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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF MCGOVERN,

Appellant,

-against-

MOUNT PLEASANT CENTRAL SCHOOL DISTRICT,

Respondent.

No. 74

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 28, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with McGovern v. Mount Pleasant Central School
3 District. Counsel, you like any rebuttal time,
4 counsel?

5 MR. WOLF: Yes, three minutes, please.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go
7 ahead, you're on, counsel.

8 MR. WOLF: Inaudible.

9 CHIEF JUDGE LIPPMAN: Yes, there has been a
10 lot of attention knowing that you the two of you were
11 going to argue this case. It's true.

12 Go ahead, counsel. We're with you.

13 MR. WOLF: We are here because our position
14 is that when monetary relief is incidental - - -

15 CHIEF JUDGE LIPPMAN: Where - - - where
16 does it say that, counsel? What - - - what authority
17 do you have for that position?

18 MR. WOLF: I cite this court's decision in
19 Fontana v. Town of Hempstead, where the court says
20 that when a - - - an action is brought to constr - -
21 - restrain a continuing act, where a demand for money
22 damage is merely incidental to the request of relief,
23 a notice of claim is not required.

24 JUDGE READ: Wouldn't that have the effect
25 of totally vitiating the provision in the statute

1 that talks about proceedings, though?

2 MR. WOLF: No, because - - -

3 JUDGE READ: Because an Article 70 - - - 78
4 proceeding can't be brought unless - - - I mean, the
5 - - - the damages have to be incidental.

6 MR. WOLF: Well, no, because essentially
7 there have been holdings by this court when it's
8 relating to the General Municipal Law and the - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah, but is
10 the General Municipal Law totally applicable to the
11 statute that - - - that we have here or is it
12 different?

13 MR. WOLF: Well - - -

14 CHIEF JUDGE LIPPMAN: How do the two
15 statutes compare?

16 MR. WOLF: Well, here - - - here they're
17 both notice requirements to give munic - - -

18 CHIEF JUDGE LIPPMAN: Well, that I know.

19 MR. WOLF: Right. To give municipalities
20 notice of injury and intent. And our position is the
21 spirit of this Education Law, as is listed in the
22 action - - -

23 CHIEF JUDGE LIPPMAN: What about the
24 language of the law - - -

25 MR. WOLF: Yes.

1 CHIEF JUDGE LIPPMAN: - - - as opposed to
2 the General Municipal - - -

3 MR. WOLF: I'm going to - - - I'm going to
4 get there, Your Honor.

5 CHIEF JUDGE LIPPMAN: Try - - - get there
6 now. Tell us what the difference is.

7 MR. WOLF: Okay, it talks about "the power
8 to adjust and pay said claim and refuse to make an
9 adjustment or payment thereof". The statute's
10 language specifically talks about payment. So our
11 position is the intent of the legislature in enacting
12 Education Law 3813, talks about primarily and
13 predominantly and - -mon - monetary damages. It - -
14 -

15 JUDGE RIVERA: Well, is - - - is adjustment
16 only about money?

17 MR. WOLF: It's not - - -

18 JUDGE RIVERA: It can't refer to some other
19 aspect of relief?

20 MR. WOLF: It can, but what I'm saying - -
21 - what we're essentially saying is this court in Kahn
22 says that - - - said that when - - - notice of claim
23 requirements don't apply when you're dealing only
24 with equitable relief. And the purpose of this
25 application - - - and I respectfully submit the

1 reason why this court agreed to hear this matter - -
2 - is because there's not been - - - there's a split
3 in the departments.

4 CHIEF JUDGE LIPPMAN: Why didn't you bring
5 this for just equitable relief?

6 MR. WOLF: Well, because essentially, when
7 Ms. McGovern - - - in every Article 78 petition when
8 a person is reinstated, it's - - - it's generally pro
9 forma language with interest, attorney la - - - fees,
10 costs, back pay, front pay - - -

11 CHIEF JUDGE LIPPMAN: So you're saying that
12 essentially this is an equitable - - -

13 MR. WOLF: Oh, absolutely.

14 CHIEF JUDGE LIPPMAN: - - - proceeding?

15 MR. WOLF: And I'll tell you why, because,
16 Your Honor, what happens here - - - and this goes to
17 the public interest exception, which is the second
18 basis - - - if Ms. McGovern - - - if Justice
19 Lorenzo's decision where he held that, you know, a
20 teacher who gets exceeding expectations and then two
21 minutes later is now a developing, should be
22 reinstated, and there's a hearing - - - with back
23 pay, that essentially, there's tenure by estoppel,
24 because they'll - - - what will happen is she would
25 have - - -

1 JUDGE STEIN: Didn't they do everything
2 they were supposed to do, though? What - - - why
3 would there be tenure by estoppel?

