs to be - - - be taking place. And I

1 would just - - - I see that my time is up. There just - -  
2 -

3 JUDGE FAHEY: Just to follow - - - just to follow  
4 up on that. I - - - I always understood the statute to say  
5 this may be the kind of situation that we have here, this  
6 rare situation, maybe this case, because there is no actual  
7 knowledge on - - - on the Middle School District because  
8 they hadn't seen the photographs. They didn't know it. No  
9 one - - - no one had linked them in it, and it wasn't  
10 until, I guess, oh, geez, you got full-size photographs in  
11 October, right? So I - - - so in October you got the full-  
12 size photographs and at that point, that's when knowledge  
13 was available, and so the question then when that knowledge  
14 became available, was there prejudice to the other party?  
15 And so we're really left with the pure situation of no  
16 actual knowledge within ninety days, so the question then  
17 becomes was there prejudice when the knowledge became  
18 available.

19 MR. MONTUORI: And certainly, in this case, Your  
20 Honor, I think there's - - - there's two answers to that  
21 question. The first - - - first part of it is there is  
22 actually language in the statute which addresses that  
23 particular situation, and that's actual knowledge within  
24 ninety days or a reasonable time thereafter. In this case,  
25 filing of the - - - of the proposed notice of claim at the

1 time it was filed actually provided actual knowledge within  
2 reasonable time thereafter because that's the only time  
3 when the petitioners were able to bring the - - - the claim  
4 to bear and to present the notice to the municipality.

5 And with the second part of that inquiry, Your  
6 Honor, with respect to the prejudice, there is certainly no  
7 prejudice at this time when - - - when the actual notice  
8 was filed several months after the accident. And that's  
9 because in reality, the respondent was in a better  
10 position, better position, after that time was up had  
11 written notice just been available ninety-one - - - shortly  
12 thereafter the accident within the ninety-day period.  
13 These are the precise type of pictures that - - - that the  
14 respondent would be looking for back right after the claim  
15 and - - - and when they became available, the - - - the  
16 notice of claim was - - - was swiftly put forward.

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Montuori.

18 MR. MONTUORI: Thank you.

19 CHIEF JUDGE DIFIORE: Ms. Gasser.

20 MS. GASSER: Good afternoon, Your Honors; may it  
21 please the court. What is the standard of review, abuse of  
22 discretion? I think in this case, this fits well within  
23 two courts taking very seriously the factors that the  
24 statute provides, applying it properly, and properly  
25 exercising its discretion to deny the application.

1 JUDGE ABDUS-SALAAM: Didn't - - - counsel, didn't  
2 the two courts, the nisi prius court said that the  
3 respondent had the burden on prejudice, and the Appellate  
4 Division said the petitioner had the burden on prejudice.  
5 And your adversary says that they both had it, but the  
6 petitioner had a threshold burden and then the burden  
7 shifted to respondent. So which - - - which do we discern  
8 that the Appellate Division thought?

9 MS. GASSER: Well, I think the Second Department  
10 clearly believes that the burden of proof as to prejudice  
11 rests with the - - - the claimant or petitioner.

12 JUDGE ABDUS-SALAAM: That's the ultimate burden?

13 MS. GASSER: That's - - - yes. I mean that's  
14 clearly - - -

15 JUDGE ABDUS-SALAAM: And that's different than  
16 the - - - than the Supreme Court thought.

17 MS. GASSER: It is, and I would hesitate to say,  
18 but perhaps the - - - the Supreme Court hadn't looked at  
19 the Felice case when it said the burden was on the  
20 respondent to prove a lack of prejudice - - - I'm sorry,  
21 the existence of prejudice. Felice clearly said the burden  
22 is on the claimant to show that there will be no prejudice.  
23 But I think the way you do that - - - and I - - - you know,  
24 there was much made of the prejudice issue, especially, in  
25 one of the amicus briefs. I think it's pretty clear that

