When is a Notice of Claim Notice of a Claim?

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Introduction

- Naming individual county employees in the Notice of Claim
- Late Notices of Claim after *In re Matter of Newcomb*

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County Law § 52(1)

- A Notice of Claim for damages or injury against a county, *its officers, agents, servants, or employees* must comply with General Municipal Law § 50-e

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General Municipal Law § 50-e(2)

- A Notice of Claim must state:
  - The name and post office address of each claimant (and his/her attorney);
  - The nature of the claim;
  - The time when, the place where, and the manner in which the claim arose; and
  - The items of damage or injuries claimed to have been sustained

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The Notice of Claim – Why Have It?

- Gives the county an opportunity to investigate a claim
  - *Purdy v. City of New York* (193 NY 521 [1908])
    - The purpose of a Notice of Claim is to permit a county "to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation"

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Naming An Individual in the Notice of Claim

- *Firester v. Lipson* (50 Misc2d 527 [Sup Ct, Nassau County 1966])
  - No Notice of Claim required for lawsuit against County Commissioner of Accounts
  - Commissioner named in individual capacity, not as a county employee

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Naming An Individual in the Notice of Claim

- *Schiavone v. County of Nassau* (51 AD2d 980 [2d Dept 1976])
  - Lawsuit brought against physicians employed by Nassau County
  - Implicates GML § 50-d
    - Requires a Notice of Claim in compliance with GML § 50-e for a claim against a resident physician, physician, intern, dentist, podiatrist, and optometrist
  - While the issue here was personal service on the physician, the Court's rationale is instructive:
    - "On a purely practical basis, it is obvious that, uniquely in medical malpractice actions, a potential claimant may be unable to ascertain the perpetrators of the alleged malpractice within the 90-day notice period."

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Naming An Individual in the Notice of Claim

- *Terrell v. County of Suffolk* (64 AD2d 897 [2d Dept 1978])
  - No Notices of Claim filed for individual defendants
  - Court held amendments to General Municipal Law and County Law removed requirement

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Naming An Individual in the Notice of Claim

- *Copece Contracting Corp. v. Erie County* (115 AD2d 320 [4th Dept 1985])
  - Compliance with County Law § 52 not required for claims filed against individual defendants in their individual capacities

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Naming An Individual in the Notice of Claim

- *Travelers Indemn. Co. v. City of Yonkers* (142 Misc2d 429 [Yonkers City Ct 1988])
  - No explicit provision of the GML that requires naming an individual in the Notice of Claim where the municipality is also named
  - **But** even if there was such a requirement, the court would ignore it under GML § 50-e(6)

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Naming An Individual in the Notice of Claim

- *Matter of Rattner v. Planning Com. of Vil. of Pleasantville* (156 AD2d 521 [2d Dept 1989])
  - A Notice of Claim is required for the named individual defendants because they are sued in their official capacities
  - The issue was not whether the individual needed to be named in the Notice of Claim but rather whether a Notice of Claim was required at all

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Naming An Individual in the Notice of Claim

- *White v. Averill Park Cent. Sch. Dist.* (195 Misc2d 409 [Sup Ct, Rensselaer County 2003])
  - No merit to argument a Notice of Claim can be filed naming government entity and then bring a lawsuit against individual employees
  - This argument also ignores the purpose of the Notice of Claim
  - GML § 50-e(1)(b) only excuses service of the Notice of Claim on an individual employee

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Naming An Individual in the Notice of Claim

- *Tannenbaum v. City of New York* (30 AD3d 357 [2d Dept 2006])
  - GML § 50-e "makes unauthorized" a lawsuit brought against an individual not named in the Notice of Claim
- *Cropsey v. County of Orleans Ind. Dev. Agency* (66 AD3d 1361 [4th Dept 2009])
  - Claim against individual employee of industrial development agency properly dismissed

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Naming An Individual in the Notice of Claim

- *Cleghornev. City of New York* (99 AD3d 443 [1st Dept 2012])
  - Action cannot proceed against individual not named in the Notice of Claim
- At this point, all Four Departments agree that an individual employee needs to be named in the Notice of Claim

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Naming An Individual in the Notice of Claim

- *Goodwin v. Pretorius* (105 AD3d 207 [4th Dept 2013])
  - Begins analysis with *White* – first case with such a holding
  - Distinguishes *Rattner* – the issue there was service of the Notice of Claim
  - The claimant/plaintiff may not be able to identify the perpetrators of the tort in time to serve and file the Notice of Claim identifying them

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Naming An Individual in the Notice of Claim

- *Pierce v. Hickey* (129 AD3d 1287 [3d Dept 2015])
  - No provision in the GML or County Law that requires naming an individual employee in Notice of Claim
  - Citing *Goodwin*, Court held that purpose of the Notice of Claim is met without naming individual employee

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Naming An Individual in the Notice of Claim

- *Alvarez v. City of New York* (134 AD3d 599 [1st Dept 2015])
  - Distinguish *Goodwin* and *Pierce*
    - In *Pierce*, name of the truck driver was known from the start, which permitted County to promptly investigate the claim
    - The *Goodwin* Court failed to explain how it was possible to investigate a claim against an individual only after the individual was named in the complaint

