At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 19th day of April 2023, by Microsoft Teams.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

RAFAEL CONCEPCION,

Plaintiff,

vs.

VILLAGE OF JOHNSON CITY, JOHNSON CITY CENTRAL SCHOOL DISTRICT and JOSEPH ROMA,

Defendants.

DECISION AND ORDER

Index No. EFCA2022002094

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

There are two motions to be determined by the Court at this time. Plaintiff Rafael Concepcion ("Concepcion") filed a motion seeking permission to serve a late Notice of Claim. Thereafter, Defendants Johnson City Central School District ("Johnson City CSD") and Joseph Roma ("Roma") filed a cross-motion, pursuant to CPLR § 3211 (a)(7) and General Municipal Law § 50-e, to dismiss the Complaint.[1] Oral argument was conducted by Microsoft Teams on April 19, 2023 and the attorneys for all parties were present. After due deliberation, this constitutes the Court's Decision and Order.[2]

BACKGROUND FACTS

On February 7, 2022, Concepcion was involved in a motor vehicle accident on Reynolds Road in Johnson City. Plaintiff claims that he was stopped behind a vehicle which was waiting to make a left-hand turn, and he was struck from behind by a Johnson City CSD school bus operated by Roma. The driver of the turning vehicle is not a party to this action. Concepcion was taken from the scene by an ambulance, and his car was towed due to the damage. The bus also sustained front end damage.

Plaintiff filed a Summons and Complaint on October 31, 2022. Defendants filed a Verified Answer with Affirmative Defenses and a Cross-Claim on January 9, 2023, which they amended on January 13, 2023. One of the affirmative defenses is based on Plaintiff's alleged failure to serve a timely Notice of Claim on Johnson City CSD.

Plaintiff brought this motion to allow him to serve a Notice of Claim, *nunc pro tunc*. Plaintiff included a proposed Notice of Claim and argued that the school district had "actual knowledge" of this accident and would not be substantially prejudiced by the granting of this motion. Plaintiff also proffered an excuse for the failure to serve the Notice of Claim, essentially claiming mistake as to the proper entity to be served. Plaintiff included a copy of the police accident report with his motion. Defendants opposed Plaintiff's motion, and filed their own cross-motion to dismiss the Plaintiff's Complaint due to Plaintiff's failure to serve a timely

[1] The action against the Village of Johnson City was previously discontinued by the Plaintiff, leaving only Johnson City CSD and Roma as Defendants.

[2] All the papers filed in connection with the motion and cross-motion are included in the NYSCEF electronic case file, and have been considered by the Court.

Notice of Claim as required under Gen. Mun. Law § 50-e. Defendants argue that timely filing of a Notice of Claim is a condition precedent to commencing an action, and Plaintiff's failure to prove compliance with this condition precedent supports dismissal for failure to state a cause of action under CPLR 3211(a)(7). In opposition to Defendants' motion to dismiss, Plaintiff filed an attorney affirmation with Exhibits, and an affidavit from the person who served the Notice of Claim, with an Exhibit. Defendants then filed their own reply affirmation.

LEGAL DISCUSSION AND ANALYSIS

Gen. Mun. Law § 50-e establishes a "protocol for serving a notice of claim as a condition precedent to a suit against a public corporation." *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 535 (2006). The purpose of requiring Notice of Claim is "[t]o enable authorities to investigate, collect evidence and evaluate the merit of a claim." *Brown v. City of New York*, 95 NY2d 389, 392 (2000); *New York State Elec. & Gas Corp. v. County of Chemung*, 137 AD3d 1550 (3rd Dept. 2016), *app dismissed* 28 NY3d 1044 (2016); *see*, *Matter of Felice v. Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138, 147 (2nd Dept. 2008). As relevant here, pursuant to Gen. Mun. Law § 50-e (1), Notice of Claim must be provided to a public corporation within ninety days after the claim arises. *Wally G. v. New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672 (2016); *Williams v. Nassau County Med. Ctr.*, 6 NY3d at 535; Gen. Mun. Law § 50-e (1)(a). A "public corporation" includes a "municipal corporation" [Gen. Const. Law § 66(1)], and a school district comes within the definition of a "municipal corporation." Gen Cons. Law § 66(2); *see, Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 n.2 (2016); *Roslyn Union Free Sch. Dist. v. Barkan*, 16 NY3d 643 (2011); *see also* Gen. Mun. Law § 800(4); Gen. Const. Law § 65 (b). Thus, the requirements of Gen. Mun. Law § 50-e are applicable to this claim against Johnson City CSD.