1           you show the prejudice by showing the - - - you show the  
2           lack of prejudice if you are the moving claimant - - -

3                   JUDGE RIVERA: I just feel like that - - -

4                   MS. GASSER: - - - by showing the actual  
5           knowledge.

6                   JUDGE RIVERA: I'm sorry. Doesn't the statute  
7           say "substantial prejudice?"

8                   MS. GASSER: Substantial prejudice, yes.

9                   JUDGE RIVERA: So there is an assumption there  
10          is, obviously, potentially some prejudice. So it's not  
11          that the standard is there should be absolutely no  
12          prejudice.

13                   MS. GASSER: Well, the standard, it does - - -  
14          the statute clearly says "substantial prejudice,"  
15          absolutely.

16                   JUDGE RIVERA: Right. It - - - that doesn't mean  
17          that there's no prejudice. I just want to clarify because  
18          you kept saying a lack of prejudice or showing prejudice.  
19          It's - - - it's a quantified prejudice.

20                   MS. GASSER: Yes. And prejudice is, in its  
21          nature, is difficult to show. But I think you go to why  
22          the statute is in place. It's in place, in some ways, as a  
23          protection from - - - for public corporations. I mean I  
24          know that may not be liked by some folks or fashionable,  
25          but it - - - it's definitely meant to protect against the

1 stale claims and maybe the ones that have no merit. And  
2 the merit in this case is of some significance because we  
3 would contend that you can look at those pictures and  
4 pretty clearly see that sign had no impact where it was set  
5 back. I think - - -

6 JUDGE PIGOTT: That - - -

7 JUDGE STEIN: But that gets to the merits of  
8 that.

9 MS. GASSER: Right.

10 JUDGE STEIN: I mean we're talking about whether  
11 - - - whether you're prejudiced or not. And so - - - so  
12 it's not like the plaintiff made no showing at all, but the  
13 plaintiff came forward and said, look, we have these  
14 photos, the - - - the school district was responsible for  
15 placing and removing the signs, and they would have been in  
16 no better position if we had - - - because the signs were  
17 removed - - - the sign was removed, single sign, befo - - -  
18 within ninety days of the accident. So the city - - - the  
19 school district would have been in no better position had  
20 we moved within the ninety days. That - - - so no  
21 prejudice. Now don't you have some obligation to come back  
22 and say, oh, but yes, we are, and to show why?

23 MS. GASSER: Well, I think the prejudice is  
24 because what does the statute hope to achieve? It gives  
25 you, as a municipal entity, the right in advance of

1 litigation, and in a very short time frame, to get that  
2 there's something that happened that you did that had an  
3 impact - - -

4 JUDGE STEIN: But now you're talking about actual  
5 knowledge.

6 MS. GASSER: - - - that was connected to injury.

7 JUDGE STEIN: And I can't - - - I can't quite  
8 discern where you draw any line at all between actual  
9 knowledge and - - - and prejudice or substantial prejudice.  
10 Can you - - - can you help me with that?

11 MS. GASSER: Because I think that the fact of the  
12 matter is and the cases are - - - they're very consistent,  
13 no matter what verbiage is used. When you don't have the  
14 actual knowledge - - - and I don't think that when it came  
15 that those photos were released that was a reasonable time  
16 thereafter, when you do not have the actual knowledge,  
17 that's the essence of the prejudice. You had a right to -  
18 - -

19 JUDGE STEIN: But why would the statute have them  
20 separately enumerated and - - - and other factors, as well?  
21 If - - - if it's all about actual knowledge and that's the  
22 end of the inquiry, what - - - what's the rest of the  
23 statute about?

24 MS. GASSER: Well, but the cases seem to, in  
25 fact, treat it that way because you have a large number of

1 cases that say when there is no actual knowledge, they are  
2 - - - they don't deal with prejudice.