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Naming An Individual in the Notice of Claim

- *Alvarez v. City of New York* (134 AD3d 599 [1st Dept 2015])
  - GML only excuses a failure to serve the individual employee with the Notice of Claim
  - A claimant/plaintiff, from criminal proceedings, would know the names and badge numbers of the officers involved
    - Simple to name them in the Notice of Claim
  - At a minimum, using the "John Doe" or "Jane Doe" placeholder would alert the government of the involvement of individual employees

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Naming An Individual in the Notice of Claim

- *Alvarez v. City of New York* (134 AD3d 599 [1st Dept 2015])
  - Dissent
    - Government defendant is "uniquely positioned" to know the facts of a false arrest claim
    - Offices are available for interviews
    - Claimant/plaintiff is not in a better position
    - Government apprised of time, place, and manner of claim is "in the best position to identify the officers involved"

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Naming An Individual in the Notice of Claim

- *Blake v. City of New York* (148 AD3d 1101 [2d Dept 2017])
  - Adopts holding from *Goodwin* and *Pierce*
  - GML § 50-e(2) does not require naming an individual in the Notice of Claim

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Naming An Individual in the Notice of Claim

- Claimants should be required to disclose as much as possible about the *'who'* just as they are required to disclose what is known about the *'what,' 'when,'* and *'where'* of alleged claims
- To allow otherwise assumes that it will be possible to identify employees involved in a particular claim from the other information in the Notice of Claim
- It is conceivable that, without this information, an adequate investigation to identify which, of its hundreds or thousands of employees, was involved in a particular incident is not possible

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Naming An Individual in the Notice of Claim

- The nature of the claim is critical
  - A false arrest claim requires the involvement of a police officer
  - A medical malpractice claim may involve an emergency medical technician, a nurse, or a doctor
  - A claim arising out of a motor vehicle accident requires the involvement of an employee driving a vehicle
- It is not feasible to separate the employee from the claim and treat the claim and employee as separate and distinct

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Naming An Individual in the Notice of Claim

- Claims against police officers
  - The approach adopted in *Blake* overlooks the fact that the government may be in a worse position than the claimant to investigate a claim
  - A claim for false arrest or malicious prosecution is based on an individual not being convicted of some criminal conduct
    - The documents that would allow the municipality to identify the police officers involved would be sealed and unavailable to the municipality until it receives permission from the claimant to obtain those records
    - The claimant's access, is not so restricted

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General Municipal Law § 50-e(5)

- On an application to file a late Notice of Claim, the Court should consider
  - Whether there is a reasonable excuse for the delay;
  - Whether the governmental entity had actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter;
  - Whether the delay has substantially prejudiced the governmental entity

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Late Notices of Claim – Substantial Prejudice

- *Matter of Newcomb v. Middle Country Cent. Sch. Dist.* (28 NY3d 455 [2016])
  - Before *Newcomb*, all four Appellate Divisions inconsistently treatment the substantial prejudice element
    - Decisions held petitioners bore the burden to demonstrate that the governmental entity would not be substantially prejudiced
    - Decisions in which this burden was initially placed on the governmental entity to demonstrate the lack of substantial prejudice or shifted the burden from the petitioner when the petitioner met its initial burden

Late Notices of Claim – Substantial Prejudice

- *Matter of Newcomb v. Middle Country Cent. Sch. Dist.* (28 NY3d 455 [2016])
  - In *Newcomb*, the Court resolved, for the most part, this inconsistency
    - The burden initially lies with the petitioner to demonstrate the lack of substantial prejudice
      - This oes not require "extensive" evidence but must include "some evidence or plausible argument" that there is no substantial prejudice
    - If met, the governmental entity must demonstrate, with "particularized evidence," substantial prejudice
      - According to the Court, this framework strikes a "fair balance" between petitioners and the government, which is "in the best position to know and demonstrate whether it has been substantially prejudiced"

Late Notices of Claim – Substantial Prejudice

- *Matter of Newcomb v. Middle Country Cent. Sch. Dist.* (28 NY3d 455 [2016])
  - Applied to *Newcomb*, the Court found the petitioner met its initial burden by submitting the photographs from the police investigation file, which would permit the school district to "reconstruct the conditions on the date of the accident"
  - As to the school district, the Court held speculation and inference relied upon by the lower courts failed to satisfy the "particularized evidence" standard

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Late Notices of Claim – Substantial Prejudice

- *Grajko v. City of New York* (150 AD3d 595 [1st Dept 2017])
  - Majority held that the petitioner failed to establish a lack of substantial prejudice because
    - No specific evidence the City was aware the accident occurred
    - Construction documents did not provide the names of any witnesses
  - Dissent found that the petitioner established a lack of substantial prejudice
    - Petitioner's affidavit described the scaffold and the nature of the petitioner's work in detail, including the fact that the scaffold was disassembled daily and could not be inspected
    - Petitioner relied upon several witnesses who could testify regarding the condition of the scaffold and his injuries
    - Photographs could be used to "reconstruct and investigate the accident"
    - The City could obtain records from its contractor to investigate and defend against the petitioner's claim and to identify potential witnesses.

