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COURT OF APPEALS
STATE OF NEW YORK

CALABRESE,

Respondent,

-against-

CITY OF ALBANY,

Appellant.

NO. 125

20 Eagle Street
Albany, New York
November 21, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is Calabrese v. City of Albany.

3 MR. MAGEE: May it please the court. Robert
4 Magee on behalf of Marisa Franchini, corporation counsel
5 for the appellant, City of Albany. If I may, I request
6 three minutes for rebuttal?

7 CHIEF JUDGE WILSON: Sure.

8 MR. MAGEE: So the more key question before the
9 court today really is whether an electronic communication
10 can be a written communication for the purpose of a
11 municipal prior - - -

12 JUDGE GARCIA: Counsel, before we get to that, I
13 - - - I have a question. If in 2019 I saw a pothole on
14 Lark Street and I wrote a letter, and I took a picture, and
15 I mailed it to the Commissioner of General Services at the
16 right address, would that be written notice under the
17 statute?

18 MR. MAGEE: Yes, it would.

19 JUDGE GARCIA: And - - -

20 MR. MAGEE: And then to address the point, I mean
21 - - -

22 JUDGE GARCIA: And that would be written actual
23 notice to the commissioner, satisfy the statute?

24 MR. MAGEE: It would.

25 JUDGE GARCIA: And at that time, what would have



1 happened to that letter?

2 MR. MAGEE: It would have been - - - I mean, it
3 would have been received by a city employee. They would
4 have understood that by the Commissioner of Public Works,
5 the person sending that communication meant it to go to the
6 Commissioner of General Services. And it would have been
7 sent to the Commissioner of General Services.

8 JUDGE GARCIA: And then once it got into the
9 building where the Commissioner of General Services is,
10 what would have happened to it?

11 MR. MAGEE: It would have been incorporated into
12 the SeeClickFix system or - - - and/or it would have been
13 referred to the person in charge of making road repairs,
14 and it would have been addressed.

15 JUDGE GARCIA: And it's pretty clear that the
16 commissioner never reads any of this?

17 MR. MAGEE: That's correct.

18 JUDGE GARCIA: So what is the difference - - -
19 let's put aside written for a second in the email context.
20 What's the difference between an electronic communication
21 coming through SCF and going into that process and a letter
22 going into the building and going into the exact same
23 process just in terms of actual notice, not I understand
24 your written argument?

25 MR. MAGEE: Yeah. In terms of actual notice, I -

1 - - I think that would be a question to a jury whether or
2 not that communication provided actual notice. But the
3 fact of the matter here is that we have a prior written
4 notice rule that needs to be complied with. And it's been
5 held - - -

6 JUDGE GARCIA: So you - - - you're not arguing to
7 this court that it's - - - the actual notice part wouldn't
8 be satisfied. Your argument now is solely that this isn't
9 a writing?

10 MR. MAGEE: It's not a prior - - - yes. It's - -
11 - our argument is that it doesn't satisfy the City of
12 Albany's prior written notice rule.

13 JUDGE GARCIA: But because it's not in writing or
14 because it's not actual notice to the commissioner?

15 MR. MAGEE: Because it's not in writing.

16 JUDGE GARCIA: Okay. Thank you.

17 MR. MAGEE: And so the court has already answered
18 that the - - -

19 JUDGE RIVERA: Just to clarify, this seems to me
20 - - - when you were answering, you answered without a
21 pause, that if - - - if the written letter is addressed to
22 the commissioner, whether commissioner reads it or not,
23 it's notice within the meaning of the statute, right? If -
24 - - if the letter does not have the commissioner's name on
25 it, but otherwise, is directed clearly to the appropriate

1 administrative entity, is the correct address, is that
2 written notice?

3 MR. MAGEE: There's an interpretation of actually
4 given that would - - - that would find that that would be
5 actual notice. And I think in those sorts of - - - or
6 prior written notice, rather. And in those sorts of
7 situations, I think the indicia under which the
8 communication can be said to have been sent to the
9 statutory designee would - - - would be directly
10 proportional to its prior written notice of fact. So - - -

11 JUDGE CANNATARO: So if I had sent the letter to
12 the Commissioner of Public Works instead of the
13 Commissioner of General Services, it would have still
14 gotten to the right place?

15 MR. MAGEE: It would have gotten to the right
16 place. And I think under those - - -

17 JUDGE CANNATARO: And that would be prior notice?

18 MR. MAGEE: That's correct.

19 JUDGE RIVERA: No. No. But my point was, there
20 is no designee listed or put on the envelope. It is only
21 the name of the entity and the address. You're saying
22 that's prior written notice?

23 MR. MAGEE: Not necessarily. I think, though, on
24 those facts alone, I don't believe it would be.

25 JUDGE RIVERA: Because?

1 MR. MAGEE: Because there's - - - excuse me?

2 JUDGE RIVERA: Because?

3 MR. MAGEE: Because there's no indication that
4 that communication was meant for the statutory designee as
5 opposed to an employee of the city - - -

6 JUDGE GARCIA: But even - - -

7 MR. MAGEE: - - - other than the statutory
8 designee.

9 MR. MAGEE: So it would have to be addressed to
10 the commissioner even if it was addressed to the department
11 and mailed to the right department - - - the same
12 department, but it didn't have the commissioner's name on
13 it, that wouldn't be actual notice?