3 JUDGE STEIN: Have we treated it that way before?

4 MS. GASSER: I think in - - - in one sense, the  
5 Williams case v. Nassau County Medical Center. I think I  
6 would say that there was the very argument that whose  
7 burden of proof was it on the issue of prejudice. And in  
8 that case, the - - - the claimant was saying well, no, no  
9 the Second Department was wrong. It said we were  
10 responsible to prove a lack of substantial prejudice.

11 JUDGE PIGOTT: When you got the notice of claim,  
12 did you do - - - did you do a 50-e?

13 MS. GASSER: A 50-h hearing? Do you mean a  
14 hearing?

15 JUDGE PIGOTT: Okay, h.

16 MS. GASSER: I - - - I think we must have, Your  
17 Honor. I'm not - - - actually, I'm not sure.

18 JUDGE PIGOTT: I didn't see it in the record, and  
19 I would have thought that would have solved a lot of this.  
20 I mean you would have asked them all kinds of questions  
21 about what happened when, where, why - - -

22 MS. GASSER: You know - - -

23 JUDGE PIGOTT: - - - and then decided this is all  
24 new to us, or the argument that, frankly, I thought made  
25 some sense, where you're saying it's meritless. I mean

1           there's no way the sign was in any way involved in this  
2           accident.  But having not done that, we're stuck with this  
3           issue, aren't we?

4                       MS. GASSER:  But I - - - I have to say, Your  
5           Honor, and I'm sorry, I didn't look at the file for that,  
6           but I do - - - do not believe there ever was because absent  
7           a timely notice of claim or a - - - a decision - - -

8                       JUDGE PIGOTT:  But you don't know that.  Well, I  
9           guess you know it because in the notice of claim they tell  
10          you what happened.  But why not do a 50-h?

11                      MS. GASSER:  Well, you just - - - with all due  
12          respect, you don't.  It's - - - it's not the common  
13          practice.  If there's - - -

14                      JUDGE PIGOTT:  It's an hour-and-a-half.

15                      MS. GASSER:  Nonetheless, not done.

16                      JUDGE PIGOTT:  Well, it depends on where you are,  
17          I guess, because I know certain municipalities that do them  
18          automatically.  And it - - - and it would solve some of  
19          these problems.

20                      MS. GASSER:  Well, we - - - we do them, in fact,  
21          regularly, but not if there's not a - - - if there's a  
22          denial of the late notice of claim application.

23                      CHIEF JUDGE DIFIIORE:  Ms. Gasser, what's the  
24          substantial prejudice to the district?

25                      MS. GASSER:  It's that a district is being asked

1 here, having had no reason to believe that a random  
2 accident on a Saturday evening was connected to a sign that  
3 someone put at a corner - - - we'll assume it's the  
4 district. We don't know if it was moved, as Judge - - -  
5 Judge Stein said earlier. We are being asked to now defend  
6 a case, having lost months of an opportunity - - -

7 JUDGE PIGOTT: Well, let me go back then.

8 MS. GASSER: - - - to find out where the sign  
9 was.

10 JUDGE PIGOTT: I don't mean to interrupt you, but  
11 that's exactly why I was asking that question. I mean you  
12 get - - - you get a notice of claim. You have a right to  
13 bring that - - - that claimant in and - - - and depose  
14 them, and - - - and then you'd find out whatever you wanted  
15 to find out. But to ignore it and say, well, it's - - -  
16 it's untimely, we'll ignore it. And then when they make a  
17 motion for late notice to say, well, you know, we didn't -  
18 - - you know, we don't have the information, it seems to me  
19 to be a little disingenuous. And I don't - - - I don't  
20 mean to put intent on that but - - -

21 MS. GASSER: Yeah. Well, but no - - -

22 JUDGE PIGOTT: Wouldn't that be easier?

23 MS. GASSER: - - - that chronology, I think, is,  
24 you know - - - that motion was in process, and the only  
25 hearing we would have had, if we had chosen - - - and

1 frankly, it just - - - I don't believe it would have  
2 crossed our mind to do it because of the posture of the  
3 case. But it would have been of the dad.