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Late Notices of Claim – Substantial Prejudice

- *Townson v. New York City Health & Hosp. Corp.* (158 AD3d 401 [1st Dept 2018])
  - Majority held that the petitioner established a lack of substantial prejudice because
    - Multiple letters sent by counsel to HHC for treatment records, which noted treatment dates
    - Nature of the serious wound, photographic evidence, and issue of whether medical records reflected a negligent omission "involved circumstances where faded memories are less likely to be an issue"

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Late Notices of Claim – Substantial Prejudice

- What will satisfy the petitioner's burden?
  - Photographs
    - *Matter of Newcomb*
  - Where a claim is based on "easily verifiable, well-documented, objective facts" within the control and knowledge of the governmental entity
    - *Matter of City of New York v. County of Nassau* (146 AD3d 948 [2d Dept 2017])
  - A petitioner may rely on an investigation conducted by a governmental entity
    - *Matter of Kerner v. County of Nassau* (150 AD3d 1234 [2d Dept 2017])
  - A repair of the alleged condition by the governmental entity
    - *Camins v. New York City Hous. Auth.* (151 AD3d 589 [1st Dept 2017])

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Late Notices of Claim – Substantial Prejudice

- What will satisfy the petitioner's burden?
  - Where a repair is started before an investigation can be conducted but during the repair
    - *Daprile v. Town of Copake* (155 AD3d 1405 [4th Dept 2017]).
  - Identifying the precise location of the underlying incident during a GML § 50-h hearing
    - *Matter of Kranick v. Niskayuna Cent. Sch. Dist.* (151 AD3d 1262 [3d Dept 2017])
  - Affidavit from petitioner stating he signed an incident report prepared by the governmental entity's employee
    - *Mercedes v. City of New York* (169 AD3d 606 [1st Dept 2019])

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Late Notices of Claim – Substantial Prejudice

- Actual Knowledge
  - "Inasmuch as the County acquired timely, actual knowledge of the essential facts of the claim and actually conducted an investigation, the petitioner made an initial showing that the County was not prejudiced by his delay in serving a notice of claim."
    - *Kerner v. County of Nassau* (150 AD3d 1234 [2d Dept 2017])
  - "Lack of actual knowledge and lengthy delays are important factors in determining whether the defendant is substantially prejudiced"
    - *Feduniak v. New York City Health and Hosp. Corp.* (2019 NY Slip Op 1564 [2d Dept 2019])
  - In light of the appellants' actual knowledge of the essential facts constituting the claim, there is no substantial prejudice to them in maintaining a defense
    - *John P. v. Plainedge Union Free Sch. Dist.* (165 AD3d 1263 [2d Dept 2018])

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Late Notices of Claim – Substantial Prejudice

- Actual Knowledge
  - Lack of substantial prejudice established where governmental entity knew of claim and was able to investigate shortly after
    - *Sherb v. Monticello Cent. Sch. Dist.* (163 AD3d 1130 [3d Dept 2018])
  - No substantial prejudice where village was aware of contamination, possible health effects, and results of blood tests
    - *Holbrook v. Vil. of Hoosick Falls* (168 AD3d 1263 [3d Dept 2019])

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Late Notices of Claim – Substantial Prejudice

- Actual Knowledge
  - Actual knowledge, and lack of substantial prejudice, established with ambulance report
    - *Ballantine v. Pine Plains Hose Co., Inc.* (166 AD3d 718 [2d Dept 2019])
  - Continuous complaints filed over period of years and action taken by school district established actual knowledge and lack of substantial prejudice
    - *C.B. v. Carmel Cent. Sch. Dist.* (164 AD3d 670 [2d Dept 2018)]
  - Petitioner failed to establish actual knowledge but established a lack of substantial prejudice
    - *Ruiz v. City of New York* (154 AD3d 945 [2d Dept 2017])

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Late Notices of Claim – Substantial Prejudice

- What will not satisfy the petitioner's burden?
  - The condition of the location is unchanged is irrelevant to a claim
    - *Matter of A.C. v. West Babylon Union Free Sch. Dist.* (147 AD3d 1047 [2d Dept 2017])
  - Records describing the underlying occurrence or the petitioner's injuries that do not connect either to negligent conduct
    - *Kennedy v. Oswego City Sch. Dist.* (148 AD3d 1790 [4th Dept 2017]); *cf Matter of McClancy v. Plainedge Union Free Sch. Dist.*, 153 AD3d 1413 (2d Dept. 2017)

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Late Notices of Claim – Substantial Prejudice

- What will not satisfy the petitioner's burden?
  - Lack of knowledge of a transitory condition
    - *Smiley v. Metro. Transp. Auth.* (168 AD3d 631 [1st Dept 2019])
  - The awareness of an employee may be insufficient to qualify as "some evidence or plausible argument"
    - *Matter of Ramos v. Bd. of Educ. of the City of New York* (148 AD3d 909 [2d Dept 2017])
  - Unauthenticated photographs
    - *Bermudez v. City of New York* (167 AD3d 733 [2d Dept 2018])
  - Assertions of counsel that there is no substantial prejudice
    - *Maldonado v. City of New York* (152 AD3d 522 [2d Dept 2017])

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Late Notices of Claim – Substantial Prejudice