14 MR. MAGEE: Again, if - - -

15 JUDGE RIVERA: Even if it's handled exactly the
16 same when it comes through the door?

17 MR. MAGEE: Well, assuming we have a writing - -
18 -

19 JUDGE GARCIA: Okay. Right.

20 MR. MAGEE: - - - right?

21 JUDGE GARCIA: Understood.

22 MR. MAGEE: And then we - - - we've satisfied
23 that portion of the prior written notice rule, then you're
24 moving over to the actual - - -

25 JUDGE GARCIA: Right.

1 MR. MAGEE: - - - actually given. And what the
2 city is asking this court to do is - - - is have the prior
3 written notice rule enforced as written. And to answer
4 this question of whether a given written communication once
5 communicated to the city was prior written notice is going
6 to depend on whether or not, under the circumstances, it
7 can be said that that communication was actually given to
8 the statutory designee. And that would be - - -

9 JUDGE HALLIGAN: Actually given or actually sent
10 to?

11 MR. MAGEE: The prior written notice rule
12 requires actually given. But under this hypothetical where
13 we have the writing, you would look to things like, who is
14 it addressed to? What department was it sent to? What
15 ways - - - you know, how has the city instructed the public
16 on how to submit prior notice?

17 JUDGE TROUTMAN: Does that designee have to
18 accept and/or read its own mail?

19 MR. MAGEE: By enforcing the prior written notice
20 rule as written, that question more or less becomes
21 irrelevant.

22 JUDGE TROUTMAN: But with respect to a designee,
23 when you have a designee, must they be required to actually
24 accept that written notice, or can they give that duty off
25 to someone else, and it still qualifies as actual - - - as

1 to the satisfying the notice requirement.

2 MR. MAGEE: It's the city's position that the - -
3 - that the prior written notice of fact of a given written
4 communication is conferred on that communication by the
5 person giving it to the city. And once they handle - - -
6 hand it over to the city, it becomes prior written notice
7 regardless - - -

8 JUDGE TROUTMAN: So just the city. It doesn't
9 have to be the designee?

10 MR. MAGEE: Again, if you would - - - you look at
11 the facts of that transfer - - - of that actual
12 communication. And if the facts were that you can conclude
13 that that communication was meant for the statutory
14 designee, then you satisfy the actually - - - then you
15 could satisfy the actually - - -

16 JUDGE TROUTMAN: Let me ask you about this
17 written - - - SeeClickFix notifications, arguably, are
18 written in the sense that they are expressed in words or
19 letters. How are they not written notice?

20 MR. MAGEE: Well, written and electronic
21 communications are - - - I mean, they are treated
22 differently. And they're treated differently in the case
23 law. They're treated different socially. You know, if I
24 send you a birthday card - - -

25 CHIEF JUDGE WILSON: Well, don't you - - - don't



1 you write an email to people? You've never written emails.

2 MR. MAGEE: You - - - the act of writing is what
3 you do to create an email. But when a writing is written -
4 -

5 CHIEF JUDGE WILSON: It's a written communication
6 if you're writing it.

7 MR. MAGEE: Well, a written communication is a
8 physical totem. It's something that is given from one
9 person - - -

10 JUDGE TROUTMAN: Why - - -

11 JUDGE HALLIGAN: Doesn't that confuse the - - -
12 the - - - the way in which we're communicating with the way
13 in which we're transmitting? I mean, isn't the distinction
14 between oral and written something that would put an email
15 and a written letter together and a phone call in a
16 different bucket? But if we're asking about transmission,
17 then a written letter and an email would be in different
18 buckets. So - - - so why wouldn't writing encompass both
19 an email and a letter?

20 MR. MAGEE: Because when you're looking at a
21 priority notice rule, you're - - - you know, as Judge Kaye,
22 held in the Fumarelli case, or noted in the Fumarelli case,
23 is the court is - - - its purpose - - - its lodestar is to
24 effectuate the purpose of the legislature in that case, and
25 you look at the text. And the text of Albany's prior

1 written notice rule, most prior written notice rules
2 requires a writing. And - - -

3 JUDGE HALLIGAN: But - - - but they could say,
4 you know, has to be put in the mail, has to be written on -
5 - - you know, with - - - with pen and paper, has to be, you
6 know, certified mail, whatever. But how - - - how do we
7 know that they mean to exclude emails, given the common
8 parlance with which we refer to writing emails?

9 MR. MAGEE: Well, in Gorman, this court held that
10 written notice was exclusive of a telephonic note or - - -

11 JUDGE HALLIGAN: So that would be the oral
12 written distinction?

13 CHIEF JUDGE WILSON: And doesn't it seem - - -

14 MR. MAGEE: And there - - -

15 CHIEF JUDGE WILSON: - - - to make some sense,
16 that is, oral, you don't really have a record of it, so
17 then there's going to be a battle about, did you call? Was
18 there a call? What was said on the call? But you don't
19 have that problem with an email communication or work
20 through SeeClickFix. There's no dispute about the content,
21 right? Where the oral, they're clear - - - there's even a
22 dispute about whether it happened.

23 MR. MAGEE: That is true, but I'm not sure it's
24 relevant to the inquiry because we're looking at - - -

25 CHIEF JUDGE WILSON: So why isn't that the

1 purpose? Why isn't that the purpose of the written notice?

2 MR. MAGEE: The purpose of written notice is to
3 manage a municipality's liability for road defects.

4 CHIEF JUDGE WILSON: Right.

5 MR. MAGEE: And then - - -

6 CHIEF JUDGE WILSON: And so that when somebody -
7 - - - well - - - and so that when somebody sues, you know
8 whether you have been notified about it before or not. And
9 with an oral communication, there was maybe not a record of
10 that.

11 MR. MAGEE: I respectfully disagree. I think it
12 is - - - the purpose of a prior written notice rule is to
13 open up to the public an opportunity to - - - to open up
14 the public fisc - - -

15 JUDGE RIVERA: When was it enacted? What year?

16 MR. MAGEE: In the - - - the - - - this version
17 of the prior written notice rule was enacted in - - -

18 JUDGE RIVERA: Okay.

19 MR. MAGEE: - - - 1983, but prior written notice
20 - - -

21 JUDGE RIVERA: I'm sorry. What year?

22 MR. MAGEE: 1983.

23 JUDGE RIVERA: Okay. Was everybody using emails
24 in 1983?

25 MR. MAGEE: They were using fax machines and



1 telegraphs had been around for a long time.