4 JUDGE PIGOTT: Sure.

5 MS. GASSER: He would - - - of the dad.

6 JUDGE PIGOTT: Yeah.

7 MS. GASSER: He would have known nothing about  
8 what was seen, what was there, what was not there.

9 JUDGE PIGOTT: Wouldn't that have helped you?

10 MS. GASSER: No. I think it would have been a  
11 wash, with all due respect. I don't think it would have  
12 helped us or hurt us. I think it would have been what it  
13 was, a hearing by a father who was going to be able to  
14 testify maybe if he knew where his son had been and maybe  
15 about their injuries.

16 JUDGE STEIN: I thought your - - - I thought your  
17 issue was with whether there were witnesses and whether  
18 there were people involved in the placing and moving and -  
19 - - and whatever of the sign that you might have lost. So  
20 what does that have to do with whether they father or the -  
21 - - or the child testifies?

22 MS. GASSER: Right. That - - - I just was  
23 responding to Judge Pigott's question. I mean, obviously,  
24 the question is what the district knew. Nothing about a  
25 50-h hearing would have assisted with that.

1                   JUDGE FAHEY: Usually, when we say prejudice  
2 we're talking about lost proof, proof that isn't  
3 recoverable. What - - - what would it be here?

4                   MS. GASSER: Well, you have a photograph. That's  
5 all you have. Or, you know, a series of photographs.

6                   JUDGE FAHEY: No. My question was what - - - how  
7 were you prejudiced? What - - - what proof did you lose  
8 access to? Usually, that's what we're talking about.

9                   MS. GASSER: Perhaps the students who could have  
10 been involved with the play who might have put the sign up  
11 who might have - - -

12                   JUDGE STEIN: But that's the point. Don't you  
13 have to come and - - - and show that - - - you know, that  
14 these students are no longer available, so many people have  
15 graduated and - - -

16                   MS. GASSER: Your - - - Your Honor, I mean, I  
17 know there are times that that can be done or that that is  
18 done, but I think in a case such as this, I - - - I go back  
19 to Williams where the claim was there was no prejudice  
20 demonstrated and where this court basically said that  
21 because there was no actual knowledge and that is an  
22 important - - - and is an important factor in determining  
23 whether the defendant is substantially prejudice. That - -  
24 - those two things go together. This court pretty much - -  
25 -

1 JUDGE RIVERA: But do you have to - - -

2 MS. GASSER: - - - stacked one on the other.

3 JUDGE RIVERA: Is your burden to show who put it  
4 up? I thought your argument is we didn't put it up.

5 MS. GASSER: Well, that was - - -

6 JUDGE RIVERA: Not within your control and then  
7 you'd have to show that that evidence is no longer  
8 available to you?

9 MS. GASSER: The courts actually assumed we put  
10 it up, so we - - - that - - - we got - - - we didn't get  
11 the benefit of any doubt there. There was an assumption  
12 that it was the district. It was a play that a school in  
13 the neighborhood had run. Having done that, the - - - this  
14 court, though, went on to say: "We have no cause to  
15 disturb the Appellate Division's determination that  
16 defendants did not have actual knowledge. Accordingly,  
17 that court's finding of substantial prejudice was within  
18 its discretion." That's precisely the position that we,  
19 really, are asking the court to take today in this same  
20 case. It can be presumed that delays meant evidence or  
21 people's memories faded. It can be presumed that students  
22 moved on, maybe teachers moved on. But the district never  
23 had what the statute said it should have had, which was  
24 notice in that ninety-day period or even a reasonable time  
25 thereafter, and five to eight months thereafter was not a

1 reasonable time. I think this is - - -

2 JUDGE RIVERA: You see that's my point, that - -  
3 - that could very well be prejudice, whether it's  
4 substantial is another story. And that strikes me that  
5 that - - - the evidence of that is within your control.