- Governmental Entity's Burden
  - Other than the fact that speculation and inference will not suffice, it is less clear what satisfies the "particularized evidence" standard a governmental entity must meet
  - Few decisions since *Newcomb* address the governmental entity's burden

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Late Notices of Claim – Substantial Prejudice

- Governmental Entity's Burden
  - Affirmation by counsel stating memories were faded and witnesses "would likely be children" insufficient
    - *Sherb v. Monticello Cent. Sch. Dist.* (163 AD3d 1130 [3d Dept 2018])
  - Claim that mats were replaced insufficient where email showed knowledge of incident and replacement part of routine practice
    - *Messick v. Greenwood Lake Union Free Sch. Dist.* (164 AD3d 1448 [2d Dept 2018])

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Late Notices of Claim – Substantial Prejudice

- Governmental Entity's Burden
  - Fact that two of three employees involved in incidents no longer employed by school insufficient
    - *C.B. v. Carmel Cent. Sch. Dist.* (164 AD3d 670 [2d Dept 2018)]
  - County failed to meet burden where need for repairs identified before administrator appointed, work orders issued shortly after administrator appointed, photographs were taken, and inspection performed
    - *Kerner v. County of Nassau* (150 AD3d 1234 [2d Dept 2017])

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Late Notices of Claim – Substantial Prejudice

- Rather than being a "fair balance," the burden placed on the government is far greater than that placed on petitioners
- The Court's stated rationale assumes the government can articulate and present "particularized evidence" as to how it has been substantially prejudiced
  - It would not be possible to gather the necessary information and evidence to meet its burden
  - It is possible that such evidence simply does not exist due to the passage of time

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Questions?

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LATE NOTICES OF CLAIM AND SUBSTANTIAL PREJUDICE: THE BURDEN IS ON?

On December 22, 2016, the Court of Appeals issued its decision in *Matter of Newcomb v. Middle Country Sch. Dis.*, 28 NY3d 455 (2016), addressing one of the required elements to obtain leave to file a late Notice of Claim. Before *Newcomb*, all four Appellate Divisions demonstrated inconsistent treatment of the substantial prejudice element of the late Notice of Claim inquiry. All four of the Appellate Divisions had decisions on the books in which petitioners bore the burden to demonstrate that the municipality would not be substantially prejudiced. *Id.* at 466. However, all four Appellate Divisions also issued decisions in which this burden was initially placed on the municipality to demonstrate the lack of substantial prejudice or shifted the burden from the petitioner to the municipality when the petitioner met its initial burden. *Id.* In *Newcomb*, the Court resolved, for the most part, this split.

The Court's Decision in *Newcomb*

Newcomb arose from a March 23, 2013 hit-and-run accident. Shortly after the accident, petitioner notified his son's school, within the respondent school district, of the accident, including the location. Petitioner's counsel requested a copy of the police department's investigation of the accident but was informed it would not be released until the investigation concluded. Petitioner's counsel also retained an investigator who photographed the scene of the accident, and Notices of Claim were served on the State, County, and Town.

In September 2013, petitioner's counsel obtained the police investigation file, which included photographs depicting a "large sign" at the corner of the intersection where the accident occurred and which did not appear in the photographs taken by petitioner's investigator. Due to the size of the police photographs, petitioner's counsel was unable to read the sign and requested enlarged copies or negatives, which he received in November 2013. Petitioner's counsel determined that the sign advertised a play at another school in the school district. Based on this information, petitioner served a Notice of Claim on the school district and moved for leave to file a late Notice of Claim or to have the served Notice of Claim deemed timely.

Petitioner argued that the school district was not substantially prejudiced because it: (1) placed the sign at the accident location and removed it (within 90 days of March 23); (2) knew about the accident "within a few days of its occurrence;" (3) had access to the police investigation; and (4) could inspect the scene on its own, which was unchanged except for the removal of the sign. An affirmation from the school district's counsel argued that petitioner had the burden to demonstrate the absence of substantial prejudice, which could be inferred from the delay in serving the Notice of Claim.

Supreme Court denied petitioner's application, holding that petitioner did not satisfy his burden of demonstrating the lack of substantial prejudice. The court presumed that the "matriculation and graduation of students...as well as personnel changes" hindered the school district's ability to investigate the sign. The court further concluded that substantial prejudice could be "inferred" solely from the passage of time. The Appellate Division affirmed.

The Court of Appeals reversed, noting that the decision to grant leave to file a late Notice of Claim is discretionary but must be supported by "record evidence," which did not exist in *Newcomb*. While the Court acknowledged "lengthy delays" should be considered when evaluating the substantial prejudice element, the inquiry is still subject to the "record evidence" requirement. Moreover, the Court recognized that it could be possible for a municipality to have actual knowledge but still to be substantially prejudiced by a late Notice of Claim.

Resolving the split in the Appellate Divisions, the Court held that the burden initially lies with the petitioner to demonstrate the lack of substantial prejudice. This burden does not require "extensive" evidence but must include "some evidence or plausible argument" that there is no substantial prejudice. If met, the municipality must demonstrate, with "particularized evidence," substantial prejudice. The Court described this framework as striking a "fair balance" between petitioners and municipalities, which are "in the best position to know and demonstrate whether it has been substantially prejudiced."