2 JUDGE RIVERA: Were those considered written
3 notice?

4 MR. MAGEE: I don't believe so. And in Gorman -
5 - - Gorman - - - by - - - according to Gorman, no.

6 CHIEF JUDGE WILSON: Wait. So a fax to the
7 commissioner back then would not have counted? It comes
8 out in paper.

9 MR. MAGEE: Well, telephonic communication
10 reduced the writing is a - - -

11 CHIEF JUDGE WILSON: I meant fax.

12 MR. MAGEE: That - - - well, I guess, a fax - - -
13 I think under Gorman - - -

14 JUDGE RIVERA: Because it's a telephonic
15 communication but is then reduced to writing. Is that why?
16 Because it wasn't originated in writing. Is that your
17 point?

18 MR. MAGEE: Well, yeah. I mean - - - so if the
19 city is - - - if the - - - if the - - - the party that - -
20 - to be bound is generating that writing, I don't think it
21 can be said that that writing was given to the
22 municipality.

23 JUDGE SINGAS: But what about, like, the net
24 effect of it? What's the difference between how it's
25 documented, processed, tracked, if it came in written

1 notice or if it came in through see SeeClick? Is there any
2 difference in how those reports are handled?

3 MR. MAGEE: There's no difference within the
4 city. But again, the - - - once these written
5 communications may qualify - - -

6 JUDGE SINGAS: Okay. So there's no difference in
7 how it's - - - how it's handled, tracked, you know,
8 documented. We know that the commissioner doesn't read it.
9 So ultimately, aren't we just elevating form over substance
10 here?

11 MR. MAGEE: No.

12 JUDGE SINGAS: Why?

13 MR. MAGEE: So a priority notice rule is - - -
14 again, is meant to manage the city's - - - is supposed to
15 put the city on notice as to when it has legal liability
16 for a given defect. So the - - -

17 JUDGE HALLIGAN: Well, why doesn't an email do
18 that? It may be that your view reduces liability, but why
19 doesn't it advise the city of liability?

20 MR. MAGEE: We're not talking about - - - in this
21 case, we're not talking about emails. We're talking about
22 electronic communications. And electronic communications -
23 - -

24 JUDGE CANNATARO: Sorry, what's the difference
25 between email and electronic communication?



1 MR. MAGEE: Well, SeeClickFix in this case is not
2 an email. An email, you know, someone has an inbox, and
3 you intend to send it to a particular inbox. With
4 SeeClickFix, again, we're talking about - - - you know,
5 almost like a - - - a social media type platform- - -

6 JUDGE HALLIGAN: I thought that - - -

7 MR. MAGEE: - - - where - - -

8 JUDGE HALLIGAN: I thought that you use
9 SeeClickFix to identify locations that needed some
10 attention.

11 MR. MAGEE: It is.

12 JUDGE HALLIGAN: Okay.

13 MR. MAGEE: So - - -

14 JUDGE HALLIGAN: And so there's some intake
15 process, presumably, in which what comes across the transom
16 is documented, because otherwise, it would be impossible to
17 - - -

18 MR. MAGEE: Right.

19 JUDGE HALLIGAN: - - - you know, issue a work
20 order.

21 MR. MAGEE: But again - - -

22 JUDGE GARCIA: So how would I do that? If I see
23 a pothole and I want to use SeeClickFix, how do I enter the
24 information?

25 MR. MAGEE: There's an app in your phone, or you

1 can go on - - - you can do it through a website.

2 JUDGE GARCIA: And a screen comes up, and I type
3 the information into that screen, and then what do I do
4 with the screen? How does it get transmitted?

5 MR. MAGEE: So it is sent to a central location
6 within - - -

7 JUDGE GARCIA: Then I hit send somehow.

8 MR. MAGEE: Yeah. So - - - yeah. So the - - -
9 the - - -

10 JUDGE GARCIA: So what is the difference between
11 that and an email? I write it on a screen and I hit send.

12 MR. MAGEE: There's not a huge difference. But
13 there is - - - there is a large gap between an email and a
14 writing and that's - - - that's the key to - - -

15 JUDGE HALLIGAN: Can I ask you: could the city -
16 - - could the city amend its prior written notice statute
17 if - - - if its preference, understanding the technology
18 has changed a lot in the past, I guess, forty years, right?
19 If the city wanted to exclude either information received
20 through an app or even an email, could it amend the prior
21 written notice statute to say only, you know, letters sent
22 via - - - you could pick what you want, certified mail or
23 whatever it is, constitutes a prior written notice for
24 purposes of liability?

25 MR. MAGEE: It could do that, but it shouldn't



1 have to because written is unambiguous. And the purpose of
2 the prior written notice rule is to define the precise - -
3 -

4 JUDGE RIVERA: So - - -

5 MR. MAGEE: - - - instance in which someone can -
6 - -

7 JUDGE RIVERA: Okay. So we got - - - I think I -
8 - - I understand your argument on that. But what about
9 this designee? I'm still not clear, even with something
10 that's, from your position, indisputably in writing, right?
11 The written - - - the paper, the envelope, commissioner's
12 name, the address, you agree that's written notice. The
13 envelope that doesn't have the commissioner's name, I think
14 you said before, it depends?

15 MR. MAGEE: Yes.

16 JUDGE RIVERA: When would that be written notice
17 if the commissioner's name is not on it, which I - - - just
18 a sidebar. I don't want to lose the - - - this moment on
19 this question - - - on this platform that they can use, can
20 you direct it to the commissioner? Or you don't even have
21 that option?

22 MR. MAGEE: That is not a default option.

23 JUDGE RIVERA: Okay. That's all I needed to
24 know. All right. So now, again, the - - - the envelope or
25 the letter that doesn't have the commissioner's name but

1 does have the correct entity, when is that not notice? Or
2 when is it notice? You - - - you choose how you want to
3 answer.