4 MR. WOLF: Because essentially, if the - -
5 - if the board - - - if Justice Lorenzo's decision is
6 followed and she's reinstated, she would have
7 completed her three years, Your Honor, and she would
8 have completed the tenure process, because un - - -

9 JUDGE READ: But she - - - but she was - -
10 - she was terminated before she got an opportunity to
11 do that.

12 MR. WOLF: Well, right, but essentially, if
13 the Judge's decision is followed, she'll be
14 reinstated, and under the law - - - the byline
15 regulations of Mount Pleasant, if you complete three
16 years, you - - - by court order or however else - - -

17 CHIEF JUDGE LIPPMAN: So you're saying,
18 effectively, that she was a tenured employee?

19 MR. WOLF: I'm saying effectively with - -
20 - if Justice Lorenzo's decision is allowed to stand.

21 JUDGE PIGOTT: Isn't that a bit much? I
22 mean, what you're then saying is that ha, ha, you
23 know, I went to court, and now you have - - - no
24 matter what you said about me, you know, whether I
25 was a poor teacher, whether I - - - whether I didn't

1 make all the mistakes that you say, you can't go back
2 and look at those anymore, because I went to court,
3 and the court said that I have an equitable claim,
4 and there's no hearing now or anything, and she could
5 be the worst - - - I'm not suggesting that she is - -
6 - but the next one may be one of the worst teacher
7 candidates they ever had, and - - - and if - - - if -
8 - - you're saying they can't - - - they can't go back
9 and look now.

10 MR. WOLF: Well - - -

11 JUDGE PIGOTT: What's wrong with sending it
12 back and having them take a look at it?

13 MR. WOLF: Well, you know, normally - - -
14 normally - - - and I - - - I will submit the court -
15 - - you know, when you file these petitions, the
16 courts usually defer and say, you know, not - - - we
17 are not educators; we can't determine. We're judges;
18 we - - - we - - - we know the law. We don't know
19 who's a good teacher and who's a bad teacher, and
20 your point - - - point is well taken.

21 What Justice Lorenzo said here is no, no,
22 no. I found the issue of bad faith is relevant and
23 that's why I'm referring - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but did he
25 contemplate a hearing?

1 MR. WOLF: He di - - - no, he actually
2 ordered a hearing.

3 CHIEF JUDGE LIPPMAN: Yeah?

4 MR. WOLF: And the reason why he ordered a
5 hearing was be - - - and I - - - I'll be quite
6 honest; I've brought many of these applications over
7 the years, and many of these applications, the courts
8 have said, listen, as I just said, I'm a judge; I'm
9 not an educator. However, this court said, how can a
10 teacher for three years be above and exceeding
11 expectations, evaluated by her principal, exceeding
12 expectations, and three months later - - -

13 JUDGE PIGOTT: Again, not this case, but
14 let's assume that that particular candidate is
15 bribing the principal or some - - - I mean, you - - -
16 you don't - - -

17 MR. WOLF: We're not suggesting that, of
18 course.

19 JUDGE PIGOTT: I'm not either. But what
20 I'm suggesting to you is that if - - - if that
21 succeeds, and then they go to court, you're saying,
22 you can't go back and look at that. You - - - you
23 know, it's too late now. We can be the worst
24 candidate for education in the world, and you can't
25 touch us, because we went to court, and the court

1 said you have to reinstate.

2 MR. WOLF: And do you want to know
3 something? In this particular case, when you can
4 show there's bad faith, when you can show - - -

5 JUDGE PIGOTT: But don't you need a hearing
6 for that?

7 MR. WOLF: Sure.

8 JUDGE PIGOTT: Have you had one?

9 MR. WOLF: If Justice Lorenzo's decision is
10 allowed to stand, we'll get one.

11 JUDGE PIGOTT: Well, that's what I mean.

12 JUDGE READ: But she's on probation - - -

13 JUDGE PIGOTT: I thought you were saying
14 you're not - - - you don't want a hearing. You want
15 - - - you want - - - you want tenure today.