If timely Notice of Claim is not given, the Petitioner/Plaintiff can still seek a court order authorizing late notice. Gen. Mun. Law § 50-e (5) permits a court, in its discretion, to extend the time to serve a Notice of Claim, or deem a late Notice of Claim timely served, *nunc pro tunc*. *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 460-461; *see*, *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d 1263 (3rd Dept. 2019); *Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 151 AD3d 1262 (3rd Dept. 2017); *see also, Matter of Reddick v. New*

York City Hous. Auth., 188 AD3d 890 (2nd Dept. 2020). In deciding whether to grant an application to serve a late Notice of Claim, the court "is statutorily required to consider a nonexhaustive list of factors, including whether the respondent had actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, whether the petitioner offered a reasonable excuse for the delay in filing and whether the respondent incurred substantial prejudice as a result." *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d at 1264 [internal brackets omitted], *quoting Daprile v. Town of Copake*, 155 AD3d 1405, 1406 (3rd Dept. 2017); *see Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY 3d at 461; *Matter of Cornelius v. Board of Educ. of Delhi Cent. Sch. Dist.*, 77 AD3d 1048, 1049 (3rd Dept. 2010); *Mindy O. v. Binghamton City Sch. Dist.*, 83 AD3d 1335, 1336-1337 (3rd Dept. 2011). "No single factor is dispositive and, absent a clear abuse of discretion, Supreme Court's determination in this regard will not be disturbed." *Matter of Waliszewski v. Ulster*, 169 AD3d 1212, 1213 (3rd Dept. 2019) *quoting Matter of Cornelius v. Bd. of Educ. of Delhi Cent. Sch. Dist.*, 77 AD3d at 1049; *Mariani v. Wilson Cent. Sch. Dist.*, 192 AD3d 1579, 1580 (4th Dept. 2021); *Matter of Reinemann v. Village of Altamont*, 112 AD3d 1264, 1265 (3rd Dept. 2013). Courts have also recognized that actual knowledge is a factor that should be given significant weight. *Matter of Christopher M. v. Bouquet Val. Cent. Sch. Dist.*, 200 AD3d 1176 (3rd Dept. 2021); *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d at 1264; *Matter of Lugo v. GNP Brokerage*, 185 AD3d 824, 825 (2nd Dept. 2020); *Matter of Felice v. Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d at 147. Given the importance of actual knowledge in the equation, the Court will start with discussion of that factor.

1. Actual Knowledge

Initially, the Court notes that the statute specifically provides that "actual knowledge" can be met by virtue of information obtained by the insurance carrier. Gen. Mun. Law § 50-e (5); *see Matter of Felice v. Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138; *McAdams v. Police Dep't of Clarkstown*, 184 AD2d 847 (3rd Dept. 1992); *see also Shapiro v. County of Nassau*, 5 AD3d 690, 690 (2nd Dept. 2004) ("It does not avail the County to argue that it received no such notice when it makes no effort to dispute that its insurer received such notice."); *Gilbert v. Eden*

Cent. Sch. Dist., 306 AD2d 925 (4th Dept. 2003). In the present case, Plaintiff's claim of "actual knowledge" applies to both the school district and its insurance carrier.