4 MR. MAGEE: A prior written notice rule, one of
5 its purposes is to allow the city to speak candidly with
6 the - - -

7 JUDGE RIVERA: Yes.

8 MR. MAGEE: - - - public about defects without
9 incurring that kind of liability. So if you were to look
10 at that - - - again, we're looking in indicia within that
11 circumstance - - -

12 JUDGE RIVERA: Yes.

13 MR. MAGEE: - - - of - - - of that - - - of the -
14 - - of the recipients having intended that communication
15 for the statutory designee.

16 JUDGE RIVERA: I'm sorry.

17 MR. MAGEE: And that's a question the court
18 doesn't - - -

19 JUDGE RIVERA: I - - - I thought it was a yes, no
20 answer. I'm getting very confused. I - - - I get when the
21 commissioner's name on it, you - - - you agree that that is
22 notice. All I'm - - - I've just changed one thing, the
23 commissioner's name is not on it. Isn't that just a yes,
24 no? Yes, it's written notice; no, it's not?

25 MR. MAGEE: No. But I think - - -

1 JUDGE RIVERA: Why is that?

2 MR. MAGEE: - - - there are - - - but again,
3 there are still facts wherein that could be considered
4 prior written notice, but - - -

5 JUDGE RIVERA: Give me one example, just one.

6 MR. MAGEE: If there is a prior written notice
7 box at the prior - - - at the statutory designee's office,
8 and - - - and he - - - he - - - he says - - -

9 JUDGE RIVERA: And that's where you put it?

10 MR. MAGEE: Right.

11 JUDGE RIVERA: Because then one would infer, if
12 I've put it in the box that's going to the designee, then
13 the fact that I didn't put their name is irrelevant because
14 it must be going to them?

15 MR. MAGEE: Exactly.

16 JUDGE RIVERA: Okay. But if otherwise, I just
17 put it in the mail, that sounds like you're saying, no.
18 Okay. One more. One more. Same envelope, doesn't have
19 the commissioner's name on it, but when you open it, it
20 says, dearest commissioner. Is that notice?

21 MR. MAGEE: I think it could be prior written
22 notice, yes.

23 JUDGE RIVERA: What's the could be in that as
24 opposed to it is or it's not?

25 MR. MAGEE: Well, if - - - if - - - if you were

1 to put that on - - - it depends on where you delivered the
2 envelope. I mean - - - but if you delivered it to the
3 office or the statutory - - -

4 JUDGE RIVERA: Yes. It's just - - - it's the
5 same as the - - - the second one.

6 MR. MAGEE: Yes.

7 JUDGE RIVERA: It just has the correct address.
8 Let's say the designee is actually in the same building
9 with - - -

10 MR. MAGEE: Yeah.

11 JUDGE RIVERA: - - - with the - - - the agency
12 itself, but the inside is where I've put dearest
13 commissioner.

14 MR. MAGEE: Yes. That would be prior written
15 notice, but the court is not - - -

16 JUDGE GARCIA: Let's say you did that on your
17 screen. Assume, putting the writing aside, you put dear
18 commissioner on the screen and hit send through
19 SeeClickFix. Would that - - -

20 MR. MAGEE: If the - - - if the City of Albany's
21 prior notice rule allowed - - -

22 JUDGE GARCIA: Yes. Putting aside the written -
23 - -

24 MR. MAGEE: Right.

25 JUDGE GARCIA: Yeah.

1 MR. MAGEE: If - - - if that - - - that would be
2 - - - that would indicate that it was prior written notice.

3 JUDGE RIVERA: Well, aren't you able to put text
4 in or no? You can't put - - - put text. You're just
5 choosing things?

6 MR. MAGEE: Yes. Well, right. In SeeClickFix,
7 you're asked to provide a narrative of - - -

8 JUDGE RIVERA: Yes.

9 MR. MAGEE: - - - of what you're seeing, and you
10 could include that - - -

11 JUDGE RIVERA: So yeah, then you could put dear
12 commissioner.

13 JUDGE SINGAS: But after the commissioner gets
14 notice, assuming it was addressed correctly and so on,
15 don't you initiate a work order through this process, the
16 SeeClick process?

17 MR. MAGEE: Right. You do - - - yes. The - - -
18 the - - -

19 JUDGE SINGAS: So all of those notices get
20 translated back to the thing that you're saying doesn't
21 give notice. There's no other mechanism, right, by which
22 to address those. It's not like you're going to get a
23 letter to the commissioner correctly addressed and then
24 it's given directly to a worker and said, go out and fix
25 this. No. You take it, right? Albany has set up the

1 system where you take that letter and then put it into
2 SeeClick, correct?

3 MR. MAGEE: Right. But we're not arguing that if
4 we received a written communication then put it into
5 SeeClickFix, it would no longer be prior written notice.

6 JUDGE CANNATARO: You're not arguing that?

7 MR. MAGEE: No.

8 JUDGE CANNATARO: I thought you - - - in response
9 to a question Judge Singas asked you a little while ago,
10 that putting - - - putting the information into SeeClickFix
11 is not the same thing as getting the information via a
12 writing?

13 MR. MAGEE: So the SeeClickFix is used - - - and
14 I see my - - - my light is on, but - - -

15 CHIEF JUDGE WILSON: Yeah. Go ahead, please.

16 MR. MAGEE: So SeeClickFix is used as a way for
17 the city to manage its work as well as a means by which the
18 public can communicate with the city. And whenever the
19 city receives - - - whenever the people at DGS receive
20 communication about a road defect, whether it's by phone,
21 in person, email, from another city employee, they will
22 then put that into SeeClickFix, and then we'll process it
23 that way. But that - - - what's - - - we don't concede
24 that that converts any such communication into a writing
25 because, you know, the judge - - - the court below did

1 notice - - - didn't, you know, find that that - - - you
2 know, because it was a work order. It said the prior - - -

3 JUDGE TROUTMAN: So it's notice but not a
4 writing? Is that what you're saying?

5 MR. MAGEE: It doesn't - - - so yeah, City of
6 Albany's prior written notice rule requires written notice,
7 and it's not - - -

8 JUDGE TROUTMAN: No. But I'm saying, putting it
9 in SeeClickFix is notice but it's not a writing. Is that
10 what you're saying?