16 MR. WOLF: No, well, what will happen is -
17 - - if - - - what I'm saying is that if the court's
18 decision is allowed to stand, and there is a hearing
19 that's held, and bad faith is - - - and she's
20 reinstated, okay, if she's reinstated under Justice
21 Lorenzo's decision, she would be going back to work
22 at the Mount Pleasant School - - - Central School
23 District, having completed three years - - -

24 CHIEF JUDGE LIPPMAN: And she'd get a
25 monetary payment.

1 MR. WOLF: Well, they would reinstate her -
2 - -

3 CHIEF JUDGE LIPPMAN: - - - despite the
4 fact that there was no - - - a notice of claim.

5 MR. WOLF: Right. She would - - - and - -
6 - and - - - listen, this court has - - -

7 JUDGE RIVERA: So let - - - let me ask you,
8 if - - - if we disagree with you and we say the
9 notice of claim is - - - is required, so now the next
10 person, same situation, but this time only require -
11 - - either files a notice of claim on time, only
12 requests, or only requests equitable relief, right.
13 Let's say, for some reason, that person is able to
14 proceed. Could they then seek back pay, if they
15 originally only claimed or only sought equitable
16 relief and they are successful and are reinstated?
17 Are they foreclosed then from getting back pay - - -

18 MR. WOLF: They're fore - - - they
19 foreclosed - - -

20 JUDGE RIVERA: - - - pay in the future?

21 MR. WOLF: Yeah, they're foreclosed.

22 JUDGE RIVERA: Nothing under the contract
23 or understanding would require back pay - - -

24 MR. WOLF: No, and - - -

25 JUDGE RIVERA: - - - to be provided if

1 they're reinstated?

2 MR. WOLF: You know, again, it - - -

3 JUDGE ABDUS-SALAAM: So in this - - -

4 JUDGE RIVERA: You must demand it, is what
5 you're telling me?

6 MR. WOLF: You must demand it.

7 JUDGE ABDUS-SALAAM: So in this case,
8 counsel, you were saying that because you were asking
9 for back pay as an incident to the equitable relief,
10 you've essentially filed a notice of claim?

11 MR. WOLF: Yeah, what - - - no, actually
12 what I'm saying is, under the case law - - - I'm not
13 - - - that's not what I'm saying, respectfully, Your
14 Honor. What I'm saying is under the case law and the
15 holdings of this court when analyzing other municipal
16 statutes - - - statutes, since I have alleged a
17 petition that, fundamental in nature, asked to be for
18 reinstatement, and the back pay is incidental to that
19 fact, I don't have to file a notice of claim.

20 CHIEF JUDGE LIPPMAN: Counsel, could we
21 sever these two things, the - - - the equitable and
22 the pay?

23 MR. WOLF: It - - - you know, I think that

24 - - -

25 CHIEF JUDGE LIPPMAN: Is that a yes or a

1 no?

2 MR. WOLF: I think you could - - -
3 certainly you could. You're the Court of Appeals. I
4 mean - - -

5 CHIEF JUDGE LIPPMAN: What would happen if
6 we did that?

7 MR. WOLF: I think, well, you know,
8 essentially, when you have a - - -

9 CHIEF JUDGE LIPPMAN: Say you're okay on
10 the equitable, but not on the pay. What - - -

11 MR. WOLF: Well, I think - - -

12 CHIEF JUDGE LIPPMAN: What would be the
13 consequence of that?

14 MR. WOLF: You know, look, I - - - I think
15 personally - - - having done this for a while - - -
16 when - - - if Ms. - - - if Ms. McGovern slipped and
17 fell outside the Mount Pleasant School District, file
18 a notice of claim - - -

19 JUDGE PIGOTT: We're beyond that.

20 MR. WOLF: - - - one hundred percent.

21 JUDGE PIGOTT: I think what we're asking is
22 - - - or at least what's troubling me - - - you're
23 saying, she goes to work tomorrow. It's not that we
24 refer it back for a hearing and she doesn't go to
25 work until there's a hearing and a finding that in

1 fact there was a bad faith, and then she can go back
2 to work. You want to say that for some reason, the
3 school district - - - if they were acting in good
4 faith here, have - - having wa- - have waived that by
5 contesting your Article 78.