6 MS. GASSER: And - - - and it would be if - - -  
7 but that wouldn't have been helped by a hearing, so I was  
8 responding to that. But I also go back to Justice - - -  
9 Judge Stein said this - - - actual knowledge is the super  
10 factor here. It's the thing to look at in particular.

11 JUDGE RIVERA: But that's not the way the statute  
12 is written.

13 MS. GASSER: It is.

14 JUDGE RIVERA: Does it - - -

15 MS. GASSER: We're saying the statute.

16 JUDGE RIVERA: The statute has those three  
17 factors, correct?

18 MS. GASSER: Yes. But the first lang - - - the  
19 first sentence of 50-e, which is what we're - - - I'm  
20 sorry, sub-5. It says: "In determining whether to grant  
21 the extension, the court shall consider, in particular,  
22 whether the public corporation or its attorney or insurance  
23 carrier acquired actual knowledge of the essential facts  
24 constituting the claim within the time specified." Then it  
25 goes on: "The court shall also" considered - - - "consider

1 all other relevant facts." But I think it clearly elevated  
2 the actual knowledge standard above all other relevant  
3 facts.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 Mr. Montuori.

6 MR. MONTUORI: Your Honors, I'd just like to  
7 point to page 64 paragraph 15 of the record, and I think  
8 that's, perhaps, the single most important section in - - -  
9 in the lower court papers, and that is the only place in  
10 this record where there's even a brief mention of prejudice  
11 on the part of the respondent.

12 JUDGE PIGOTT: But when you look at - - - I  
13 thought that - - - I was kind of struck by the merit - - -  
14 or meritlessness of this because, you know, when you - - -  
15 when you finally get the police report, when you look at it  
16 and you look at the pictures and everything else and you  
17 see where the - - - the plaintiff was and where the sign  
18 was and everything else, I'm wondering why - - - why you're  
19 chasing them. And it seems to me, and maybe you can tell  
20 me if this is right or wrong, whether you win or lose this,  
21 any one of the other defendants - - - because I assume you  
22 sued the - - - you know, the drivers - - -

23 MR. MONTUORI: Yes. Yes, Your Honor.

24 JUDGE PIGOTT: - - - and everybody else, they're  
25 going to bring them in anyway, aren't they?

1 MR. MONTUORI: Well, that's - - - it would be up  
2 to them. We presume that they will like - - - likely  
3 probably bring them in. But with respect to the merits,  
4 Judge Pigott, I would point first and foremost, of course,  
5 to the fact that we're not analyzing the merits - - -

6 JUDGE PIGOTT: Yeah.

7 MR. MONTUORI: - - - and that's going to be an  
8 extraordinary step. And in claims where it's - - - this  
9 court and other courts have held patently meritless is the  
10 standard that's normally done as a matter of law.

11 JUDGE GARCIA: But going to - - - to that  
12 question, Judge Pigott's question on the merits, in a  
13 different way, as I understand the timeline here, the  
14 sign's taken down before you file your late notice of  
15 claim?

16 MR. MONTUORI: That's - - - that's correct.

17 JUDGE GARCIA: And you have photos. But isn't it  
18 - - - if they would have gotten this notice of claim while  
19 the sign was up, wouldn't you want to do a study of was it  
20 in the way, could you see it if you have your expert come  
21 and look at the road and say was that sign - - - where's  
22 the plain - - - where's the plaintiff, was it blocked?  
23 They can't do any of it now and now they just have a photo.  
24 And you say, yes, they took the sign down but didn't have  
25 your notice of claim yet.

1 MR. MONTUORI: Well, Your Honor, I believe that  
2 that - - - the - - - the brief that respondent has filed  
3 itself has moved us toward the merits. We have the very  
4 definition of lack of substantial prejudice in this case.