11 MR. MAGEE: It's notice, but it's not sufficient
12 to - - -

13 JUDGE TROUTMAN: Because it's not a writing?

14 MR. MAGEE: Right. But - - -

15 JUDGE GARCIA: So are you also claiming - - - I
16 guess, going back to my original question, are you also
17 claiming that it isn't actually given to the commissioner
18 unless it says dear commissioner on the screen?

19 MR. MAGEE: Yes. But again, we're not - - -
20 there's no evidence whatsoever on the record that the
21 commissioner received the SeeClickFix at issue in this
22 case.

23 JUDGE GARCIA: No, no, no. I'm not - - - I'm not
24 saying - - - there's no evidence he received anything, but
25 - - - apparently, never receives anything. But if I send

1 SeeClickFix written - - - I type it on my screen, again,
2 putting aside the writing issue, and I send it through this
3 process, and it's processed the way it's described in the
4 record, is it - - - again, putting aside written, is it
5 actual notice given to the commissioner? Or do I have to
6 put dear commissioner in that screen? Or is it okay if it
7 just goes to the right department?

8 MR. MAGEE: Again, we don't have a writing. And
9 I think that's - - - that - - - that might be getting lost.
10 In terms of whether it's actually given, that would
11 indicate that it was - - - that that electronic
12 communication was actually given to the statutory designee.
13 But that wouldn't be - - - that wouldn't be sufficient to
14 satisfy the prior written notice rule or to maintain a road
15 defect liability case against the City of Albany.
16 Ultimately, we're just asking for the prior written notice
17 rule to be enforced and applied as it is written.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. BALOUSKAS: Good afternoon. May it please
20 the court. My name is Peter Balouskas, with Harding
21 Mazzotti, for the plaintiff-respondent, Henry Calabrese in
22 this case. There are a number of questions that need to be
23 addressed on this appeal. Firstly, in my view, the
24 question is whether SeeClickFix notifications constitute a
25 writing under the appellant's prior written notice statute

1 in this case. And it is a fundamental rule of law that the
2 clearest indicator of the legislative intent is to look at
3 the statutory text - - -

4 JUDGE CANNATARO: Why is that question relevant
5 if - - - if I understand your adversary's argument
6 correctly, the statute requires prior written notice. And
7 that is a legal term of art, apparently, that signifies a
8 very particular thing, which is basically words written in
9 ink or pencil on a piece of paper and delivered to a
10 physical office somewhere. If it's a writing, you know,
11 that - - - my understanding of his argument is that that's
12 a distinction without a difference - - -

13 MR. BALOUSKAS: Well - - -

14 JUDGE CANNATARO: - - - or it's a distinction
15 with a huge difference.

16 MR. BALOUSKAS: Well, the way the prior written
17 notice statute in this case reads is written notice. And
18 written notice, given its plain meaning, simply means
19 forming visible letters or characters. That's according to
20 Merriam Webster.

21 JUDGE CANNATARO: So if they understand it to
22 mean one thing, but we, collectively, as people who read
23 statutes and interpret them, understand it to mean
24 something else, our view of what it is prevails. Is - - -
25 is that your argument?

1 MR. BALOUSKAS: The plain meaning prevails.

2 JUDGE CANNATARO: So if we think written is
3 something you submit on SCR, or something you mail, maybe
4 even something you email, you're good?

5 MR. BALOUSKAS: Correct. That would be correct,
6 Your Honor.

7 JUDGE HALLIGAN: I think what Judge - - -

8 JUDGE RIVERA: Does it matter when it's enacted
9 you don't have this form of communication?

10 MR. BALOUSKAS: It doesn't matter that the
11 specific technology did not exist. The definition of - - -
12 of a writing would be putting words or letters together so
13 that you can visualize that.

14 JUDGE TROUTMAN: What about the argument that
15 it's - - - it's a legal term of art of what a writing is?

16 MR. BALOUSKAS: Well, that is not the - - - that
17 is not the way that a statute is interpreted.

18 CHIEF JUDGE WILSON: Well, so what if I send it
19 in a Snapchat that disappears automatically after somebody
20 opens and reads it? Written, not written?

21 MR. BALOUSKAS: Well, that - - - that - - - if
22 you've - - - if you've typed it - - -

23 CHIEF JUDGE WILSON: Yeah.

24 MR. BALOUSKAS: - - - it is a writing. And what
25 I would - - - what I would say to that - - -

1 CHIEF JUDGE WILSON: Sorry. So that's a yes - -
2 -

3 MR. BALOUSKAS: Yes.

4 CHIEF JUDGE WILSON: - - - that satisfies the
5 statute?

6 MR. BALOUSKAS: That satisfies - - -

7 CHIEF JUDGE WILSON: Don't you think part of the
8 purpose of this is so that the city has something in the
9 form of a permanent record so it knows what it has been - -
10 - it has received before, and a Snapchat would not fulfill
11 that purpose?

12 MR. BALOUSKAS: Well, I would assume if you were
13 using a Snapchat, there would be some way in which to make
14 a permanent record of that once it has been received.

15 CHIEF JUDGE WILSON: Well, what if there wasn't?

16 MR. BALOUSKAS: Well, then I would say, if - - -
17 if it hasn't constituted a written record, then it is not
18 written notice. In this case - - -

19 CHIEF JUDGE WILSON: So it doesn't matter if you
20 wrote it originally. It has to be preservable in written
21 form?

22 MR. BALOUSKAS: Well, I would - - - I would
23 imagine that Snapchat, even when received, is somehow
24 recordable at that point where you receive it. It can be
25 made - - - a copy can be made in some form or fashion.