6 MR. WOLF: No, what I - - - what - - -
7 actually what I'm saying is, I'm asking - - - I'm not
8 asking for anything that Judge Lorenzo didn't order.
9 I'm asking for Justice Lorenzo's - - -

10 JUDGE PIGOTT: But you're saying in the
11 meantime, I go - - - she goes back to work.

12 MR. WOLF: Well, that's what Judge Lorenzo
13 says. He says, pending the hearing, she should be
14 reinstated with back pay.

15 JUDGE PIGOTT: And then you'll make the
16 argument that she's been there for three years, and
17 she's entitled to tenure.

18 MR. WOLF: Correct. And - - - and - - -
19 and - - -

20 JUDGE PIGOTT: That's not going to work, I
21 don't think.

22 MR. WOLF: Well, I - - - in other words, if
23 - - - if she - - - if the issue of bad faith - - -
24 you know, obviously it's pending the hearing on bad
25 faith, but I think the bad faith is a separate issue.

1 I think the issue is, she's reinstated, and I can
2 make that argument. But whether or not that argument
3 ultimately carries the day, the issue - - - that's my
4 - - - that's the public interest except - - -

5 JUDGE PIGOTT: All right, but not your
6 client, but the last one, you know, who was - - - he
7 was a guy who had a worked at another - - - at
8 another school district. He is a fall-down,
9 alcoholic drunk. And he says I didn't get a hearing.
10 And we give him a hearing. You're - - - you're
11 saying, even though the Court of Appeals is giving
12 him a hearing, that fall-down drunk goes - - - goes
13 into the fourth grade and teaches until that hearing
14 is done.

15 MR. WOLF: That fall-down drunk doesn't get
16 the hearing, because - - -

17 JUDGE PIGOTT: No, I'm giving him the
18 hearing. I'm only one-seventh of the court.

19 MR. WOLF: Right.

20 JUDGE PIGOTT: If we say - - - if we say,
21 didn't get a hearing, he's entitled to a hearing.
22 You're saying pending that hearing that he goes - - -
23 he goes - - - he goes in front of the class.

24 MR. WOLF: You know, I'm not saying that.

25 JUDGE PIGOTT: Okay.

1 MR. WOLF: And I'll tell you why. What - -
2 - what I'm saying here is, look, the case law is very
3 clear, mostly - - nine - - most of these cases don't
4 get to this point, because these cases are situations
5 where we're asking judges to be educators and to
6 second guess the actions of educators. Only where
7 you find the situation like with Ms. McGovern, who -
8 - -

9 JUDGE PIGOTT: I get that, but we're not
10 educators, and you're telling us that we've got to
11 put her back in front of a classroom before the
12 hearing.

13 MR. WOLF: I'm - - - I'm saying that's what
14 Judge Lorenzo ordered. And - - - and a fall-down
15 drunk - - - a fall-down drunk doesn't get here, even
16 if you let - - - let him get here, I suggest he
17 doesn't get passed - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel,
19 thanks, you'll have your - - - oh, I'm sorry. One
20 more question; Judge Read.

21 JUDGE READ: Did you make any of these
22 arguments to Judge Lorenzo about eq - - - incidental
23 to equitable relief, because I didn't see them.

24 MR. WOLF: Well, we - - - we never - - -
25 you know, in Westchester County, all motions are on

1 submission. And we didn't get - - -

2 JUDGE READ: Well, you may have put in a
3 reply.

4 MR. WOLF: But we put it - - - we put it in
5 the papers, and in his decision, the judge cites
6 Court of Appeals' cases - - - cases from - - -

7 JUDGE READ: So that's what you're relying
8 on for preservation?

9 MR. WOLF: Yeah, well, judge, the judge - -
10 - the judge found that the notice of claim was not
11 required, and - - - and he cited cases to that
12 effect, and then we - - - in our briefs to the Second
13 Department, we cited cases to that effect, and then
14 in this - - -

15 JUDGE READ: So you - - - you made the
16 argument about the incidental to - - - damages - - -
17 but you did, okay.

18 MR. WOLF: Oh, absolutely, it was - - -

19 JUDGE READ: And you're - - - and you're
20 relying again on Judge Lorenzo's decision and - - -

21 MR. WOLF: I'm relying on Judge Lorenzo's
22 decision. I'm relying on the Court of Appeals
23 decision in Fontana. I'm relying on the statute
24 itself, which speaks of - - -

25 JUDGE READ: Okay, I just - - -

1 MR. WOLF: - - - payment.

2 JUDGE READ: My question was directed to
3 preservation.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE READ: Thank you.

