At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Cortland County Courthouse, in the City of Cortland, New York on the 22nd day of April, 2016.

PRESENT: HON. PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

JEROME WILLIAMS, JR., as parent and natural guardian of J.W.,

Claimants,

vs.

CORTLAND ENLARGED CITY SCHOOL DISTRICT,

Respondent.

DECISION AND ORDER
Index No. 16-113
RJI No. 2016-0080-M

APPEARANCES:

SMITH, SOVIK, KENDRICK & SUGNET, P.C.
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PHILLIP R. RUMSEY, J. S. C.

On March 7, 2016, Petitioner commenced this proceeding, pursuant to General Municipal Law § 50-e(5), seeking leave to serve a late notice of claim against respondent Cortland Enlarged City School District (the District) for injuries allegedly sustained by his son (also referred to herein as the infant or the student) during a physical education, or gym, class on October 26, 2015. The infant was a fifteen year old sophomore who petitioner alleges sustained an injury to his right knee when he was tackled by a fellow student while participating in a required flag football game during gym class.[1] The petitioner also alleges that his son "subsequently" went to the school nurse to report the injury (Affidavit of Jerome Williams, Jr., sworn to March 2, 2016 [Williams Affidavit], ¶ 8). District records show that the student reported his knee injury to the school nurse on October 29, 2016, when he told her it was caused by a fall and that there were no witnesses to the incident (see Affidavit of Karen Phalen, sworn to April 7, 2016, with Exhibit A). Petitioner alleges that he reported the incident to the District Administration, averring that "[w]ithin a month after the incident, I specifically spoke with the Cortland Junior Senior High School principal regarding my son's incident. I discussed my concern for the lack of supervision on the date of the incident, and the extent of my son's injuries known at that time" (Williams Affidavit, ¶ 14). The Principal at the Cortland Junior Senior High School for all freshmen and sophomores states that he has "never spoken to Mr. Williams about his son's alleged incident,

[1] Petitioner originally claimed that his son was injured in gym class on October 15, 2015. After receiving respondent's answering papers, petitioner's counsel filed an amended notice of claim acknowledging that the "correct" date of the incident is October 26, 2015, and alleging that petitioner was "previously confused" about the date of the incident (Affidavit of Karen J. Krogman Daum, sworn to April 21, 2016, ¶ 5). Notably, there is no affidavit from petitioner or the infant regarding the correct date of the incident, and the amended notice of claim is executed by counsel.

injuries or the lack of supervision as a result. In fact, at no time prior to this motion has the infant claimant, or anyone for that matter, told me that he was injured when he was tackled by another student" (Affidavit of Kenneth Brafman, sworn to April 7, 2016, ¶ 4). Petitioner further alleges that, as a result of the injury, the infant had arthroscopic surgery on his knee on January 3, 2016.

Petitioner's proposed notice of claim alleges negligence and negligent supervision, on the basis that the gym teacher was not providing any supervision or control over the students in the class when the infant was "unexpectedly, aggressively and negligently tackled by another student," whose actions were foreseeable because the fellow student had been aggressive toward other students in the past (Affidavit of Karen J. Krogman Daum, sworn to April 21, 2016, Exhibit A [amended proposed notice of claim], ¶¶ 5-10).

> "It is well settled that Supreme Court has broad discretion in deciding whether to grant an application for leave to file a late notice of claim pursuant to General Municipal Law § 50-e, providing the application is made prior to the expiration of the one year and 90-day statute of limitations. . . . In deciding whether to permit a late filing of a notice of claim, the court must consider certain statutory factors, including whether the respondent had actual knowledge of the essential facts constituting the claim, whether there exists a reasonable excuse for any delay in filing the notice of claim and whether the delay has caused substantial prejudice to any defense to the claim. Moreover, no one factor is dispositive of the issue."

Matter of Conger v Ogdensburg City School Dist., 87 AD3d 1253, 1254 (2011) (quotations and citations omitted).

In a thorough decision, the Appellate Division, Second Department, observed that the purposes of the notice of claim requirement are to afford public corporations the opportunity for timely and efficient investigation of tort claims and to protect them from stale claims (see Matter

of Felice v Eastport/South Manor Cent. School Dist., 50 AD3d 138, 143 [2008]). It then held that, although no one factor is dispositive, the most important factor is whether the public corporation had actual knowledge of the essential facts constituting the claim (id., at 147), which requires "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim" (id., p. 148).