1 What is important is, what does it mean to be written and -
2 - -

3 JUDGE RIVERA: Let's assume we agree with you on
4 that. Isn't the real problem that it's got to be written
5 and - - - and given to the designee, and unless any of
6 these things say, dear commissioner, perhaps they don't
7 satisfy that part of the requirement?

8 MR. BALOUSKAS: Well, I - - - I would disagree
9 that it would have to say, dear commissioner. In - - - in
10 a case where it is actually given - - - in this case there
11 is no dispute that the SeeClickFix notifications were
12 actually made and actually received by the Department of
13 General Services.

14 JUDGE RIVERA: But - - - but that doesn't mean
15 that the designee got them. That was my point about,
16 here's a letter. It doesn't have the designee's name on
17 it. You open it up, still doesn't have the designee's name
18 on it. But it - - - it sets forth some grievance, and it
19 goes through the normal course of that - - -

20 MR. BALOUSKAS: Correct.

21 JUDGE RIVERA: - - - administrative entity.

22 MR. BALOUSKAS: Correct. But if you look at the
23 record in this case, the statutory designee is telling the
24 public, send SeeClickFix, that notification to my office,
25 to me, to this location, SeeClickFix.

1 JUDGE GARCIA: Well, they're actually saying,
2 though, that that isn't notice under the statute in the
3 system, right? They're saying this doesn't constitute
4 notice. Isn't there some kind of disclaimer on the system?

5 MR. BALOUSKAS: They are trying to say that, and
6 to which I would say that, you, as a legislative body have
7 written a statute. It is the statute which controls
8 whether or not a prior written notice has been satisfied.

9 JUDGE HALLIGAN: So on that - - - on that front,
10 I think we generally look not only at the text of the
11 statute, but also at what the purpose of a provision was.
12 And I think we can agree, unless you were, perhaps, you
13 know, working way ahead of - - - of your time, that in 1983
14 that people were not using email. And so it seems likely
15 to me, maybe certain almost, that the intent behind the
16 words prior written notice was a mailing, not necessarily -
17 - - maybe through the post office, you can maybe drop the
18 letter off, but it would be handwritten letter. You agree
19 with that?

20 MR. BALOUSKAS: Well, I would agree with that,
21 except for the time frame that we're talking about. In
22 1998 is when they are saying that their prior written
23 notice allegedly was modified to now include the
24 Commissioner of General Service - - -

25 JUDGE HALLIGAN: Okay. But I thought that it was

1 originally enacted, I - - - I thought your adversary said
2 about forty years ago. My question is just that: if - - -
3 if it seems clear to us, just as a matter of technology,
4 that what was contemplated at the time was a piece of paper
5 with some ink on it, why shouldn't we hew to that and
6 exclude email and - - - and honor the purpose of the - - -
7 of the provision?

8 MR. BALOUSKAS: Because they have the ability to
9 update their statute to - - -

10 JUDGE HALLIGAN: Sure.

11 MR. BALOUSKAS: - - - keep up with the times.

12 JUDGE HALLIGAN: But in terms of understanding
13 what those words meant, if it seems clear to us that they
14 couldn't have intended it to include email because there
15 was no email, why wouldn't we read it that way?

16 MR. BALOUSKAS: Well, again - - -

17 JUDGE RIVERA: And then they don't update it.

18 MR. BALOUSKAS: I'm sorry?

19 JUDGE RIVERA: They don't update it.

20 MR. BALOUSKAS: Well - - -

21 JUDGE RIVERA: Right? I mean, the various
22 governmental entities have updated whatever applies to them
23 in terms of the way they communicate both internally and
24 with the public.

25 MR. BALOUSKAS: Correct.

1 JUDGE RIVERA: If they don't update it, aren't we
2 then left with the understanding that they still mean this
3 thing right here?

4 MR. BALOUSKAS: Or what they meant was words or
5 characters that are capable of being read and made into a
6 written record, which is what an email would be, which is
7 what SeeClicks would be, which is what a letter is. They
8 receive it. They have a written record of having received
9 it and having been put on notice.

10 CHIEF JUDGE WILSON: So they send it in
11 hieroglyphs, that's okay?

12 MR. BALOUSKAS: I wouldn't say if it's in
13 hieroglyphs, Your Honor, but I would say if they have been
14 put on notice, and there's no dispute that this was in
15 English, that the SeeClickFix were put in English letters -
16 - -

17 JUDGE TROUTMAN: And - - - and does it matter
18 that they set up SeeClickFix and asked - - - invited the
19 public to provide information, and that that information
20 goes through the system to reach the people who are
21 responsible for actually responding? Does that all play
22 into your interpretation?

23 MR. BALOUSKAS: It absolutely matters. They
24 intended to have this system - - -

25 JUDGE RIVERA: But it completely bypasses the

1 designee, doesn't it not? All - - - all the designee gets
2 is some spreadsheet.

3 MR. BALOUSKAS: Correct. But there is no
4 requirement - - - there is no precedent that the designee
5 actually views it or reads it. It is that he's actually
6 given it. In this case, he is in possession and control of
7 that. He has implemented a system where he is bypassed.

8 JUDGE RIVERA: Right. A system that I don't see
9 it, but you can submit all the grievances you want, maybe
10 my agency gets them, maybe they won't. They'll prioritize
11 it. If you want it to come to me, put my name on it, put
12 it in writing, and send it to me.

13 MR. BALOUSKAS: No. That is not the record in
14 this case. Nothing reached this commissioner whether you
15 put it in writing, in an envelope. He delegated his mail
16 to his deputy commissioner. That was also bypassed through
17 the commissioner. The commissioner never saw any writing
18 in any form of any kind in this case.

19 JUDGE GARCIA: Counsel, just to pick up on that
20 point, when a written communication came in and it went to
21 the deputy commissioner, then what would happen to it?

22 MR. BALOUSKAS: Then it would get assigned to a
23 supervisor, and it would also be put to a clerk at the
24 front desk, who would then input it into SeeClickFix
25 because SeeClickFix was incorporated as the only form of

1 work orders used by the Department of General Services.
2 They used it as their work orders. They also acknowledge
3 that it is the only form of record that they keep at
4 SeeClickFix.