The phrase "actual knowledge of the essential facts constituting the claim" has generated considerable litigation and discussion about the circumstances in which that requirement is met. The caselaw has established that a municipality's knowledge of the incident/accident itself is not enough. *See, Williams v. Nassau County Med. Ctr.*, 6 NY3d 531; *Matter of Felice v. Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138; *Matter of McFarland v. City of New York*, 169 AD3d 687 (2nd Dept. 2019). Thus, for example, mere possession of medical records, an accident report, or a police report, without more, does not establish actual knowledge. The evidence must include details providing some reasonable inference of fault ascribable to the municipality [*See, e.g. Matter of Christopher M. v. Bouquet Val. Cent. Sch. Dist.*, 200 AD3d 1176; *Sherb v. Monticello Cent. Sch. Dist.*, 163 AD3d 1130 (3rd Dept. 2018); *Matter of Reinemann v. Village of Altamont,* 112 AD3d 1264; *Matter of Petersen v. Susquehanna Val. Cent. Sch. Dist.*, 57 AD3d 1332 (3rd Dept. 2008)] as well as information concerning injuries resulting therefrom. *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531; *Spaulding v. Cobleskill-Richmondville Cent. Sch. Dist.*, 289 AD2d 860 (3rd Dept. 2001); *see, Matter of Jackson v. Newburgh Enlarged City Sch. Dist.*, 85 AD3d 1031 (2nd Dept. 2011); *Santana v. W. Reg'l Off-Track Betting Corp.*, 2 AD3d 1304 (4th Dept. 2003). Here, the evidence is sufficient to show both the municipality's potential fault and that Plaintiff sustained injury.

First, the record(s) must provide some facts to suggest that the municipality might be responsible for the accident or otherwise liable. *See, Kirtley v. Albany County Airport Auth.*, 67 AD3d 1317 (3rd Dept. 2009); *see also, Wally G. v. New York City Health & Hosps. Corp.*, 27 NY3d 672, 677 ("medical records must 'evince that the medical staff, by its acts or omissions, inflicted an injury on plaintiff' in order for the medical provider to have actual knowledge of the essential facts."). If the records do not show, suggest, or imply any responsibility on the part of the municipality, then actual knowledge is not established. *See, e.g. Williams v. Nassau County Med. Ctr.*, 6 NY3d 531; *Kirtley v. Albany County Airport Auth.*, 67 AD3d 1317; *Matter of Antoinette C. v. County of Erie*, 202 AD3d 1464 (4th Dept. 2022); *Matter of D.M. v. Center Moriches Union Free Sch. Dist.*, 151 AD3d 970, 972 (2nd Dept. 2017); *Matter of Apgar v. Waverly Cent. Sch. Dist.*, 36 AD3d 1113 (3rd Dept. 2007); *Brown v. City of Buffalo*, 100 AD3d 1439, 1440 ("for a police report to provide actual knowledge of the essential facts, one must be

able to readily infer from that report that a potentially actionable wrong had been committed by the public corporation."). The record must "demonstrate[] that respondents possessed more than a generalized awareness that [Petitioner] had been injured and, indeed, 'acquired actual notice of the essential facts of the claim shortly after the accident through their representatives sufficient to allow them to undertake the necessary investigation to defend a potential claim.'" *Matter of Schwindt v. County of Essex*, 60 AD3d 1248, 1250 (3rd Dept. 2009) [internal brackets omitted], *quoting Matter of Isereau v. Brushton-Moira Sch. Dist.*, 6 AD3d 1004, 1006 (3rd Dept. 2004); *Matter of Felice v. Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138. This framework serves to further the underlying purpose of the notice requirement- to permit the public corporation to recognize the potential of a claim being made and to investigate the claim and collect evidence.

Second, the report(s) must also indicate an injury resulted from the accident/incident. *Matter of Diaz v. Rochester-Genesee Regional Transp. Auth (RGRTA),* 175 AD3d 1821 (4th Dept. 2019); *Spaulding v. Cobleskill-Richmondville Cent. Sch. Dist.*, 289 AD2d 860. Without an injury, the municipality only has information of some events or conditions, but has not been provided information warranting any investigation. In *Smith v. Otselic Valley Cent. Sch. Dist.*, 302 AD2d 665 (3rd Dept. 2003), Petitioner was injured while attempting to fix a guard on a roofing saw, while working on the roof of an elementary school. He sought to bring an action for Labor Law violations. The Third Department noted that there was evidence that some District employees had been aware that a worker was injured, but there were no details as to the specifics of the accident or the extent of any injuries. That was insufficient to show actual knowledge. Similarly, in *Spaulding v. Cobleskill-Richmondville Cent. Sch. Dist.*, 289 AD2d 860, where Petitioner was involved in a motor vehicle accident with a school bus, but no injuries were reported to the investigating police officer, actual knowledge was not established and there was "no reason to conduct the type of thorough investigation warranted where serious injuries are involved." *Id.* at 861.