It is undisputed that the infant reported his knee injury to the school nurse within three days after he was allegedly injured. Petitioner submits no proof contradicting respondent's proof that the infant reported only that he had injured his knee when he fell, and that there were no witnesses to the event. There is no affidavit or other proof directly from the infant, who was fifteen years old when he was injured, by which he claims to have reported to any school personnel that he was tackled. Petitioner's hearsay allegation that the infant told the gym teacher, presumably shortly after the incident, that he had been tackled is insufficient to place respondent on notice that petitioner may assert a claim for negligent supervision (see Matter of Keyes v City of New York, 89 AD3d 1086, 1086 [2011] ["There was no evidence in the record to support the hearsay allegations of the infant petitioner's father that the infant petitioner reported the incident to a teacher"]; see also Matter of Lewis v East Ramapo Cent. Sch. Dist., 110 AD3d 720, 722 [2013] [there was no evidence to support hearsay allegations that the student's parents had reported the claim to the assistant principal directly after the incident]; Matter of Hampson v Connetquot Cent. Sch. Dist., 114 AD3d 790, 791-792 [2014] ["there was no evidence in the record to support the petitioner's hearsay allegations that aides and teachers were aware that the students were 'horsing around,' warned the students to stop 'horsing around,' and did nothing further to control the students' behavior"]).

Petitioner also makes the general allegation that he spoke to an unidentified principal within a month of the incident about his son's known injuries and his concern for a lack of supervision.[2] The conclusory nature of petitioner's allegations bear emphasizing – he fails to identify the person with whom he allegedly spoke and he does not state with any specificity his "concern for the lack of supervision." Thus, even if it assumed that petitioner's conversation with the unidentified principal took place, the conclusory nature of petitioner's allegations regarding the content of that conversation are insufficient to provide the District with actual knowledge of the essential facts of the present claim based on negligent supervision (see Matter of Jantzen v Half Hollow Hills Cent. School Dist. No. 5, 56 AD3d 474, 475 [2008] [mother's affidavit, alleging that she provided "detailed information concerning what had transpired" to the school nurse within one week after the incident was insufficient to provide notice of a claim for negligent supervision]).

It has been repeatedly held that a school district's knowledge that a student has been injured, without more, does not constitute actual knowledge of the essential facts constituting a claim based on negligent supervision (see Matter of Felice, 50 AD3d at 147-148 [collecting cases]). That principle has been repeatedly applied in situations similar to the facts present in this case, namely where a school district had knowledge that one of its students was injured while participating in gym class or another athletic activity, but where no facts showing the existence of a potential claim for negligent supervision were alleged until after the deadline for serving a

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[2] As previously noted, Principal Brafman avers that he is the Principal responsible for the freshmen and sophomore classes and that any matter concerning the infant, who was a sophomore at the time, would have been referred to him. He denies ever speaking with Mr. Williams about the incident.

timely notice of claim had passed (id. [cheerleading]; Matter of Manuel v Riverhead Cent. Sch. Dist., 116 AD3d 1048 [2014] [student injured his right knee while playing two-hand touch football in gym class]; Matter of Conger, 87 AD3d 1253 [3d Dept 2011] [student was injured when he fell on ice while playing broomball during gym class]; Matter of Jantzen, 56 AD3d 474 [student was injured during a wrestling scrimmage]; Matter of Scolo v Central Islip Union Free School Dist., 40 AD3d 1104 [2007] [six year old student received a cut on her upper lip requiring five or six stitches when she collied with another student in gym class]; Matter of Ryder v Garden City School Dist., 277 AD2d 388 [2000] [student was injured when he was hit by another player during football practice]; Matter of Rusiecki v Clarkstown Cent. School Dist., 227 AD2d 493 [1996] [15 year old student was injured when she banged her knee on the floor during volleyball practice]). The principle that a school district's knowledge of a student's injury, without more, does not constitute actual knowledge of the essential facts constituting a claim based on negligent supervision has also been consistently applied to incidents not involving physical education or athletics (see e.g. Matter of Saponara v Lakeland Cent. School Dist., ___ AD3d ___, 2016 NY Slip Op 02836 [2d Dept, April 13, 2016]; Matter of Lamprecht v Eastport-South Manor Cent. Sch. Dist., 129 AD3d 1084 [2015]; Matter of Hampson, 114 AD3d 790; Matter of Joseph v City of New York, 101 AD3d 721 [2015]; Matter of Petersen v Susquehanna Val. Cent. School Dist., 57 AD3d 1332 [3d Dept 2008]; Matter of Messere v Fink, 240 AD2d 811 [1997]).