5 JUDGE GARCIA: So if it came in originally
6 through SeeClickFix, the only thing that would be different
7 from what you've just described the process being, with
8 respect to the letter, would be it wouldn't go through the
9 supervisor step to, you know, the deputy supervisor on
10 down. It would just go into the SeeClickFix level.

11 MR. BALOUSKAS: So the SeeClickFix, as - - - as
12 the record is, it goes to the front desk clerk of the
13 Department of General Services.

14 JUDGE GARCIA: So if it's writing, it comes down
15 to the clerk, through the deputy commissioner, through a
16 supervisor then to the same place?

17 MR. BALOUSKAS: Correct. Correct. And - - -

18 JUDGE CANNATARO: I just want to double-check on
19 that very same issue because I think your adversary sort of
20 intimated that SeeClickFix is the general portal. But
21 there was different treatment depending on how they
22 received it or - - - or possibly what it was for. So are
23 you saying whether it comes in as writing - - - writing,
24 maybe that even mentions the written notice law versus
25 something that's submitted by someone who just happens to

1 see something and goes on SeeClickFix, it's treated exactly
2 the same. The same steps happen once it's received except
3 for the added step of transcribing it into SeeClickFix?

4 MR. BALOUSKAS: Correct. That - - - that is
5 correct. And they both bypass the statutory designee. He
6 never receives them.

7 JUDGE CANNATARO: No. No. Yeah. I'm not as
8 concerned about - - - I know, you know, that you have a lot
9 of questions about dear commissioner or naming the
10 commissioner. That's not my question. My question is
11 whether these things are treated differentially if it can
12 be determined that one is for purposes of providing notice.
13 It's just a very conscientious citizen who's writing as the
14 notice law provides to let this - - - let Albany know
15 there's - - - there's an issue versus someone who's trying
16 to get something fixed. Are they treated the same?

17 MR. BALOUSKAS: They're treated the same by the
18 city. The same procedure is followed. One comes in
19 through a SeeClick notification to the Department of
20 General Services, to the front desk, who then assigns it to
21 a supervisor. A letter would be handled by the
22 commissioner's deputy, who would then give that letter to
23 the front desk, who would do the same process.

24 JUDGE CANNATARO: And then it goes in and a
25 repair order is generated, and that goes to whoever it's

1 supposed to go to. And maybe there's a repair, and maybe
2 there's not a repair, but the treatment is exactly the
3 same?

4 MR. BALOUSKAS: Treatment is - - - is the same.

5 JUDGE GARCIA: Counsel, there's some indication
6 in the record that some of the SeeClickFix notices were
7 originally telephonic. Is that your understanding?

8 MR. BALOUSKAS: That is true. And we're not
9 making the argument that a telephonic communication that is
10 converted to writing would satisfy the prior written notice
11 statute. We're talking strictly about the ones that are
12 typed in and which are capable of being read at that point,
13 just like a letter would be, and would satisfy any form of
14 written notice. It's just a different form of written
15 notice. And as - - - as was raised initially, this - - -
16 the - - - the appellant and the municipalities in this case
17 have the ability to control their statutes. They can write
18 the statutes the way they want, and they can restrict them
19 in the way they want. They could easily have written
20 handwritten, or they could have easily written made by
21 registered mail.

22 That was not done in this case. The words
23 written notice are the only words on that, and they are
24 seeking to place restriction now on this appeal that is not
25 included in that statute. Again, the commissioner put into

1 place and promoted SeeClickFix as the way to reach him.
2 That was what the citizens were following, and it was a
3 writing, and it does qualify. I also want to briefly touch
4 on the fact that, at the time that this accident occurs,
5 the - - - the prior written notice statute had that
6 statutory designee as the Commissioner of Public Works.
7 That is a position that had not existed for twenty years in
8 the City of Albany. The Commissioner of General Services,
9 in a completely different section of the code, was to adopt
10 or pick up the responsibilities of the Commissioner of
11 Public Works. However, anybody who was reading the prior
12 written notice statute - - -

13 JUDGE GARCIA: So your position under that, which
14 I understand to be an impossibility argument, would be that
15 for twenty years, there's no necessity for anyone to show
16 notice was given?

17 MR. BALOUSKAS: Well, it's in two part. That is
18 part of it. The other part of it is, how can the city
19 demonstrate prima facie that the Commissioner of Public
20 Works did not get written notice in this case.

21 JUDGE TROUTMAN: Is - - - is there ever an
22 instance where they claimed a lack of notice because it
23 didn't go to the nonexistent person?

24 MR. BALOUSKAS: Well, I don't know if they ever
25 claimed it. But for them to meet their burden to show

1 there was no prior written notice under their statute as
2 written at the time of this accident, they would need to
3 show that the Commissioner of Public Works never received
4 written notice before this accident. I don't know. And
5 there's nothing in the record to show how that is possible,
6 how they can show that somebody didn't send a letter.

7 JUDGE GARCIA: So the effects of that, to go back
8 to my question, would be for twenty years there was no
9 requirement that you give prior written notice?

10 MR. BALOUSKAS: That - - - that would be correct.
11 That would be the end result of - - - of that, Your Honor.
12 They could not make out that prima facie on a motion with
13 respect to their burden. The last point, and I know my
14 time is running short, is there is also, obviously, an
15 exception to the prior written notice requirement, and that
16 is with respect to the affirmative negligence that creates
17 an immediate dangerous condition in this case. What we
18 know is that on April 3rd of 2019, the city's water
19 department did a hugely extensive dig right at 67 Lark
20 Street. They opened up the entire roadway. We know that
21 they filled that roadway back in. And that as early as the
22 next month in May, there was a SeeClickFix phone call made,
23 and said, hey, there's a giant hole in the area of 65 Lark
24 Street. Now, these houses are very close together, and it
25 is rattling the entire roadway. Can somebody please go

1 take a look at that?