6 CHIEF JUDGE LIPPMAN: Thanks, counsel.

7 Counsel? Start with preservation. Did
8 they preserve this issue?

9 MS. LUCAS: Excuse me?

10 CHIEF JUDGE LIPPMAN: Did they preserve
11 this issue?

12 MS. LUCAS: The notice of claim issue? I
13 do not believe they - - -

14 CHIEF JUDGE LIPPMAN: The issue of the
15 incidental and all this business that - - -

16 MS. LUCAS: I do not believe that they did.
17 We're actually standing here before you because of a
18 notice of claim issue, not on the subjective nature
19 of why Ms. McGovern was terminated, as you know.

20 CHIEF JUDGE LIPPMAN: All right. So go
21 into the statutes, then, the same thing we asked your
22 adversary.

23 MS. LUCAS: Absolutely.

24 CHIEF JUDGE LIPPMAN: What does this
25 statute say? How does it relate to the general

1 municipal law? Tell us - - - tell us what the
2 distinction is and why, obviously - - -

3 MS. LUCAS: Okay.

4 CHIEF JUDGE LIPPMAN: - - - your position
5 is that without a notice of claim - - -

6 MS. LUCAS: Sure.

7 CHIEF JUDGE LIPPMAN: - - - it's no good.
8 Go ahead.

9 MS. LUCAS: The Court of Appeals has never
10 recognized an exception for equitable claims under
11 Education Law Section - - - Education Law Section
12 3813(1). My adversary relies solely on cases that
13 deal with 50-e of the General Municipal Law.

14 CHIEF JUDGE LIPPMAN: So what - - - what
15 about - - - so what about Court of Appeals cases? Is
16 there any precedent here?

17 MS. LUCAS: Absolutely. As - - - is - - -

18 CHIEF JUDGE LIPPMAN: Yes, go ahead.

19 MS. LUCAS: - - - as it relates to private
20 interest rights versus public interest rights, and
21 it's very clear that Ms. McGovern's case is a private
22 interest right, and therefore notice of claim is
23 absolutely mandatory. The cases that my adversary
24 has relied on - - -

25 CHIEF JUDGE LIPPMAN: Are there cases

1 dealing with this business about the equitable - - -
2 the - - - the monetary being incidental to the main
3 equitable action? Have we ruled on that issue?

4 MS. LUCAS: No, I - - - you've left it open
5 since Kahn - - -

6 CHIEF JUDGE LIPPMAN: Okay, why - - -

7 MS. LUCAS: - - - in 2012.

8 CHIEF JUDGE LIPPMAN: - - - why, from a
9 policy perspective - - - putting aside there is no
10 precedent, why from a policy perspective, is it
11 better that we rule in your favor instead of holding
12 that if a claim is essentially equitable and the
13 monetary is secondary or incidental in nature, why
14 from a policy perspective should we rule for you?

15 MS. LUCAS: We're dealing with Education
16 Law 3813. Those are claims against a public school
17 district. The statute Education Law 3813 is very,
18 very specific. It is an all-encompassing statute.
19 It is much different than 50-e of the General
20 Municipal Law.

21 JUDGE PIGOTT: It seems to be, but let - - -
22 - let me - - - let me give you a hypothetical.
23 You've got ninety days from the date of the - - - of
24 the accident or whatever to file a notice of claim,
25 right? Do you agree with me on that?

1 MS. LUCAS: Yes.

2 JUDGE PIGOTT: Okay. So she files on the
3 ninetieth day. Now, the school district has thirty
4 days with - - - to do something with that.

5 MR. WOLF: Correct, to investigate.

6 JUDGE PIGOTT: All right. So 120 days are
7 gone. You got to bring your Article 78 within four
8 months of the date of the firing, so how much time
9 does she got after you guys decide on day thirty that
10 you're not going to hire her?

11 MS. LUCAS: She's got thirty additional
12 days.

13 JUDGE PIGOTT: From where?

14 MS. LUCAS: My understanding is that there
15 are Court of Appeals cases that have extended that
16 time for the thirty days.

17 JUDGE PIGOTT: There's - - - there's a
18 statutory exception. But - - - but absent that,
19 she's essentially out of time before the school
20 district - - - not yours, but another one - - - gets
21 around to saying, yeah, we're not going to hire you.

