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2 No. 35
Tymeik Williams, &c.,
 Appellant,
 v.
Nassau County Medical Center,
et al.,
 Respondents.

John M. Daly, for appellant.
David B. Goldin, for respondents.
New York City Health and Hospitals Corporation, amicus
curiae.

ROSENBLATT, J.:

 In General Municipal Law § 50-e, the Legislature
enacted a protocol for serving a notice of claim as a condition
precedent to a suit against a public corporation. Section
50-e (1) requires that the notice be served within 90 days after

the claim arises. The Legislature, however, gave courts discretion to extend the time and devised criteria for determining whether to grant extensions (see Cohen v Pearl River Union Free School Dist., 51 NY2d 256, 265-266 [1980]).

Section 50-e (5), the late-notice statute, directs the court to consider, in particular, whether within 90 days or a reasonable time thereafter the public corporation (or its attorney or insurance carrier) acquired actual knowledge of the facts underlying the claim. In deciding whether to grant an extension, the court must also consider a host of factors, including infancy and whether allowing late filing would result in substantial prejudice to the public corporation.¹

¹Section 50-e (5) reads in its entirety:

"Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; 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; and whether the delay in

In the case before us, the infant plaintiff alleges that his epilepsy and developmental disabilities were the result of negligence on the part of Nassau County Medical Center and its employees in connection with his birth in September 1993. The medical employees in attendance gave his mother pitocin, a drug used to facilitate the birth. The delivery involved two attempts at vacuum extraction and, ultimately, the use of forceps. According to the hospital records, the mother's pelvis was adequate to accommodate the baby's head and the birth was without complication. The infant weighed eight pounds, three and one-half ounces. His Apgar score (an index to evaluate the condition of a newborn infant with ten being a perfect score) was within satisfactory range: eight at one minute after birth and nine at five minutes after birth. The records also reveal that there were marks on his forehead from the forceps and his clavicle was broken.

In support of his motion for late service of a notice of claim, plaintiff submitted an affidavit from a physician who interpreted the hospital records and alleged that the hospital knew or should have known that complications would and did occur. He averred that the size of the mother's pelvis and signs of fetal distress argued against the use of pitocin, and that after

serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."

birth the baby was trembling and showed physical signs of trauma. The defendants argue that plaintiff's disability was not apparent until, at the age of one or two, he began to experience epileptic seizures and show delayed development.

The record reveals that in 1995 plaintiff had an electroencephalogram (EEG), a test to trace his brain waves. The results were normal, but EEGs in 1998 and 1999 showed signs of abnormality. On September 3, 2003, ten years after plaintiff's birth, his counsel sent the hospital a notice of claim alleging, in essence, that plaintiff suffered brain damage resulting from the hospital's malpractice during his delivery.

Exercising its discretion, Supreme Court granted leave to serve the late notice. The Appellate Division, however, reversed "on the law and as a matter of discretion" (13 AD3d 363 [2d Dept 2004]). We affirm. We will treat the three relevant General Municipal Law § 50-e (5) criteria in their statutory order.

Actual Knowledge of the Essential Facts

Plaintiff argues that the Appellate Division erred by requiring that the defendants have actual knowledge of the "specific claim." In support, plaintiff emphasizes that section 50-e (5) contemplates "actual knowledge of the essential facts constituting the claim," not knowledge of a specific legal theory. We agree with plaintiff's point, but do not read the

Appellate Division's decision as deviating from that principle.

The hospital's records reveal that the delivery was difficult, but that when it was over there was scant reason to identify or predict any lasting harm to the child, let alone a developmental disorder or epilepsy. The infant's Apgar scores were satisfactory, and even two years later his EEG was normal. Under these circumstances defendants could well have concluded that when plaintiff left the hospital there was nothing wrong with him beyond a broken clavicle (cf. Medley v Cichon, 305 AD2d 643 [2d Dept 2003] [where hospital records indicated, among other things, that infant plaintiff required resuscitation and had an Apgar score of zero, actual knowledge of injury was established]).

We do not agree with plaintiff's suggestion that because defendants have medical records, they necessarily have actual knowledge of the facts constituting the claim. Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process.