Applied to *Newcomb*, the Court found the petitioner met its initial burden by submitting the photographs from the police investigation file, which would permit the school district to "reconstruct the conditions on the date of the accident." As to the school district, the Court held speculation and inference relied upon by the lower courts failed to satisfy the "particularized evidence" standard.

"Substantial Prejudice" and Late Notice of Claim Motions After *Newcomb*

The Court's decision in *Newcomb* was an important clarification of where the burden of proof regarding substantial prejudice lies, and what proof satisfies that burden. That the burden should initially lie with a petitioner and then shift to the municipality should come as no surprise, as this is how the burden of proof is handled in many situations. What is surprising, and potentially concerning for municipalities, is the imbalance in the evidence that will satisfy petitioner's initial burden and the municipality's burden.

In addition to photographs, the petitioner's burden will also be met when a claim is based on "easily verifiable, well-documented, objective facts" within the control and knowledge of the municipality. *See Matter of City of New York v. County of Nassau*, 146 AD3d 948 (2d Dept. 2017). A petitioner may rely on an investigation conducted by a municipality, *see Matter of Kerner v. County of Nassau*, 150 AD3d 1234 (2d Dept. 2017), or that the municipality repaired the alleged condition, *see Camins v. New York City Hous. Auth.*, 151 AD3d 589 (1st Dept. 2017). There will not be substantial prejudice where a repair is started before an investigation can be conducted but during the repair. *See Daprile v. Town of Copake*, 155 AD3d 1405 (4th Dept. 2017). A petitioner may demonstrate a lack of substantial prejudice by identifying the precise location of the underlying incident during a GML § 50-h hearing. *See Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 151 AD3d 1262 (3d Dept. 2017).

Actual knowledge an accident occurred has been found to demonstrate a lack of substantial prejudice. *See Matter of Jaffier v. City of New York*, 148 AD3d 1021 (2d Dept. 2017). Substantial prejudice may also be determined by the amount of time that elapsed after the 90-day

period to file a Notice of Claim. *See Matter of Cruz v. City of New York*, 149 AD3d 835 (2d Dept. 2017).

The "some evidence or plausible argument" requirement will not be met if the fact that the condition of the location is unchanged is irrelevant to a claim. *See Matter of A.C. v. West Babylon Union Free Sch. Dist.*, 147 AD3d 1047 (2d Dept. 2017). Records describing the underlying occurrence or the petitioner's injuries but that do not connect either to negligent conduct are insufficient to meet the initial burden. *Id.*; *see also Kennedy v. Oswego City Sch. Dist.*, 148 AD3d 1790 (4th Dept. 2017); *cf Matter of McClancy v. Plainedge Union Free Sch. Dist.*, 153 AD3d 1413 (2d Dept. 2017). The awareness of a municipal employee may also be insufficient to qualify as "some evidence or plausible argument." *See Matter of Ramos v. Bd. of Educ. of the City of New York*, 148 AD3d 909 (2d Dept. 2017).

In *Matter of Grajko v. City of New York*, 150 AD3d 595 (1st Dept. 2017), *appeal dismissed* 2017 NY Slip Op 08039 (Ct App Nov. 16, 2017), the majority held that the petitioner failed to establish a lack of substantial prejudice because the petitioner did not point to any specific evidence the City was aware the accident occurred. Rather, the petitioner cited construction documents but did not point to any specific documents or provide the names of any witnesses.

The two justice dissent found that the petitioner established a lack of substantial prejudice, relying on the petitioner's affidavit that described the scaffold and the nature of the petitioner's work in detail, including the fact that the scaffold was disassembled daily and could not be inspected. The dissent also noted that the petitioner relied upon several witnesses who could testify regarding the condition of the scaffold and his injuries, and photographs that could be used to "reconstruct and investigate the accident." Finally, the dissent noted that the City could obtain records from its contractor to investigate and defend against the petitioner's claim, and to identify potential witnesses.

Other than the fact that speculation and inference will not suffice, it is less clear what satisfies the "particularized evidence" standard a municipality must meet. Few decisions since *Newcomb* address the municipality's burden. An affirmation from counsel without any supporting affidavits from a person with knowledge is not "particularized evidence." Further, the appellate courts do not appear hesitant to overrule decisions where the lower court does not rely on evidence in the record.

Rather than being a "fair balance," the burden placed on municipalities is far greater than that placed on petitioners. The Court's stated rationale behind the substantial prejudice inquiry assumes that a municipality will be able, at the time a petitioner chooses to seek leave to file a late Notice of Claim, to articulate and present "particularized evidence" as to how it has been substantially prejudiced. Conceivably, in the short time in which a municipality would have to respond to such an application, it would not be possible to gather the necessary information and evidence to meet its burden. It is also possible that such evidence simply does not exist due to the passage of time. The true impact of *Newcomb* will only be clear as the lower courts apply the new substantial prejudice test in the future.