22 MS. LUCAS: Well, she has thirty - - -
23 thirty days to file her actual claim.

24 JUDGE PIGOTT: I - - - I understand that.
25 I guess what I'm getting at is, you're saying she's

1 not harmed because she can go to court and say,
2 there's a thirty-day exception because they took so
3 long. I'm not sure of that at all. I would think a
4 judge could say, hey, you got - - - you got 120 days
5 to bring an Article 78; you didn't do it.

6 MS. LUCAS: Right.

7 JUDGE PIGOTT: And I'm throwing it out.
8 And that - - - that seems to be incongruous with - -
9 - with what 3813 says, because they talk about - - -
10 as Mr. Wolf pointed out - - - payments. They talk
11 about, you know, slips and falls - - - you know,
12 negligence, but not where the school district itself
13 takes the action to fire somebody and then does
14 something like that.

15 MS. LUCAS: I - - - I respectfully
16 disagree, because 3813 specifically references
17 special proceedings. And when you're dealing with
18 special proceedings against a school district, the
19 vast majority, if not all special proceedings, are
20 Article 78 proceedings. And all remedies under an
21 Article 78 proceedings are equitable as well as you
22 can get incidental damages. If this court were to
23 rule that Ar - - - all Article 78s, there's an
24 exception for purposes of filing a notice of claim,
25 that's going to increase the litigation against

1 school districts. And the reason to go back to the
2 whole public policy - - -

3 JUDGE PIGOTT: Well, of course it is. But
4 why - - - why do we fear litigation? I mean - - -

5 MS. LUCAS: Well - - -

6 JUDGE PIGOTT: - - - it seemed to me that
7 if -- if - - if teachers are not being treated fairly
8 or if probationers are not being treated fairly,
9 could the school district, say look, we want to fire
10 these people, and if you're going to make us justify
11 our firing, well, we're going to get sued. So don't
12 do that; don't make us justify our firing.

13 MS. LUCAS: Well, no. 3813 gives the
14 school district the ability to take a second look at
15 any type of claim that may be forthcoming. And
16 that's very important for a public school district.
17 We're looking to spend monies on children, not on
18 litigation. I can't tell you how many clients I have
19 that say, we don't want to spend money on attorneys,
20 and - - - and rightfully so. So - - -

21 CHIEF JUDGE LIPPMAN: Yeah, yeah, but you -
22 - - but you have to treat your employees,
23 particularly your teachers, who are the basis of how
24 you educate, fairly.

25 MS. LUCAS: Absolutely.

1 CHIEF JUDGE LIPPMAN: So if there's a claim
2 that you did not treat them fairly or you broke the
3 rules in some way, then you get litigation.

4 MS. LUCAS: I understand that. But that
5 gives us the ability, especially the Board of
6 Education, who's the governing board of a school
7 district, the ability to step back and say, you know
8 what? We're going to take some time; we're going to
9 investigate, and we're going to look at the
10 administrative decisions of our administrators. And
11 - - -

12 JUDGE ABDUS-SALAAM: Counsel, even if there
13 is no thirty-day extension, is there any bar to the
14 petitioner bringing an Article 78 - - - a timely
15 Article 78 and then - - -

16 MS. LUCAS: No.

17 JUDGE ABDUS-SALAAM: - - - withdrawing it,
18 if - - - if - - -

19 MS. LUCAS: No, absolutely not. I think
20 there - - - there's sufficient time. In addition,
21 there's always the ability to request an extension of
22 time to file a notice of claim. And a notice of
23 claim is not - - - you know, it's not a huge project.
24 A notice of claim is either one or two pages that
25 sets forth the basis for which they're making a claim

1 against the school district. So I don't think that
2 there would be insufficient time for someone to file
3 an actual petition against a school district.

4 JUDGE RIVERA: Should - - -

5 JUDGE PIGOTT: What - - -

6 JUDGE RIVERA: - - - should she have had
7 the opportunity to withdraw the claim for incidental
8 damages, for the back pay?

9 MS. LUCAS: Should she have been given the
10 opportunity?

11 JUDGE RIVERA: Yeah.

12 MS. LUCAS: Sure, certainly, if - - - if
13 she was seeking only reinstatement, which is clearly
14 an equitable remedy.

15 JUDGE RIVERA: Correct.

16 MS. LUCAS: You know, my position is that
17 the incidental damages is not relevant. It's still
18 not an equitable remedy that they're seeking. This
19 is a public school teacher, and we're looking at
20 hundreds of thousands of dollars at this point.

21 CHIEF JUDGE LIPPMAN: So why don't they - -
22 - why don't we say, so they could have the equitable
23 claim, and we'll get rid of the monetary claim?