The relevant inquiry is whether the hospital had actual knowledge of the facts -- as opposed to the legal theory -- underlying the claim. Where, as here, there is little to suggest injury attributable to malpractice during delivery, comprehending

or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying a claim.

Infancy

As to this factor, plaintiff claims that the Appellate Division improperly required that he show a "nexus" between his infancy and the delay in service, or, put differently, that the delay was a product of his infancy. The history of section 50-e (5) and the case law demonstrate that a nexus between infancy and delay, while not a requirement, remains a statutory factor that a court should take into account. The Appellate Division concluded that "the 10-year delay in moving, in effect, for leave to serve a late notice of claim was not the product of the plaintiff's infancy" (13 AD3d at 364). Its holding does not treat the absence of a nexus as fatal to a plaintiff's claim.

Before 1976, section 50-e (5) allowed late service, at the discretion of the court, "[w]here the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified" (emphasis supplied). Even then, this causation requirement was not inflexible. Analyzing the previous version of the statute, we stated in Matter of Murray v City of New York (30 NY2d 113 [1972]) that "[t]he impediment [to timely filing] may reasonably be presumed to attend infancy; there is no requirement that it be factually demonstrated" (id. at 120).

Rather, the causative relationship between infancy and the delay was a matter committed to the court's discretion, in view of the circumstances in a given case (*id.* at 119; see also Sherman v Metropolitan Transp. Auth., 36 NY2d 776 [1975]).

The Legislature deleted the causation language and added a list of considerations that should come into play, including the simple fact of infancy. This change, however, does not preclude a court from examining whether infancy caused the delay in serving the notice. In deciding whether to allow late service of a notice of claim the court must consider "all other relevant facts and circumstances" (General Municipal Law § 50-e [5]). A delay of service caused by infancy would make a more compelling argument to justify an extension. Conversely, the lack of a causative nexus may make the delay less excusable, but not fatally deficient. It all goes into the mix. The Appellate Division, we conclude, did not exceed its discretion by pointing out that, among other reasons for denying an extension, the delay was not the product of plaintiff's infancy.

Substantial Prejudice

Plaintiff also asks us to hold that the Appellate Division incorrectly burdened him with the responsibility of showing lack of substantial prejudice to the defendants as a result of late service of the notice of claim. Although the

length of the delay is not alone dispositive, it is influential.² Here, there was a 10-year delay.

Plaintiff argues that the defendants were not substantially prejudiced on the theory that the hospital knew or should have known of the essential facts constituting his claim. Like the length of the delay in service, proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by such a delay.³ We have no cause to disturb the Appellate Division's determination that defendants did not have actual knowledge. Accordingly, that court's finding of substantial prejudice was within its discretion.

In summary, the 1976 amendments to § 50-e (5) de-emphasized the importance of a nexus between a plaintiff's infancy and the delay in service of a notice of claim. The statute now contains a non-exhaustive list of factors that the court should weigh, and compels consideration of all relevant facts and circumstances. This approach provides flexibility for

²In an analogous situation, commencing an action or special proceeding, late service is permissible under CPLR 306-b "upon good cause shown or in the interest of justice." We have noted, in that context, that lengthy delays in service can lead a court to infer substantial prejudice (Leader v Maroni, Ponzini & Spencer, 97 NY2d 95, 107 [2001]).

³See e.g. Matter of Andrew T.B. (Anon.) v Brewster Cent. Sch. Dist., 18 AD3d 745, 748 (2d Dept 2005); Bazer v Town of Walworth, 277 AD2d 994, 995 (4th Dept 2000); Battle v City of New York, 261 AD2d 614, 615 (1st Dept 1999); Hunt v County of Madison, 261 AD2d 695, 696 (3d Dept 1999).

the courts and requires them to exercise discretion. Under the pre-1976 version of the statute, we noted that "[w]here satisfied that the court has acted within the perimeters of reason, we have consistently affirmed the exercise of discretion whether it has been invoked to sustain or deny grants of permission for late filing" (Matter of Murray, 30 NY2d at 119). In line with that premise, we find no abuse of discretion by the Appellate Division.

Accordingly, the Appellate Division order should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Decided April 4, 2006