Notice of Claim Requirements in Suits Against Police Officers Revisited

In a recent unanimous decision, the Appellate Division, Second Department, overturned the dismissal of a lawsuit against three police officers who were not named in the Notices of Claim. The decision in *Blake v. City of New York*, 148 AD3d 1101 (2d Dept. 2017), overruled prior cases in the Second Department and came just 15 months after the First Department reached the opposite conclusion in *Alvarez v. City of New York*, 134 AD3d 599 (1st Dept. 2015). With this Department split, it will only be a matter of time before the Court of Appeals is asked whether claimants are required to name individual municipal employees in their Notices of Claim.

Blake stems from the arrest and indictment of the plaintiffs for their alleged involvement in an October 2008 shooting in Queens. After approximately 16 months in jail awaiting trial, a police informant who had positively identified the plaintiffs in two photo arrays recanted his identification and the charges were dismissed. The plaintiffs then filed lawsuits against, *inter alia*, the City of New York and five individual police officers for false arrest, malicious prosecution, and civil rights violations. Three of the named police officers, who were not identified in the Notices of Claim, moved for dismissal since they were not named in the Notices of Claim. Supreme Court granted dismissal on this basis and the plaintiffs appealed.

The Second Department held that the three police officers were not entitled to dismissal of the false arrest and malicious prosecution claims. The court began its analysis by acknowledging a split in the decisional law, noting that the First Department requires a municipal employee to be named in the Notice of Claim, *see Alvarez*, 134 AD3d 599; *Tannenbaum v. City of New York*, 30 AD3d 357 (1st Dept. 2006), whereas the Third and Fourth Departments do not. *See Pierce v. Hickey*, 129 AD3d 1287 (3d Dept. 2015); *Goodwin v. Pretorius*, 105 AD3d 207 (4th Dept. 2013).

Adopting the rationale of the Third and Fourth Departments, the *Blake* Court adhered to a narrow interpretation of the statutory language of General Municipal Law § 50-e(2), requiring the Notice of Claim to (1) be in a sworn writing; (2) provide the address of the claimant and his attorney; (3) set forth the nature of the claim, the time, place, and manner in which the claim arose; and (4) itemize the claimant's injuries and damages. The court held that it would not impose a requirement on claimants that is not specifically enumerated in the GML. In contract to the First Department, the court characterized the purpose of the Notice of Claim as being solely to "notify the municipality, not the individual defendants" of a potential claim. *See Blake*, *supra* (citing *Zwecker v. Clinch*, 279 A.D2d 572 (2d Dept. 2001).

The court also relied upon *Scott v. City of New Rochelle*, 44 Misc3d 366 (Sup Ct 2014), which adopted the Fourth Department's reasoning, distinguishing the Second Department's decision in *Matter of Rattner v. Planning Commission of the Village of Pleasantville*, 156 AD2d 521 (2d Dept. 1989), because the issue was whether a Notice of Claim was required at all, not whether individual employees were required to be named therein. *See Scott*, *supra*. The court went on to approve the notion that the Notice of Claim is merely a vehicle by which to give a municipality an opportunity to investigate the facts and merits of a claim. *See Scott*, *supra*.

Further, the *Scott* court noted that there was a possibility the claimant would be unable to identify the employee within the 90-day period to file a Notice of Claim. *See Scott, supra.* The court found the Notice of Claim contained "all the relevant information" the municipality required for the opportunity to conduct a thorough investigation, which made the identity of the individual officers "readily accessible" to the municipality in a "straightforward inquiry" combined with the information in the police department's "event report." *See Scott, supra.* According to the court, the municipality, with access to this information, was in the "best position to investigate and identify" the individual officers. *See Scott, supra.*

The *Blake* decision overrules at least two pre-*Scott* decisions from the Second Department that held a claimant was required to name a municipal employee in the Notice of Claim to maintain a lawsuit against that individual. In both *Santoro v. Town of Smithtown*, 40 AD3d 736 (2d Dept. 2007), and *Gabriel v. City of New York*, 89 AD3d 982 (2d Dept. 2011), the Second Department upheld the dismissal of lawsuits brought against individual employees who were not named in the Notices of Claim in either their official or individual capacities.

Blake also appears to be in conflict with several post-*Rattner* decisions holding the Notice of Claim requirements applied to claims brought against individual employees only in their official capacities. For example, in *Zwecker*, the Second Department upheld dismissal of the complaint against the individually named defendants because the plaintiff did not offer any evidence demonstrating they were acting outside the scope of their employment. In *Smith v. Scott*, 294 AD2d 11 (2d Dept. 2002), the court reached the same conclusion, rejecting the plaintiff's argument that he was not required to file a Notice of Claim because he sued only the municipal employees.

If Notices of Claim are truly intended to apprise municipalities of the facts and nature of claims, claimants should be required to disclose as much as possible about the *'who'* just as they are required to disclose what is known about the *'what,' 'when,'* and *'where'* of alleged claims. To not require a claimant to identify the municipal employees who were involved in the incident that gave rise to the claim assumes that a municipality will be able to identify its employees involved in a particular claim from the other information in the Notice of Claim. While in some instances this information may be sufficient, it is conceivable that, without this information, a municipality will not be able to conduct an adequate investigation to identify which, of its hundreds or thousands of employees, was involved in a particular incident.