By contrast, in the cases cited by petitioner, it was undisputed that the school district had timely actual notice of the essential facts constituting the claim (see e.g. Guga v Watertown Bd. of Educ., 113 AD3d 1108, 1109 [2014] [respondent "investigated the incident by questioning

students and faculty 'within days of the occurrence'"]; Matter of Hursula v Seaford Middle School, 46 AD3d 892, 893 [2007] ["All of the witnesses to the accident, the coach and other members of the cheerleading team, are known, and the [district] will likely have no trouble interviewing them"]; Matter of Vitale v Elwood Union Free School Dist., 19 AD3d 610, 611 [2005] ["The appellants do not dispute that they had immediate notice of the infant petitioner's schoolyard accident, and actually interviewed eyewitnesses and prepared an accident report"]; Matter of Strevell v South Colonie Cent. School Dist., 144 AD2d 733 [1988] [the student was unable to walk after her fall and was carried to the school nurse by a janitor; a principal prepared and signed an incident report on the date of the incident]; Pepe v Somers Cent. School Dist., 108 AD2d 799, 800 [1985] ["the school district 'acquired actual knowledge of the facts constituting the claim' immediately after the accident"]; Matter of Urban v Waterford-Halfmoon Union Free School Dist., 105 AD2d 1022 [1984] [district was put on notice of the infant's fall in an unlighted staircase and the nature of his injuries within five days of the incident]). Accordingly, the court concludes that respondent did not have actual knowledge of the essential facts of petitioner's claim based on negligent supervision until he commenced this proceeding.

Turning to consideration of the remaining two factors, petitioner offers two excuses for his delay in timely filing a notice of claim – the student's infancy and the fact that the severity of his injuries was not known until he had surgery on January 3, 2016. Neither excuse is reasonable. Infancy alone, without any showing of a nexus between the infancy and the delay, is insufficient to constitute a reasonable excuse (see Matter of Saponara, 2016 NY Slip Op 02836; Matter of Manuel v Riverhead Cent. Sch. Dist., 116 AD3d at 1049; Matter of Felice v Eastport/South Manor Cent. School Dist., 50 AD3d at 151). The fact that a claimant is

reasonably unaware of the extent of his or her injuries until after the time for filing a notice has passed may constitute a reasonable excuse for delay; however, that factor is not present in this case. It is now undisputed that the incident occurred on October 26, 2016 and that the infant had surgery on January 3, 2016 – 69 days later – well within the 90-day deadline for timely service of a notice of claim.

Moreover, petitioner has failed to establish that the delay will not substantially prejudice respondent's defense of the claim. The District did not have notice of petitioner's claim that it is liable for the infant's injuries due to negligent supervision – it was only aware that the infant had injured his knee due to a fall – thus, it had no reason to conduct a prompt investigation of the incident (see Matter of Scolo, 40 AD3d at 1106; Matter of Ryder, 277 AD2d at 389). Nor did the initial reports show that the infant's injuries were so serious as to alert the District to the need to conduct a prompt investigation of the incident (see Matter of Rusiecki, 227 AD2d at 494). Further, neither the infant nor the petitioner have yet identified any witnesses to the incident; in fact, the infant initially reported to the school nurse that there were no witnesses to his fall. Thus, it would be difficult to now identify witnesses, whose memories of an incident that may not have seemed noteworthy at the time – given the fact that the infant did not initially appear to have been seriously injured – have likely faded in the six months that have passed since the incident (see e.g. Matter of Felice, 50 AD3d at 153).

Thus, each of the three factors, most notably the fact that respondent did not have timely knowledge of the essential facts constituting the claim, weigh against granting petitioner leave to serve a late notice of claim; accordingly, petitioner's application for leave to serve a late notice of claim is denied.

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry (see CPLR 5513).

Dated: May 2, 2016
Cortland, New York

Phillip R. Rumsey

Digitally signed by Phillip R. Rumsey
DN: cn=Phillip R. Rumsey, o, ou, email=PRumsey@NYCourts.gov, c=US
Date: 2016.05.02 07:38:45 -04'00'

HON. PHILLIP R. RUMSEY
Supreme Court Justice

ENTER

The following documents were filed with the Clerk of the County of Cortland:

- Notice of motion dated March 4, 2016.
- Affidavit of Karen J. Krogman Daum, sworn to March 4, 2016, with Exhibit A.
- Affidavit of Jerome Williams, Jr., sworn to March 2, 2016.
- Affidavit of Keith A. O'Hara, sworn to April 11, 2016.
- Affidavit of Michael J. Hoose, sworn to April 7, 2016.
- Affidavit of Sean Mack, sworn to April 7, 2016.
- Affidavit of Karen Phalen, sworn to April 7, 2016, with Exhibit A.
- Affidavit of Kenneth Brafman, sworn to April 7, 2016.
- Affidavit of Karen J. Krogman Daum, sworn to April 21, 2016, with Exhibit A.
- Original Decision and Order dated May 2, 2016.