With the above factors in mind to guide the Court's review in this case, the Court finds that Plaintiff has established Defendants' actual knowledge, both through the information obtained by the insurance company, and through the school district employees and/or representatives. As to the insurance company's knowledge, this accident involved one of the District's buses, and the insurance carrier for the school district, Utica National Insurance Group

("Utica National"), was notified of the accident by letter dated March 2, 2022 from Plaintiff's attorney. Plaintiff submitted a copy of the March 2, 2022 letter to Utica National and the carrier's reply of March 3, 2022 (24 days after the accident) acknowledging Plaintiff's claim for bodily injury. A claim for bodily injury is evidence that Plaintiff was seeking redress for injuries sustained as a result of the bus driver's fault. Plaintiff also supplied a March 11, 2022 letter from Concepcion's own insurance company, Liberty Mutual Insurance ("LMIC"), stating that LMIC had contacted Utica National regarding Concepcion's possible underinsured benefits, and that Utica National had accepted coverage and liability for the accident. This proof is sufficient to show that Johnson City CSD's insurance carrier had information concerning the accident in a timely manner, and acknowledged Plaintiff's claim for bodily injury. The fact that this was a rear end collision makes it even more compelling because a rear end collision creates a *prima facie* case of negligence. *Altman v. Shaw*, 184 AD3d 995 (3rd Dept. 2020).

Some of the evidence produced can show knowledge of both the insurance company and the school district. Plaintiff attached a copy of the police report completed following the accident, which revealed that the school bus rear-ended Concepcion's car, and the police report states that the operator of the bus was at fault for the accident. Unlike cases where the report does not suggest any fault on the part of the municipality, the potential for liability is evident upon any reasonable review of the police accident report. Furthermore, here the record establishes that the school district's bus was involved in the accident and sustained damage. Once informed of the damage to their property, the school district had sufficient information to begin an investigation [*see e.g. Gilbert v. Eden Cent. Sch. Dist.*, 306 AD2d 925], and here the school district also had evidence of fault and injuries, based on the police report and the fact that Plaintiff was transported by ambulance to a local hospital. The fact that the municipality's employee was involved in the accident on which the claim is based, and performed the acts complained of, is particularly important to showing actual knowledge. *See, e.g. Gibbs v. City of New York*, 22 AD3d 717 (2nd Dept. 2005); *Spaulding v. Cobleskill-Richmondville Cent. Sch. Dist.*, 289 AD2d 860.

Defendants cite to *Thill v. N. Shore Cent. Sch. Dist.*, 128 AD3d 976 (2nd Dept. 2015) to support their claim of lack of actual knowledge, but that case is distinguishable. In *Thill*, a police accident report was submitted, but it did not make any suggestion of fault on the part of the Defendant/Respondent (in particular, an employee of Defendant/Respondent). The Defendant's

employee was a pedestrian within a crosswalk when she was struck by a vehicle driven by a non-party. The non-party vehicle then crossed the median and struck Thill's vehicle. The Second Department noted that a "report which describes the circumstances of the accident without making a connection between the petitioner's injuries and negligent conduct on the part of the public corporation will not be sufficient to constitute actual notice of the essential facts constituting the claim." *Thill*, 128 AD3d at 977 (citations omitted). In *Thill*, the school district's employee was referenced in the police accident report, but there was nothing to suggest any wrong-doing on the part of the employee, who was simply a pedestrian in the accident. *See, e.g. Matter of Antoinette C. v. County of Erie*, 202 AD3d 1464 (the police accident report did not make a connection between the accident and any negligence on the part of the municipality); *Brown v. City of Buffalo*, 100 AD3d 1439. In the case at bar, the police accident report specifically noted that the school bus operator was at fault for following too closely. Unlike *Thill*, where fault was not evident from review of the police accident report, here fault was clearly set forth in the police accident report. Even without Utica National's acknowledgment, the facts show that Johnson City CSD independently acquired "actual knowledge".