24 MS. LUCAS: Again, you're the Court of
25 Appeals, you can do that. But the - - -

1 CHIEF JUDGE LIPPMAN: Why - - - why isn't
2 it a good thing to say, if in es - - - if in essence,
3 it's an equitable claim, from a policy perspective,
4 why isn't a good thing to say, let that go forward,
5 the monetary claim, you need to notice the claim, and
6 end of story. What's wrong with that?

7 MS. LUCAS: Well, again, I think that 3813
8 is such - - - and it's drafted in such a way - - -

9 CHIEF JUDGE LIPPMAN: You're saying the
10 statute doesn't allow you to do that?

11 MS. LUCAS: Correct.

12 JUDGE READ: That's the legislature's
13 decision?

14 MS. LUCAS: That is correct. I believe
15 3813 is clear on its face that all claims against a
16 school district - - -

17 CHIEF JUDGE LIPPMAN: As opposed to the
18 General Municipal Law?

19 MS. LUCAS: That's correct. The General
20 Municipal Law deals with torts. Torts that - - - the
21 remedy for torts is damages, which I can understand,
22 if somebody was saying, you know what, I don't want
23 damages; I want some form of equitable relief, then
24 the courts have decided, you know what? Then you
25 don't have to file a notice of claim, but - - -

1 JUDGE PIGOTT: Well, that's what - - - part
2 of Mr. Wolf's argument is at the bottom of 3813(1) it
3 says "having the power to adjust or pay said claim
4 has neglected or refused to make an adjustment or
5 payment thereof for thirty days after such
6 presentment."

7 MS. LUCAS: Right.

8 JUDGE PIGOTT: It reads like it's - - -
9 it's designed for collections and for negligence and
10 things like that, not whether or not a teacher has
11 been properly fired or not.

12 MS. LUCAS: Yeah. I mean, think at first
13 glance, that is an adequate reading of 3813, but I
14 think when you go back and look at the inclusion of
15 special proceeding, which I think is very instructive
16 in this type of case, it clearly - - - a special
17 proceeding against a school district is clearly an
18 Article 78 proceeding.

19 JUDGE PIGOTT: Right. But that - - - I
20 mean, because you're a public body or officer,
21 meaning, that's the way that you get sued.

22 MS. LUCAS: Right, but if we were to say,
23 just equitable claims could move forward without a
24 notice of claim, we, in essence, may be eliminating
25 all Article 78s from a notice of claim requirement,

1 which then query, why is a reference to special
2 proceedings in 3813(1)?

3 JUDGE RIVERA: Well, the - - - I mean, they
4 have the incentive, because she wants the back pay.
5 So they have the incentive to file the notice of
6 claim.

7 MS. LUCAS: Certainly.

8 JUDGE RIVERA: I mean, it's not as if
9 people are now all of sudden going to intentionally
10 choose not to file a notice of claim. They want the
11 back pay. They want to comply with the requirement,
12 if that - - - if that's the way we - - - we rule.

13 MS. LUCAS: Correct.

14 JUDGE STEIN: Would it - - - would the
15 special proceedings apply, for example, to
16 proceedings regarding arbitration decisions?

17 MS. LUCAS: Yes.

18 JUDGE STEIN: And - - - and there are a lot
19 of those also in the - - -

20 MS. LUCAS: Yes.

21 JUDGE STEIN: - - - in the realm of
22 education?

23 MS. LUCAS: It's definitely a possibility.
24 There's not a tremendous number of them, I will tell
25 you, just from my practice.

1 JUDGE PIGOTT: But that's what they're for.
2 If - - - if you're - - - if you're seeding your
3 football field and using DDT to kill the dandelions,
4 somebody's going to sue you, and they're going to do
5 it in an Article 78.

6 MS. LUCAS: They're not going to do it in
7 an Article 78, you're correct.

8 JUDGE PIGOTT: Oh, they most certainly
9 will.

10 MS. LUCAS: I don't know.

11 JUDGE PIGOTT: They're going to make you
12 stop.

13 MS. LUCAS: That's injunctive relief,
14 correct?

15 CHIEF JUDGE LIPPMAN: Anything else,
16 counsel?

17 MS. LUCAS: I don't think so.

18 CHIEF JUDGE LIPPMAN: Okay, thank you.

19 MS. LUCAS: Thank you.

20 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

21 MR. WOLF: Two very quick points. The
22 first sentence of 3813 doesn't only speak of special
23 proceedings. It says "No action or special
24 proceeding, for any cause whatsoever". Tort,
25 contract, anything else, so our reading of 3813 is -

1 - - it's similarly to the 50-e, because it also deals
2 with torts, and specifically - - -

3 JUDGE PIGOTT: Where - - - where does - -
4 where does it say in there - - - are you essentially
5 saying, any employment issue, there is no notice of
6 claim requirement?