5 JUDGE GARCIA: But maybe - - - but that goes to  
6 their ability to defend on the merits, not whether that  
7 study would have shown anything great for them. But  
8 prejudice to them in being able to defend this action  
9 because it's - - - the scene has changed now. And if you  
10 had filed the notice within the time period specified, they  
11 could have had their photogr - - - photographers go out  
12 there, their experts go out there, and now they cannot do  
13 that, right?

14 MR. MONTUORI: Well, no. There is, in fact, no  
15 indication that the scene has changed.

16 JUDGE GARCIA: The - - - the sign is down.

17 MR. MONTUORI: The sign is down but again, that's  
18 something that they had the knowledge of when they took it  
19 down within the ninety-day period.

20 JUDGE GARCIA: But they didn't know you were  
21 suing them at that point, right?

22 MR. MONTUORI: Well, but, Your Honor, in - - - in  
23 fact, there should have been at that point, we - - - we  
24 suggest, a - - - a possibility that they would be subject  
25 to claim, and we've pointed to the violations of the Town

1 of Brookhaven code that this sign does, in fact, represent.  
2 And in addition to that, the sign is a large sign.

3 JUDGE GARCIA: They can't defend against that  
4 anymore, either, because the sign is down.

5 MR. MONTUORI: Well, they - - - the scene is  
6 capable of being reconstructed, Your Honor. That's  
7 certainly - - - certainly, I believe, true, by virtue of  
8 the signs, by virtue of the fact that they had the  
9 knowledge, and there's no - - - simply no indication in the  
10 record, only speculation from the lower court, that certain  
11 students may have been graduated - - - I see that my time  
12 is up, but if I may just finish my - - - there's simply  
13 speculation.

14 And the fact, also, I just would like to mention  
15 the incapacitation issue and that when there is an  
16 incapacitation, there's a rich tradition within the Second  
17 Department and - - - and other departments that, in that  
18 case, the burden of showing substantial prejudice, every  
19 specter of actual knowledge does, in fact, rest with the  
20 municipality. And I can point to the Bensen case, the Haeg  
21 case, the DeMolfetto case, if that line of cases was  
22 followed, we - - - we simply wouldn't be in this position  
23 today. And in fact, this case is even compelling. This -  
24 - -

25 JUDGE RIVERA: Counsel, with - - - with Chief

1 Judge's permission, could you respond to counsel's argument  
2 about the construction of that statute, that actual  
3 knowledge is the primary factor everything else is  
4 secondary?

5 MR. MONTUORI: And again, Your Honor, I think  
6 it's - - - to say it's the primary factor, it's - - - it's  
7 the quick way to determine whether or not we get to be - -  
8 - having the statutory intent preserved because if we have  
9 that factor, the chances are most likely - - - again, not  
10 in every case. There - - - there could be certain  
11 scenarios like unclean hands, that I mentioned, on behalf  
12 of the petitioner where there's not going to be any  
13 prejudice, it's not going to be a stale claim, and there  
14 will be an opportunity to defend on the merits.

15 But, of course, that's not the end of the  
16 inquiry. The inquiry goes substantially further than that,  
17 to the prejudice inquiry, to the inquiry of incapacitation,  
18 the ability to timely satisfy the statute, all that goes  
19 into the mix. And in this particular mix of stand - - -  
20 circumstances, I believe there's compelling evidence to  
21 suggest that the notice was filed as soon as it possibly  
22 could be filed when the evidence became available. There  
23 was a criminal investigation which - - - which further  
24 hindered the cascading effects of the inability satisfy the  
25 statute. So I believe that the actual knowledge piece,

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when we add the reasonable time component of that language, is certainly satisfied in this case. And we couple that with the pictures and the own knowledge of respondent, we get to a point where saying that this petition should have been granted and it was abuse of discretion to ignore all these different factors.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MONTUORI: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Middle Country Central School District, No. 198 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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