In this case, the school district's own employee was involved in the accident, the school district's property was damaged, and the accident report specifically identifies the school district's employee as responsible for the accident. That is sufficient to show actual knowledge on the part of Johnson City CSD concerning potential responsibility for the accident. *See, e.g. McAdams v. Police Dep't of Clarkstown*, 184 AD2d 847 (police department's vehicle was involved in an accident and had to be towed from the scene, three people were taken from the scene by ambulance, a police accident report was prepared, and the Department's employee was involved in the accident); *De Groff v. Bethlehem Cent. Sch. Dist.*, 92 AD2d 702, 702 (4th Dept. 1983) (school bus involved in accident and Plaintiff's injuries "were sufficiently serious to have alerted respondent to the advisability of undertaking a thorough investigation of the incident.").

The evidence is also sufficient to show an injury resulted from the accident. Defendants argue that even if there was some notice of the accident and fault, the summary in the police accident report only indicates that Concepcion complained of back and neck pain at the scene, which did not alert the school district to potential injuries or even whether Plaintiff sustained a "serious injury" as defined in NY Ins. Law § 5102 (d). Defendants posit that a complaint of pain does not show that Plaintiff required any further treatment. The Court finds that argument

unpersuasive. There were sufficient details of Plaintiff's injuries in the accident report, and by virtue of him being transported to the hospital by ambulance. This fact pattern is far removed from the cases where it was not clear if any injuries at all resulted. Here, the evidence is more than adequate to inform the Defendants of at least some injury that should have alerted them of the prudence of further investigation. The nature of the Notice of Claim and "actual knowledge" is not to fully delineate the injuries and damages (which oftentimes would not even be known within the 90 days to file a Notice of Claim), but to provide some basic information of an injury being sustained such that the Defendant had enough information to merit further investigation. The evidence presented in this case meets that standard.

Whether the Plaintiff will be able to establish "serious injury" is not the focus of a Notice of Claim, and not a basis to claim a lack of actual knowledge. The issue of "serious injury" is relevant to an injured party's ability to bring a lawsuit for pain and suffering under Insurance Law, and is entirely distinct from the Notice of Claim requirements under Gen. Mun. Law § 50-e. The School District was provided with enough information to show some possible injury resulting from the accident even though the full extent of any claimed injuries was unknown. Any failure to inquire further is not attributable to the late Notice of Claim.

Based on all the relevant considerations, the Court concludes that although the Claimant did not file a Notice of Claim within 90 days of the accident, that the Johnson City CSD and/or its insurance carrier did obtain "actual knowledge" of the accident and the potential for a claim to be made for injuries sustained in the accident.

2. Lack of prejudice

The Court next turns to the question of prejudice. "[T]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 151 AD3d at 1263. If Petitioner makes that showing, then the burden is shifted to Respondent to rebut Petitioner's showing of a lack of prejudice, by providing particularized evidence. *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 467; *Perkins v. Albany Port Dist.*

Comm'n, 189 AD3d 1929 (3rd Dept. 2020); *Sherb v. Monticello Cent. Sch. Dist.*, 163 AD3d 1130. "[A] finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record." *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 465-466.

In this case, the Court has concluded that Johnson City CSD had "actual knowledge" and "[s]ince the District acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing a lack of prejudice." *Matter of Fennell v. City Sch. Dist. of City of Long Beach*, 118 AD3d 783, 784 (2nd Dept. 2014) (citations omitted); *see*, *Perkins v. Albany Port Dist. Comm'n*, 189 AD3d 1929; *Sherb v. Monticello Cent. Sch. Dist.*, 163 AD3d 1130. Thus, the burden was shifted to Defendants "to rebut plaintiff's showing with particularized evidence." *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d at 467.

Defendants claim that they have been prejudiced because: 1) they were unable to conduct a Gen. Mun. Law § 50-h hearing and obtain a physical examination prior to the commencement of the action; 2) Plaintiff has been involved in two other motor vehicle accidents with injuries, some of which may be similar to the current claim, and 3) Plaintiff apparently underwent a cervical fusion at some point after this accident, and Defendants are now unable to obtain an Independent Medical Examination prior to the surgery. The record does not specify the date of the surgery and no medical records regarding the same were provided to the Court.

At the outset, the Court again notes that Johnson City CSD's insurance carrier had knowledge of the accident, the potential for liability and at least some level of injury, 24 days after the accident, at the latest. Despite that, no effort was made to conduct a 50-h hearing or obtain an IME. Defendants' failure to avail themselves of those options are not the result of the late Notice of Claim.