7 MR. WOLF: I'm saying that when you are - -
8 - that's - - - no, of course not. If - - - if I am -
9 - -

10 JUDGE PIGOTT: How do you - - - how do you
11 distinguish it?

12 MR. WOLF: Oh, if I am suing somebody for a
13 employment - - - a breach of con - - employment
14 contract - - -

15 JUDGE PIGOTT: That's what I said, yeah.

16 MR. WOLF: - - - and my only relief is
17 monetary, because I'm an at - - - I'm an at-will
18 employee, and the contract says I'm at-will, but
19 there are some payments guaranteed to me under the
20 contract, and I want to sue for those payments. And
21 it's financial only.

22 JUDGE PIGOTT: All right. That's minor.
23 But let - - - let's - - - let's assume you've got - -
24 - pick any - - - anyone who works, not teachers, but
25 other people who work for the school - - - bus

1 drivers, grounds keepers, things like that - - - any
2 of those. If they are fired, they do not have to
3 file a notice of claim, unless they're due back pay
4 and that's all they're seeking?

5 MR. WOLF: Yeah, I mean, if it's - - - if
6 it's somebody who is seeking a - a reinstatement to a
7 position, and the back pay is incidental, I would
8 argue that the notice of claim is not required. But
9 if the - - -

10 JUDGE PIGOTT: How?

11 MR. WOLF: If the gravamen of the complaint
12 is financial - - - slip and fall, breach of contract
13 - - - this court says - - -

14 JUDGE PIGOTT: No, I understand all that.
15 I'm - - - I'm - - -

16 MR. WOLF: Yes.

17 JUDGE PIGOTT: - - - I'm focusing on the
18 employment. You're saying - - -

19 MR. WOLF: I don't think the position
20 matters. I don't think it matters whether they're
21 the gardener or the principal. If - - if they're
22 seeking reinstatement and the back pay is incidental,
23 and there's a - - - an issue, you know, relating to
24 the re - - - the fi - - - the primary basis is that
25 they were fired improperly, and it's not over a

1 financial rights that accrued during employment, then
2 - - -

3 JUDGE FAHEY: So that it's always
4 equitable, in that circumstance. To follow up on
5 Judge Pigott's point, it's always going to be an
6 equitable claim then. The back pay is purely
7 incidental, because the question is, how was I fired?
8 Whether you're a groundskeeper or whether you work in
9 maintenance, whatever you're doing - - - you're
10 principal, teacher, whatever it is, it's - - - your
11 main point is always going to be the way they did
12 this was wrong, that they - - - they didn't have a
13 proper work record here to fire this person. You're
14 always seeking equitable relief in that circumstance,
15 then.

16 MR. WOLF: Yeah, in that circumstance, un -
17 - - unless, of course, there are - - - it's - - - as
18 I said, it's under an employment contract or CEOs do
19 stock options.

20 JUDGE FAHEY: But that's - - - as - - - as
21 the Judge said, that's a minor point.

22 MR. WOLF: Yeah.

23 JUDGE FAHEY: Yeah, that's a minor point.

24 MR. WOLF: And the other - - - the other
25 point I wanted to make is - - - quickly, is that this

1 Court talk - - - we're talking about private rights
2 versus public rights; this court in the Cowan v.
3 Board of Education, says, when a teacher is seeking
4 to vindicate tenure rights, whether or not they're
5 ultimately granted or not, but when the basis of
6 application is to vindicate those rights, it is, the
7 legal rights granted by State Law and in the public
8 interest, a notice of claim is not required.

9 So although we may not get the tenure
10 ultimately after a hearing, the bad faith hearing,
11 the fact that the fundamental basis of the
12 application is to vindicate the fact that she didn't
13 get tenure, the notice of claim is also not required
14 for that reason. Thank you.

15 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
16 you.

17 MR. WOLF: Thank you.

18 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of McGovern v. Mount Pleasant Central School District, No. 74, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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