2 JUDGE CANNATARO: Do you think you're - - -
3 you're - - - I assume you're going to conclude with the
4 position that you're entitled to summary judgment on this
5 create theory. Is - - - is that right?

6 MR. BALOUSKAS: No. I'm saying there is at least
7 a question of fact there - - -

8 JUDGE CANNATARO: Oh, okay.

9 MR. BALOUSKAS: - - - that gets through the prior
10 written notice as an exception because we know that as in
11 June, that there's an internal email from the water
12 department that says, the roadway is sinking. Please go
13 out there and investigate. Now, we know that in July, this
14 accident happens where Mr. Calabrese hits a large
15 depression in the roadway.

16 JUDGE CANNATARO: Have the courts below - - -
17 either of the courts below deprived you of your opportunity
18 to show that the defect was created by the city?

19 MR. BALOUSKAS: No, Your Honor. They - - - they
20 haven't deprived us of that. My understanding is, on this
21 appeal, part of what they are arguing is there is no one
22 affirmative creation argument available.

23 JUDGE CANNATARO: Oh.

24 MR. BALOUSKAS: I'm saying that there is, and it
25 is applicable to this case, separate and apart from the

1 prior written notice statute. We put in an expert who
2 explains that this is not something that gradually happens
3 over time where you have all these notices so soon after a
4 giant dig. This is something that was immediate, and this
5 was a problem immediately. He uses that term directly
6 following the dig. This was a bit apparent. This is not
7 something that happened with delay when you have this many
8 notices in sequence. So in addition to the prior written
9 notice statute, we would ask that this court affirm below
10 on that basis.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. BALOUSKAS: Thank you.

13 MR. MAGEE: So - - -

14 JUDGE RIVERA: Could you address why the
15 SeeClick's posts are - - - are not covered - - - I think
16 this is your position - - - are not written notices covered
17 under the Electronic Signatures and Records Act?

18 MR. MAGEE: Well, I mean, State Technology Law
19 309 says very explicitly that nothing in the ESRA requires
20 a governmental entity to use electronic records. ESRA is
21 instead a way for government or - - - or business to use
22 electronic records and rely on them as if they were written
23 according to the - - -

24 JUDGE RIVERA: But Albany does use electronic
25 records, does it not?



1 MR. MAGEE: Not for prior written notice, Your
2 Honor.

3 JUDGE RIVERA: Is that because of your
4 disclaimer?

5 MR. MAGEE: That's because of the way the prior
6 written notice rule is written. And - - - and so the prior
7 written notice rule is a means by which a member of the
8 public can, on their own, open up the public fisc to tort
9 liability for a given road defect. And the Albany's prior
10 written notice law prescribes a way in which that is to be
11 done.

12 JUDGE TROUTMAN: What do you say to the
13 suggestion that, for twenty years, you really had no notice
14 statute because there was no real designee?

15 MR. MAGEE: Well, there was a designee. Again,
16 if you get to that second element of the - - - of the
17 statutory construction principles, the purpose - - - if you
18 look at the - - - when - - - when the city code was
19 amended, it was clear that the Department of General
20 Services, their commissioner was going to be - - - was
21 going to stand in as statutory set designee. And that's
22 how it worked in numerous cases and for that time including
23 a case that's come before this court. In all those cases,
24 the prior written notice rule in Albany was found to be
25 functioning properly.



1 JUDGE SINGAS: How about the - - -

2 JUDGE GARCIA: You've changed that rule. You've
3 changed the designee now, right? You amended the statute?

4 MR. MAGEE: Yes. We - - -

5 JUDGE GARCIA: You made no other changes to the
6 statute, though, at that time?

7 MR. MAGEE: No, just that. And I should - - -
8 and I should note, though, that when that change was made,
9 there was no incorporation of SeeClickFix into that
10 because, again, written - - - written communications and
11 electronic communications are different. And I would ask
12 the court - - -

13 JUDGE SINGAS: Albany - - - Albany set up the
14 system in this way, right? They could have set up the
15 system the way other municipalities have and treated
16 SeeClick as, like, a 311, right? And that wouldn't have
17 constituted notice. But Albany decided to make it part of
18 their operating procedure and the only way to track and
19 keep track of the - - - and issue work orders. They made
20 it part of their system of government very systemically.

21 MR. MAGEE: So - - -

22 JUDGE SINGAS: So how do you answer that? I
23 mean, there - - - there was - - - there was a choice that
24 Albany made. And now it seems that you made that choice,
25 and now you're backing away from it saying, oh, no, that's

1 not notice.

2 MR. MAGEE: When it came to communicating with
3 the public, SeeClickFix did operate like a 311 system. We
4 also - - - we - - - the city is contracting for this
5 service. And what it allows us to do is just to more
6 systematically track - - - and I see my time is up, but
7 I'll answer - - - more systematically track their receipt
8 of communications about road defect regardless of where
9 they came from and how - - - how they respond to it. It's
10 a matter of good government. It's - - - it's a way of - -
11 - of memorializing what we receive when to make ourselves
12 accountable to the public.

13 But we never amended the prior written notice
14 rule to require - - - or to allow for anything other than
15 written notice that was actually given to the commissioner
16 to create that - - - that liability on the part of the
17 public. And looking at the purpose of - - - of a prior
18 written notice rule, if the court is going to adopt the
19 reasoning of the Third Department, it's going to have to
20 essentially find that electronic and written communications
21 are fundamentally the same. And that's not something
22 that's in the - - - that's borne out in the case law. I'll
23 refer to Misty Cleaning Services. That's something that
24 was borne out in common sense. If you received, you know,
25 a birthday card, it means more than a birthday text, just

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as an example.

So as the court is writing its decision in this case, it needs to think very seriously about whether or not written still means something in the context of a - - - of a statute that allows one party to impose a legal obligation onto another. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Calabrese v. City of Albany, No. 125 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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