Moreover, the Court's consideration of the 50-h argument is nearly the same as actual knowledge under 50-e (5). *Jusino v. New York City Hous. Auth.*, 255 AD2d 41, 46-47 (1st Dept. 1999). The purpose of a § 50-h examination is "'is to afford the city an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement.'" *Colon v. Martin*, 35 NY3d 75, 79-80 (2020), *quoting Alouette Fashions v. Consolidated Edison Co. of N.Y.*, 119

AD2d 481, 487 (1st Dept. 1986). Since Johnson City CSD had actual knowledge shortly after the accident, and certainly within 24 days of the accident that provided information as to the place, time and nature of the accident, the school district had enough details and could investigate and evaluate the merit of the claim. *See, Bennett v. N.Y. City Transit Auth.*, 3 NY3d 745 (2004).

Johnson City CSD had knowledge of the claim but failed to seek a § 50-h examination. Having failed to avail itself of that opportunity, Johnson City CSD cannot now claim prejudice. Further, Defendants have failed to establish, with particularized evidence, how the failure to obtain a § 50-h examination has resulted in prejudice to the school district. For example, there has been no showing that witnesses are no longer available, or that there is some other impediment to investigating the accident, even now.

Similarly, Defendants have failed to establish prejudice by virtue of Plaintiff having been involved in other motor vehicle accidents. While those accidents and any injuries resulting from those accidents could certainly bear on the issue of damages attributable to this accident, they do not have bearing on the Johnson City CSD's potential liability for this accident.

Defendants have not identified any manner in which their investigation would have been different if a Notice of Claim was filed. In particular, Defendants have not advanced an argument why they would have investigated the accident if a Notice of Claim was filed, but they could not do so even though they had actual knowledge of the accident. Also absent in Defendants' submission is any indication that an investigation of all the facts at this point is impossible, or that they cannot investigate the circumstances of the other accidents and injuries, with an eye toward possible apportionment of damages to those accidents.

Defendants also argue that they were prejudiced because they were not given an opportunity to have an Independent Medical Examination prior to the Plaintiff undergoing cervical surgery. However, Defendants' argument is speculative, and they have not provided any details regarding the surgery, Plaintiff's prior condition, or why an Independent Medical Examiner could not review medical records and offer an opinion as to what injuries and treatment, if any, are related to this accident. An injured Plaintiff should be permitted to pursue a course of treatment necessary to address his injuries without waiting for an IME that may, or may not be, scheduled in the future. "Plaintiffs must be free to determine when to undergo medical treatments based on personal factors such as doctor's advice and their specific pain and discomfort level. It would be absurd for courts to require a plaintiff to forego surgery (or other

medical treatment) for an injury so as not to potentially compromise a lawsuit against the party(s) alleged to have caused the injury." *Gilliam v. Uni Holdings*, 201 AD3d 83, 87 (1st Dept. 2021); *Cf. Lemma v. Off Track Betting Corp.*, 272 AD2d 669 (3rd Dept. 2000). In *Lemma*, there was no injury apparent immediately after the subject incident, and then Plaintiff waited over a year to give notice to the Defendant of the claim. In that situation, the Third Department concluded that the delay prevented Defendant from investigating, obtaining witness statements and obtaining an IME, and that Defendant was prejudiced. Here, Defendants have failed to show that they are prejudiced by having to conduct an IME after the surgery was performed. In fact, the IME might actually be aided by being able to review surgical reports and follow up treatment records.

The Court concludes that Plaintiff made a *prima facie* showing that Johnson City CSD will not be prejudiced if Plaintiff's motion is granted. The Defendants have not adequately met their burden to rebut Plaintiff's showing. Defendants have not shown that their ability to investigate this accident has been compromised- they can still obtain a § 50-h examination, collect evidence including medical records, and conduct an Independent Medical Examination. Therefore, Defendants have not rebutted the *prima facie* showing of no prejudice.