The identity of the municipal employees involved in a particular claim is intertwined with the facts surrounding a claim. A false arrest claim requires the involvement of a police officer; a claim of medical malpractice may involve an emergency medical technician, a nurse, or a doctor; a claim arising out of a motor vehicle accident requires the involvement of an employee driving a municipal vehicle. It is not feasible to separate the municipal employee from such claims and treat the claim and employee as separate and distinct, or to require information about the facts of a claim without some identification of the employee involved.

Finally, in the class of claims brought against a municipality that implicate individual employees, the majority involve interactions between citizens and police officers. The approach taken in *Scott*, and implicitly adopted in *Blake*, overlooks the fact that, in some cases, the municipality

may be in a worse position than the claimant to investigate a claim. Since a claim for false arrest or malicious prosecution is based on an individual not being convicted of some criminal conduct, the documents that would allow the municipality to identify the police officers involved would be sealed and unavailable to the municipality until it receives permission from the claimant to obtain those records (typically only after a lawsuit has been filed). The claimant, however, does not face the same restrictions on access to relevant paperwork – and would be in the better position to identify the individual police officers.

Just over one year ago, the First Department's decision in *Alvarez* revealed a widening split between the Appellate Divisions. With the Second Department's *Blake* decision, it seems that the issue of whether individual municipal employees must be named in a Notice of Claim is again at the forefront and needs to be addressed by the Court of Appeals. It does not appear that, absent a decision from the Court of Appeals, the difference in outcomes will be resolved. How the Court would decide this issue remains unclear.

Outside Counsel

Notice of Claim Requirements In Suits Against Police Officers

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The Appellate Division, First Department, has sided with six individually named police officers in a case that will likely find its way to the Court of Appeals to decide an issue of critical importance to all municipalities. In *Alvarez v. City of New York*, a deeply divided First Department affirmed the Bronx County Supreme Court's decision that granted dismissal of all state law claims against the individually named police officers because the plaintiff failed to include them in his Notice of Claim.

In *Alvarez*, the plaintiff claimed he was falsely arrested in April 2008 by members of the New York City Police Department (NYPD). In June 2008, he filed a Notice of Claim that named the City of New York and the NYPD. The Notice of Claim alleged false arrest, imprisonment, assault and battery, and excessive force. Significantly, the Notice of Claim did not name any individual police officer nor did it use a placeholder (i.e., John Doe) to indicate he intended to make a claim against an individual officer who could not then be identified.

Plaintiff commenced a lawsuit in September 2008 that named as defendants the city, the NYPD, "Police Officer John Doe a/k/a Officer Green," and "Police Officer John Doe Badge Number 14007." Plaintiff filed an amended complaint in March 2011 that added four individually named police officers. The allegations in both the complaint and the amended complaint were stated against the individually named officers only in their official capacity as members of the NYPD.

In September 2013, the six individually named officers moved to dismiss the state law claims alleged against them, arguing that dismissal was warranted because they were not named in the Notice of Claim. The plaintiff opposed, contending that General Municipal Law §50-e, which sets the requirements for a Notice of Claim, does not require naming individual municipal employees.

Relying on the First Department's decision in *Tannenbaum v. City of New York* and the Second Department's decision in *Matter of Rattner v. Planning Commission of Village of Pleasantville*, [illegible]

> It is likely that the issue of whether an individual municipal employee must be named in the Notice of Claim will come before the Court of Appeals in the near future.

the Supreme Court granted the individual defendants' motion to dismiss, holding that, since the allegations concerned the individual defendants' conduct in the official capacities as police officers, the plaintiff was required to name them in the Notice of Claim. The plaintiff appealed.

Presiding Justice Luis A. Gonzalez and Justices Angela M. Mazzarelli and John W. Sweeny Jr. concurred in a two-opinion majority to affirm the Supreme Court's decision to dismiss the state law claims against the six individually named police officers. Justice Rosalyn H. Richter joined in a dissent by Justice Sallie Manzanet-Daniels.

Dissent

In the dissent, Justice Manzanet-Daniels noted that General Municipal Law §50-e(2), which sets forth the information that must be included in the Notice of Claim, does not require naming an individual defendant. Manzanet-Daniels also noted that the General Municipal Law also does not require service of the Notice of Claim on an individual defendant, and that service of a Notice of Claim on a municipality for a claim arising out of the conduct of an employee is only required if the municipality would be liable for the conduct of its employee, implying that only municipalities are entitled to the notice that the statute requires.

Turning to the Court of Appeals' decision in *Brown v. City of New York*, Manzanet-Daniels noted that the sole purpose of the Notice of Claim is to provide the municipality with an opportunity to collect evidence to evaluate a claim. The sufficiency of a Notice of Claim is determined only by whether it contains a sufficient description of the when, where and nature of the claim to allow the municipality to investigate the claim.

In a case involving an allegation of false arrest in particular, Manzanet-Daniels wrote that the municipality apprised of the when, where and nature of the claim would be in the unique and best position to identify the police officers involved in the claim, since they are employees of the municipality and, therefore, available for interviews. The plaintiff, according to Manzanet-Daniels, would be in no better position to ascertain the identities of the police officers involved in the claim.

Thus, Justice Manzanet-Daniels would have followed the decisions of the Third and Fourth Departments in [illegible] and [illegible], holding that, for the purposes of compliance with the General Municipal Law's requirements and the purpose of the Notice of Claim, the plaintiff would not be required to name the involved individual municipal employees in the Notice of Claim.

Concurrence and Majority

Justice Mazzarelli [illegible]

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Notice

Continued from page 4

following the First Department's decision in *Tannenbaum*, the facts of which she could find "no discernable difference" with those presented in *Alvarez*.

Justice Sweeny, writing for himself and Presiding Justice Gonzalez, agreed with the dissent's premise that, under the Court of Appeals' decision in *Brown*, the Notice of Claim is intended to allow the municipality to collect sufficient information to investigate and evaluate a claim. Sweeny noted that the Brown decision involved an alleged sidewalk defect and, unlike *Alvarez*, did not involve individual municipal employees.

According to Justice Sweeny, the function of the Notice of Claim articulated in *Brown* could not be realized under the standard adopted by the Third and Fourth Departments and the dissent. Sweeny questioned how a municipality could be expected to conduct an "adequate and timely investigation" of a claim against an individual employee when the individual employee was not named in the Notice of Claim but could be named as a defendant in a lawsuit commenced potentially months or years after the incident giving rise to the claim occurred.

Sweeny also questioned the service requirements of the Notice of Claim under the standard adopted by the Third and Fourth Departments and the dissent. Since the General Municipal Law does not require service of the Notice of Claim on an individual municipal employee, Sweeny argued that service of a Notice of Claim on a municipality that did not name an involved municipal employee could not constitute service of the Notice of Claim on the individual employee. According to Sweeny, the General Municipal Law does not condone serving the Notice of Claim on one entity and commencing a lawsuit against another.

Thus, Justice Sweeny held that, particularly where the allegations against an individual municipal employee arose entirely within the individual municipal employee's scope of employment, necessitating the filing of a Notice of Claim against the municipality, the individual employee must be named in the Notice of Claim. At a minimum, the Notice of Claim must include a placeholder such as "John Doe" to put the municipality on notice that the claims contained therein will also be alleged against one or more of its employees. Only then will a Notice of Claim truly comply with the purpose of the Notice of Claim. Any other result raises questions of fundamental fairness for the individual defendants who were not given notice of the fact that they would become defendants and prejudices the ability of both the municipality and the individual defendant from investigating and defending against the claims.

Split in Appellate Courts

Given the split between the First and Second Departments and the Third and Fourth Departments, as well as the heavily divided Alvarez court, it is likely that the issue of whether an individual municipal employee must be named in the Notice of Claim will come before the Court of Appeals in the near future. Whichever way the Court will come down on this issue is not clear, but the Alvarez decision is [illegible] in several ways.

First, the position adopted by the Third and Fourth Departments departs from the purpose of the Notice of Claim as articulated by the Court of Appeals in *Brown*. As Justice Sweeny noted in his opinion, it is difficult, if not impossible, to reconcile the purpose of the Notice of Claim, to provide the municipality with sufficient notice of the when, where, and how a claim arose with a standard that does not require a plaintiff to identify, to some extent, the individual municipal employee involved in their claim. Sweeny's recommendation of using a "John Doe" placeholder would at least provide the municipality with the bare minimum of notice that one of its employees may be involved in the claim.

> Requiring the Notice of Claim to identify the individual employee, or a placeholder, will place the municipality on notice of the potential lawsuit against one of its employees and allow the municipality to obtain and/or secure any relevant information at the earliest possible date.

Second, such a standard fails to take into consideration the prejudice to the municipality and the individual municipal employee that will arise from the delay between when a Notice of Claim is filed and when the identity of an individual employee is revealed. As noted in *Alvarez*, any number of events could result in prejudice to the municipality and the individual employee during that time. Requiring the Notice of Claim to identify the individual employee, or a placeholder, will place the municipality on notice of the potential lawsuit against one of its employees and allow the municipality to obtain and/or secure any relevant information at the earliest possible date.

Finally, the dissent's view that the municipality is in a unique and the best position to know the facts of any claim substantially overstates the powers of a municipality. In the context of a false arrest claim, such as in *Alvarez*, the municipality is unable to obtain police or prosecution paperwork for an open arrest. See NY Crim. Proc. L. §87. Even when an arrest has been closed, the municipality cannot obtain this paperwork without an authorization from the plaintiff and, in some cases, a court order. See NY Crim. Proc. L. §160.50. The plaintiff in such cases, however, will have access to all of this information, either directly or through his attorney. Similarly, the municipality will be unable to obtain medical records without an authorization from the plaintiff.

The dissent's belief that, as employees of the municipality, its employees will be "available for interviews" also overlooks the fact that, particularly in cases involving police officers, there may be internal investigations as well as rights guaranteed to them through their unions. Thus, it is not always, as the dissent suggests, a simple process for the municipality to ascertain the identity of its employees who may be involved in a particular claim.

For the moment, the Alvarez decision solidifies the First Department's interpretation of the General Municipal Law's Notice of Claim requirements with respect to including individual employees in the Notice of Claim. The Alvarez decision is also likely to confirm the Second Department's adherence to its decision in *Matter of Rainey*. However, given the split between the four appellate courts, either standard is not likely to survive for much longer, as the Court of Appeals is sure to weigh in on this department split in the near future.

[illegible]