3. Reasonable Excuse

The Court next turns to issue of whether Petitioner has articulated a reasonable excuse for the delay. Although the statute does not expressly list this factor, the statute does require the court to "consider all other relevant facts and circumstances", and the courts have consistently considered a Petitioner's "reasonable excuse" when determining whether to permit a late Notice of Claim. *See, e.g. Perkins v. Albany Port Dist. Comm'n.*, 189 AD3d at 1930; *Matter of Waliszewski v. Ulster*, 169 AD3d 1212, 1213; *Matter of Holbrook v. Village of Hoosick Falls*, 168 AD3d 1263, 1264.

A factor that is specifically listed in Gen. Mun. Law § 50-e (5) is "whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted." The Court will consider the error concerning the proper entity under the broader "reasonable excuse" factor.

Plaintiff concedes that Johnson City CSD was not properly served with a Notice of Claim. However, Plaintiff asserts that his process server made a mistake concerning the public corporation that needed to be served. The affirmation from Plaintiff's attorney states that he took over representation from another attorney and was informed that Notice of Claim had been served while the case was being handled by the first attorney. However, Plaintiff's current counsel then came to realize that service was made, but that it was made on the Village of Johnson City; not on Johnson City CSD.

Plaintiff submitted an affidavit of the process server who stated that on March 22, 2022 (43 days after the accident) he travelled from Brooklyn, New York to Johnson City to serve a Notice of Claim. Being unfamiliar with the area, he inquired where he needed to go to serve the Village and the school district and he was directed to a government building where he delivered the Notice of Claim to a Clerk, and received a stamped copy back. In fact, however, it appears that the Clerk was only authorized to accept service on the Village, but not Johnson City School District. The process server also stated that he was confused about the identity of the proper public corporations that were to receive the Notice of Claim. "Error concerning the identity of the governmental entity to be served can be excused provided that a prompt application for relief is made after discovery of the error." *Farrell v. City of New York*, 191 AD2d 698, 699 (2nd Dept. 1993); *see, Santana v. W. Reg'l Off-Track Betting Corp.*, 2 AD3d 1304; *Lemma v. Off Track Betting Corp.*, 272 AD2d 669. Here, Plaintiff's counsel averred that the first attorney informed him that the Notice of Claim was served (which it was, but just not properly on all parties), and that he was waiting to receive an affidavit of service. After he found out there was no affidavit of service of the Notice of Claim on the school district, and Defendants raised that affirmative defense in their Answer (initially filed on January 9, 2023 and Amended on January 13, 2023), Plaintiff made this motion on January 27, 2023.

Based on the foregoing, the Court concludes that Plaintiff has provided a reasonable excuse for failing to serve a timely Notice of Claim on Johnson City CSD, and acted promptly after Defendants' affirmative defense alerted him to that defect. *See, Matter of Duarte v. Suffolk County*, 230 AD2d 851 (2nd Dept. 1996). Even if the Court were to find that Plaintiff did not show a reasonable excuse, that fact "is without significance given the existence of actual notice and the city's failure to show substantial prejudice by the late notice." *Richardson v. New York City Transit Auth.*, 210 AD2d 38, 38 (1st Dept.), *quoting Gerzel v. New York*, 117 AD2d 549, 551

(1st Dept. 1986). Since Defendants had actual knowledge, and did not establish prejudice, the motion should be granted irrespective of a reasonable excuse. *Perkins v. Albany Port Dist. Comm'n*, 189 AD3d 1929; *Sherb v. Monticello Cent. Sch. Dist.*, 163 AD3d 1130; *Daprile v. Town of Copake*, 155 AD3d 1405.

CONCLUSION

The Court concludes that Concepcion has established the Johnson City CSD had actual knowledge of the essential facts constituting the facts of the claim within 90 days; that Johnson City CSD will not be prejudiced by the granting of Plaintiff's motion; and that Petitioner has set forth a reasonable excuse for her failure to timely file a Notice of Claim. Accordingly, Plaintiff has met the requirements for the Court to grant his relief under Gen. Mun. Law § 50-e (5).

Based on all the foregoing, it is hereby

ORDERED, that the Petition seeking an Order to permit the filing of a late Notice of Claim is GRANTED; and it is further

ORDERED, that Defendants' cross-motion to dismiss the Plaintiff's Complaint is DENIED.

This Decision and Order is being electronically uploaded to the NYSCEF system, but Plaintiff remains responsible for ensuring proper compliance with any service upon Respondents of the Decision and Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 7, 2023
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice