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COURT OF APPEALS

STATE OF NEW YORK

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CITY OF NEW YORK,

Appellant,

-against-

NO. 15

JAIME,

Respondent.

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CITY OF NEW YORK,

Appellant,

-against-

NO. 16

OROZCO,

Respondent.

20 Eagle Street  
Albany, New York  
February 13, 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: Good afternoon, everyone.  
2 We're going to start with the first two matters on the  
3 calendar. Number 16, Orozco, and Number 15, Jaime. You  
4 have no adversary arguing orally, counsel submitted, which  
5 I think you know. Please.

6 MS. DRUKER: Good afternoon, Your Honors. Elina  
7 Druker, on behalf of the City of New York. The First  
8 Department's decision here is wrong at every turn, and it  
9 effectively nullifies the late notice of claim statute - -  
10 - in fact, the notice of claim statute; the underlying  
11 statute as well. And I'd like to address those errors as  
12 sort of in two buckets.

13 First are all of the errors that go to the actual  
14 notice standard, which is a static fact that exists or  
15 doesn't exist whether or not the public corporation had  
16 knowledge - - -

17 JUDGE RIVERA: Do you agree that a court could  
18 determine that there's no actual notice, but yet grant the  
19 motion? Or are you saying that that is an absolutely  
20 required factor?

21 MS. DRUKER: So under the statute, the actual  
22 knowledge prong is called out by the legislature as the  
23 most important. But I believe there could be a  
24 hypothetical - - -

25 JUDGE RIVERA: That's not dispositive - - -

1 MS. DRUKER: It's not - - -

2 JUDGE RIVERA: - - - otherwise it would be  
3 written that way.

4 MS. DRUKER: Exactly. No, the statute - - - it's  
5 not dispositive, but the statute makes clear that - - - I  
6 mean, the factors are set out.

7 JUDGE RIVERA: So under what circumstances, in  
8 your opinion, would the court not abuse its discretion in  
9 granting the motion to file a late notice, even when  
10 there's been no - - - you can't point to actual knowledge?

11 MS. DRUKER: Well, it is hard to identify such a  
12 scenario, but I suspect it would be one in which the other  
13 factors very strongly favor granting the petition. That  
14 means both that there would be no prejudice whatsoever to  
15 the municipality in defending the lawsuit, and a reasonable  
16 excuse, among other things.

17 JUDGE RIVERA: So then, does this case boil down  
18 to whether or not there is no prejudice - - -

19 MS. DRUKER: No.

20 JUDGE RIVERA: - - - or the record is enough that  
21 one would say the court could have come to that conclusion?

22 MS. DRUKER: No. Because a few things - - - I  
23 mean, that's just not how this case was litigated or really  
24 the - - -

25 JUDGE RIVERA: But in terms of the statute?

1 MS. DRUKER: Well, even in terms of the statute,  
2 there's - - - there's no - - - there's no claim - - -  
3 really no reasonable claim here that there is an - - -  
4 there's a credible excuse for the delay, nor is there  
5 really any briefing or anything as to prejudice. The  
6 petitioner's theory has always been that by virtue of the  
7 fact that New York City police officers participated in a  
8 tort, the entire statute - - - all the factors are  
9 satisfied, particularly the actual knowledge. And that was  
10 really what the petitioner hung this case on.

11 JUDGE TROUTMAN: So it's that they filed reports,  
12 they said. So there is knowledge.

13 MS. DRUKER: Well, the question is knowledge of  
14 what, right? The actual - - - this is what I was trying to  
15 say. The actual knowledge standard, that this court has  
16 made very clear, isn't just knowledge of the fact of an  
17 injury. So the fact that somebody came to a hospital and  
18 had a bad medical outcome. The fact that someone was  
19 arrested, seemingly the prosecution, which is not a city  
20 agency, but the prosecutor's office decided ultimately that  
21 they couldn't prove the case beyond a reasonable doubt.  
22 That does not connote the fact that there has been - - -

23 JUDGE TROUTMAN: So just because - - -

24 MS. DRUKER: - - - what plaintiff alleges - - -

25 JUDGE TROUTMAN: - - - there was - - -



1 MS. DRUKER: - - - which is the wrongdoing.

2 JUDGE TROUTMAN: - - - the arrest and there were  
3 arrest reports. It doesn't necessarily specify what the  
4 harm was that they're suing about or giving information so  
5 that evidence could be preserved, et cetera.

6 MS. DRUKER: Yeah. Not just the harm, but the  
7 wrongdoing. Exactly. And it's important, I think, to step  
8 back and understand the purpose - - - the legislative  
9 purchase - - - purpose here, because the legislature struck  
10 a balance. It eliminated the - - - the sovereign immunity  
11 of a public corporation, and with it created a handful of  
12 protections, including the ability to have a quick hearing.  
13 And included, most importantly, this notice of claim  
14 requirement in ninety days. It's a really easy requirement  
15 to satisfy. Within ninety days you file a notice; there's  
16 no real burden - - -

17 JUDGE HALLIGAN: So what standard exactly are you  
18 requesting here? At some point in your briefs, you refer  
19 to access to the information, at other points you refer to  
20 - - - you know, someone with - - - with decision-making  
21 authority or risk management authority. So what  
22 specifically are you suggesting?

23 MS. DRUKER: So I think that it really does  
24 depend on the facts of the case and the nature of the case.  
25 But - - -

1 JUDGE HALLIGAN: Okay. But if we want to try to  
2 articulate a standard that can be applied going forward.

3 MS. DRUKER: I think a lot of what this court has  
4 already said gets us much of the way there, and the First  
5 Department ignored that, which is that there needs to be  
6 actual eviden - - - actual knowledge on that part of the  
7 municipal corporation within ninety days or shortly  
8 thereafter, which is a static fact, of - - -

9 JUDGE HALLIGAN: Knowledge by whom?

10 MS. DRUKER: Right. Well, this is of both the  
11 fact of an injury and of some wrongdoing. And then for  
12 that knowledge to be actionable in some way, consistent  
13 with the notice of claim statute, it needs to be an actor  
14 in position to assess the potential for - - - for  
15 litigation - - - for a tort, and to either act on it  
16 themselves or refer to the comptroller. And that means  
17 what we know is that the First Department's ruling, which  
18 is that every single rank and file employee, 330,000 public  
19 employees in the City of New York, knowledge of - - - on  
20 the part of any of them would be sufficient.

21 JUDGE HALLIGAN: Right.

22 MS. DRUKER: That's clearly wrong.

23 JUDGE HALLIGAN: So just to press you a little  
24 bit on that, and I'm not suggesting this is what was  
25 alleged to have happened here. But if you had a

1           circumstance where someone with the requisite authority  
2           decided that they would rather not, for example, get  
3           certain reports because that would be sufficient to impute  
4           knowledge. I assume in a circumstance like that, where  
5           there's some effort to shield yourself as a decision-maker  
6           who would qualify from any information, that that would be  
7           a different circumstance not present here?

8                       MS. DRUKER: Absolutely. That's a completely  
9           different situation. And I think the best way to think of  
10          it is as a counterfactual. So what we have here is  
11          basically nothing. So I - - - I - - -

12                      JUDGE RIVERA: Wait a minute. Why would it  
13          matter? If your point is you got to have the actual  
14          knowledge, why would it matter?

15                      MS. DRUKER: Why would what matter?

16                      JUDGE RIVERA: You either have the actual  
17          knowledge or you don't, correct?

18                      MS. DRUKER: Well, he actual knowledge is both  
19          knowledge of the injury and knowledge - - -

20                      JUDGE RIVERA: No, no.

21                      MS. DRUKER: - - - of potential wrongdoing.

22                      JUDGE RIVERA: Regarding your response to Judge  
23          Halligan?

24                      MS. DRUKER: Well, the question is - - -

25                      JUDGE RIVERA: That it would be a different case



1 if the person who you would say, yes, if they knew then - -  
2 - then that would be knowledge that one could impute to the  
3 municipal corporation. If that person is actually trying  
4 not to get the information, you said, that's different.  
5 But I thought when you had started this argument, I thought  
6 your briefing was that you've got to have the actual  
7 knowledge.

8 MS. DRUKER: Right. So I think the suggestion -  
9 - - maybe I'm misunderstanding the question. But as I  
10 understand it, if there is a person who ought to have  
11 started an investigation, who knows about some wrongdoing  
12 on behalf of, you know, a police officer, a high-ranking  
13 official learns about it and says I don't want to know  
14 about it, don't tell me, we're in a completely different  
15 situation.

16 JUDGE RIVERA: But again, why does it matter - -  
17 -

18 MS. DRUKER: Because in that - - -

19 JUDGE RIVERA: - - - if the point of the statute  
20 is to ensure the corporation has an opportunity to get to  
21 information that would be useful to defend itself before it  
22 goes stale or disappears?

23 MS. DRUKER: Well, the statute doesn't require  
24 that we - - - that the petitioner show that we did an  
25 investigation. It only requires that they show that we had

1 an opportunity to do that investigation. And so I'm not  
2 suggesting a - - - an insuperable burden here that they  
3 prove that we did investigate. Which is, I think, what the  
4 question was relating to, whether or not we - - - if chose  
5 not to follow up on it that's - - - that's on us, but the  
6 fact that we need to have a basis to have that  
7 investigation to preserve evidence. Because that's the  
8 balance the legislature struck.

9 CHIEF JUDGE WILSON: So I'm wondering about the  
10 requirement that the person -- - or maybe not quite as  
11 strong as the requirement - - - the person be somebody in a  
12 position that has a responsibility to report it, et cetera.  
13 Because I think in Dalton, right? The - - - and this was a  
14 slip and fall of a student on a parking lot of a school. I  
15 think he reported it to somebody in the IT department and  
16 to the custodian. Not clear that those are people with  
17 that sort of responsibility to investigate a report.

18 MS. DRUKER: Well, I think - - - I think it  
19 really depends on the facts of the case, right? So I think  
20 that the conclusion is in the facts - - - on the facts.  
21 You're suggesting that in that scenario, there was an  
22 expectation that that would be sufficient to meet the - - -  
23 the requirements of the notice of claim statute, which is  
24 that somebody probably had an - - - you know, a  
25 responsibility - - - a reporting responsibl - - - there's

1 something - - - there's something else that's lacking. And  
2 the First Department's assumption is that there is a  
3 presumption. Basically, that we presume that just because  
4 of the participation. In fact, the intentional misconduct  
5 of an officer, that would be hidden, sort of, by  
6 definition, based on the description - - -

7 CHIEF JUDGE WILSON: Well, that seems to me an  
8 important point regarding this case.

9 MS. DRUKER: Yeah. So - - - so I think that the  
10 question about whether or not - - - so this is all to that,  
11 whether or not there's actual knowledge. Whether or not  
12 the circumstances are those that would prompt an  
13 investigation and settlement of claims or could prompt an  
14 investigation of settlement of claims is critical. And  
15 here there's - - - there's sort of multiple problems.  
16 There's problems that go to the - - - whether or not the  
17 facts, as they're alleged, are sort of - - - they're stated  
18 in the alternative, so it's even harder to identify what  
19 the exact facts are. But whatever it is, the theory is not  
20 one that shows both what happened and who know - - - who  
21 knew about it.

22 And then, moreover, what's presented was an  
23 attorney affirmation and no evidence whatsoever, no basis  
24 for the trial court to exercise any discretion. And what -  
25 - - what you're saying is that there's - - - when there's a

1 fact question about - - - you know, is this the kind of  
2 scenario under which someone should have acted?

3 CHIEF JUDGE WILSON: Well, the problem with no  
4 evidence, I think, is it's a little bit inconsistent with  
5 where you started earlier. That filing a notice in - - -  
6 within the time period is - - - is a very easy thing to do.  
7 I mean, the heavier you make that evidentiary burden, the  
8 harder it becomes to do.

9 MS. DRUKER: Well, so - - - so I think this is -  
10 - - and my time is over but I can answer the question.

11 CHIEF JUDGE WILSON: Please go ahead.

12 MS. DRUKER: This is the critical difference  
13 between the notice of claim and the late notice of claim.  
14 What happens is that the notice of claim is a - - - is a  
15 calculation made by the legislature that within ninety days  
16 of a tort, the petitioner just has to let the city know of  
17 a potential claim and that's the end. And then as a  
18 measure of legislative grace, in response to concerns that  
19 that was too harsh in circumstances when the city had the  
20 functional equivalent of a notice of claim, so the city  
21 already knew about the claim and should have investigated  
22 it anyway. In that narrow situation, what this court  
23 described as exceptional cases in Beary, there was a - - -  
24 the ability then to file a note - - - a late notice of  
25 claim petition and ask the court to adjudicate, oh, this is

1 the functional equivalent of a notice of claim; you have  
2 that notice. And so that evidentiary burden that I'm  
3 suggesting, it's not a particularly high one, but it is - -  
4 - when you're filing a petition and you're starting a  
5 special proceeding, asking the court to find that you've  
6 had the functional equivalent of a notice of claim and  
7 you've satisfied it, then you have to put it forward more  
8 than just an attorney affirmation that in boilerplate  
9 alleges the - - - really, the elements of a tort claim  
10 without really any accounting for whether the municipality  
11 knew about it within ninety days or shortly thereafter, and  
12 could have acted on it.

13 JUDGE RIVERA: I guess the - - - if I may? The  
14 question then becomes how would they know about it if they  
15 don't have access to records?

16 MS. DRUKER: Well, they would know about it,  
17 because imagine - - - let's take Mr. Orozco's claim. If we  
18 were to spin out, I don't know enough facts about his claim  
19 because it's stated at such a high level of generality.  
20 But let's say he pled a more concrete theory; he said an  
21 officer lied. And after the officer lied, I didn't file a  
22 notice of claim, but I did - - - this is a static fact - -  
23 - I did put the city on notice in another way. And I did  
24 that by filing of a complaint with the CCRB. I did that by  
25 - - - you know, making it clear to the District Attorney; I

1 told him about these lies; they were uncovered; my case was  
2 dismissed. And at that point it was referred for  
3 discipline. Because there's a whole set of procedures in  
4 place in the city that could provide a functional  
5 equivalent of a notice of claim, depending on the facts.  
6 And that's where it's a fact-bound analysis.

7 JUDGE RIVERA: So if I'm - - - if I'm  
8 understanding this point now, you're saying that regardless  
9 of whether or not the municipality has in place mechanisms  
10 to surface on its own, without - - - without a complaint,  
11 if there has been misconduct, right? That - - - in those  
12 kinds of cases that the individual has got to come forward  
13 and at least alert them in some way with some kind of  
14 complaint?

15 MS. DRUKER: And I think the way that that makes  
16 sense is to say, with a false arrest claim. When you have  
17 a person who's been arrested and then subsequently - - -

18 JUDGE RIVERA: It does - - - it does - - -

19 MS. DRUKER: - - - the case - - -

20 JUDGE RIVERA: - - - incentivize, does it not, a  
21 municipality not to put in place those kinds of ways to  
22 ensure that you're constantly identifying when you're - - -  
23 let's just take the police for the moment, police are  
24 perhaps acting inappropriately?

25 MS. DRUKER: Absolutely not. I don't think - - -

1 I mean, I think there's a couple of things. One is that I  
2 think that primary tort liability, while an important  
3 factor - - - I mean, we have a whole nationwide movement  
4 for police accountability and I don't think that the  
5 legislature's judgment about when the public fisc should be  
6 open to tort liability and when it shouldn't, is really a  
7 question about police accountability. But I do think if  
8 we're going to have a principled rule on the late notice of  
9 claim portion, the question is whether the police  
10 departments - - - whether a petitioner who says I provided  
11 notice to the city, if what we're suggesting is, oh, well,  
12 some police department in somewhere in the - - - in the  
13 state might decide not to follow up, that doesn't protect  
14 them from tort liability. Because the whole threshold  
15 question is only whether or not there was adequate notice,  
16 whether in the form of a notice of claim, or as the court  
17 sort of recognized in the late notice of claim, a slightly  
18 more flexible but still functional equivalent to it.

19 So - - - you know, whether the attorney, the  
20 insurance carrier, or the public corporation, in a similar  
21 capacity knows about the claim. Whether or not we then act  
22 on it for purposes of police accountability is sort of  
23 neither here nor there for whether or not tort liability is  
24 there.

25 JUDGE HALLIGAN: And presumably any result here



1 would apply across a very wide range of claims. So for  
2 example, if you shovel - - - you know, the snow, any - - -  
3 any range of the - - - of the wide variety of claims that  
4 the city is on - - -

5 MS. DRUKER: Yeah.

6 JUDGE HALLIGAN: - - - the receiving end of.

7 MS. DRUKER: Exactly. Yeah. And General  
8 Municipal Law 4 establishes that the - - - the notice of  
9 claim requirement applies for all negligence claims and all  
10 malfeasance claims. So we're talking about across-the-  
11 board tort liability. And the legislature doesn't provide  
12 a basis to distinguish different types of claims, which is  
13 what the First Department really did here by saying, oh,  
14 intentional conduct or police and corrections conduct is  
15 different. They - - - it's a result that's not consistent  
16 with the statutory scheme. Which at this point, this  
17 statutory scheme is really just about the notice of claim  
18 and the tort liability.

19 I know my time is up, so unless you have further  
20 questions.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. DRUKER: Thank you.

23 MR. DI SILVIO: Good afternoon. May it please  
24 the court. Lorenzo Di Silvio, on behalf of the city.

25 As my colleague explained, the First Department's



1 analysis is wrong at every turn.

2 JUDGE GARCIA: Counsel, can I ask you something?

3 MR. DI SILVIO: Yes, Your Honor.

4 JUDGE GARCIA: It seems to me there's two  
5 different ideas going on here. They're a bit conflated as  
6 I look at it, but - - - and maybe this is the wrong way to  
7 approach it. But it seems one theory was this is an  
8 intentional tort, as your colleague was saying. So the  
9 city actor must have known you were on notice. Right? But  
10 there's also a theme, let's say, that there are documents  
11 somewhere in the system that's - - - at least set forth the  
12 activity that was going on here. And those separately  
13 would also be - - - you know, enough to give you notice.  
14 More along the lines of Wally G. and the other cases. Is  
15 that right? Or are those some - - - those two ideas  
16 somehow merged here?

17 MR. DI SILVIO: I think they are independent and  
18 interrelated. But regarding the sort of animating idea  
19 behind the First Department's analysis that, well, you  
20 paper over everything; you can just go look at the  
21 documents. That's really about prejudice and the ability  
22 to reconstruct whether a tort happened after the fact. But  
23 as my colleague was referring, actual knowledge is a static  
24 fact that you have to look at. Did it exist within ninety  
25 days or a short time thereafter?

1           And another response to your concern, Your Honor,  
2           is that if you look at the Wally G. and the Williams cases,  
3           even in those cases where you have licensed professionals  
4           who were doing diagnostic evaluation and reviewing or  
5           building a chronology every time someone comes into a  
6           municipal hospital, even then the court said, look, we need  
7           to be able to say that a particular record evinced an  
8           injury fairly traceable to an actionable wrong by someone  
9           working for the city.

10           JUDGE GARCIA: But - - - no. And I understand  
11           that. I guess, my point more was that there are really two  
12           different issues or - - - or information facts that go to  
13           two different parts of the analysis. Is that what you're  
14           saying? So that we need to reach whether or not in the  
15           intentional action by the City - - - you know, the officer,  
16           is enough to give notice because the documentation issue  
17           goes to prejudice?

18           MR. DI SILVIO: So I think there's statutory and  
19           doctrinal reasons why the scheme that the legislature came  
20           up with doesn't differentiate between the types of torts or  
21           the fact patterns - - - the context in which they could  
22           arise. So that's one answer why the First Department's  
23           focus on intentional action is wrong. But the second  
24           answer is if you look at the five virtually identical  
25           proposed notices of claim in the Jaime matter. They are

1 full of boilerplate and they're honestly, intentionally  
2 cagey about what this petitioner is saying even happened to  
3 him. So what's more egregious in the Jaime matter than in  
4 the Orozco matter is that the First Department said, no  
5 matter the claim he is raising, no matter whether it's  
6 sound in negligence or intent, no matter the way the injury  
7 arose and how the municipal respondent is related to - - -

8 JUDGE GARCIA: Yes. But counsel, what I'm really  
9 trying to ask you is in terms of notice, do we need to  
10 reach the intentional tort issue? That's my issue. Or is  
11 there something else going on here with the documents as  
12 well? Does that also - - - is that really what's  
13 underlying the notice issue here?

14 MR. DI SILVIO: In the Jaime matter?

15 JUDGE GARCIA: Here, yes. Your case.

16 MR. DI SILVIO: Well, I just don't know what the  
17 tort is that the petitioner is alleging on each of the five  
18 occasions, so that's problem number one. There needs to be  
19 something in the balance for the court to weigh. And then  
20 the second point about the documents, it's just not the  
21 case that just because we know that documents will be  
22 created in the ordinary course of business - - -

23 CHIEF JUDGE WILSON: I'm not sure why you say you  
24 don't know what the torts alleged in each of those five  
25 incidents is.

1 MR. DI SILVIO: We know that he was injured.

2 CHIEF JUDGE WILSON: Well - - -

3 MR. DI SILVIO: - - - he says assault and  
4 corrections officers and/or other inmates.

5 CHIEF JUDGE WILSON: No, he - - - doesn't he  
6 identify the officers, for example, in the first one?

7 MR. DI SILVIO: He identifies the officers and  
8 the time and place, and that might go to prejudice. But it  
9 doesn't tell us why, at the point in time or shortly  
10 thereafter, we would have a reason to be doing the  
11 functional equivalent of the investigation that would have  
12 been prompted by a timely notice of claim in each of these  
13 five instances.

14 So just to round out the point, you know, if they  
15 - - - no matter the claim that are raised in the five - - -

16 CHIEF JUDGE WILSON: So sorry.

17 MR. DI SILVIO: Oh, I'm sorry, Your Honor.

18 CHIEF JUDGE WILSON: Let me just back you up  
19 there. I was just processing your answer. So your view is  
20 that the actual knowledge has to be of facts that are  
21 sufficient to have caused the municipality to investigate?

22 MR. DI SILVIO: Yes. Because that's at the core  
23 of the statute. If we don't have timely notice of claim,  
24 which will prompt an investigation by the controller, we're  
25 asking if there has been a functional equivalent. And the

1 fact that someone misjudged the use of force when trying to  
2 maintain control of an inmate, or maybe punched him because  
3 he didn't like the way he looked at him, or perhaps knew  
4 that a particular inmate or a group of inmates - - - you  
5 know, had it out for him and should have protected him, all  
6 we know here is there's some sort of injury. He says  
7 something along the lines of, well, he told people to look  
8 out for me.

9 CHIEF JUDGE WILSON: It shows a fractured arm in  
10 the records or no?

11 MR. DI SILVIO: It - - - the - - - in one  
12 instance there was a fractured arm, in another instance he  
13 alleges stitches. There's no documentary or record support  
14 for that but the notices of claim do purport to allege  
15 that.

16 CHIEF JUDGE WILSON: But the hospital - - - the  
17 infirmary records don't show a broken arm?

18 MR. DI SILVIO: If - - - so if the question is,  
19 let's just go look at the documents and see what they say,  
20 that really goes to prejudice. And it makes sense that in  
21 the context of prejudice, we know what - - -

22 CHIEF JUDGE WILSON: Does it only - - - in  
23 context does it only go to prejudice? That is, if there's  
24 a prison infirmary and an inmate comes in and has a broken  
25 arm, you would think that they'd want to know how that

1           happened.

2                       MR. DI SILVIO:  It's possible that that  
3           information might never be shared because there could be an  
4           inmate who, for whatever reason, doesn't want to disclose  
5           the cause of the injury; that it was another inmate or  
6           another officer, for whatever reason.  And so it will  
7           depend on the facts and circumstances of each individual  
8           case.  But if we had potentially a personal affidavit from  
9           the petitioner who said these injuries happened on these  
10          dates, I went to the infirmary, I told them that this is  
11          what happened to me, that would be an entirely different  
12          matter than the bare bones - - - you know, mere allegations  
13          that we seem to have here.

14                       So there needs to be - - -

15                       JUDGE SINGAS:  Is one of your issues here that  
16          the attorneys verified these as opposed to the petitioners?

17                       MR. DI SILVIO:  That is one of the issues here.  
18          So - - -

19                       JUDGE SINGAS:  Why is that problematic?

20                       MR. DI SILVIO:  So it's - - - the attorney is  
21          basically saying that on information and belief these  
22          things happened.  It seems that maybe he had conversations  
23          with his client and put in the best that he could.  But  
24          it's still so boilerplate that all we know about is the  
25          injury, not how it's fairly traceable to an action wrong,



1 much less how we had actual knowledge or something else to  
2 have prompted an investigation close in time or shortly  
3 thereafter to each of these incidents.

4 JUDGE SINGAS:: So it's content-based? Not - - -  
5 not through the vehicle of which it comes to your  
6 attention, it's what it is?

7 MR. DI SILVIO: I think there's multiple layers  
8 of errors in the First Department's analysis, and it could  
9 be in the Jaime matter, easy to correct - - - you know, one  
10 of them without having to delve into more thorny issues.  
11 But I do think both the lack of record support beyond a  
12 very bare bones attorney affirmation and notices of claim;  
13 the fact that we have no information about why the static  
14 fact of actual knowledge as to each of these five incidents  
15 would have existed at the time; and the very fact that I'm  
16 not even sure what it is he says caused his injury, so how  
17 is it that a court could even begin to exercise the - - -

18 JUDGE RIVERA: What if he said it - - - it's  
19 certain officers and named them, and certain inmates?

20 MR. DI SILVIO: That would allow us to - - -  
21 potentially, allow us to reconstruct the tort after the  
22 fact, but that doesn't tell us whether there was some basis  
23 to that.

24 JUDGE RIVERA: So let me ask you this. If you  
25 can reconstruct the tort after the fact, what is the - - -

1 what's the prejudice? If we disagreed with you, would you  
2 be able to go and defend?

3 MR. DI SILVIO: So in this particular case there  
4 was no independent argument on prejudice except for the  
5 showing on actual knowledge. There could be some case  
6 where there was an independent showing on prejudice. And  
7 as you were just asking my colleague, there could be a set  
8 of facts where no or very weak showing on actual knowledge,  
9 and potentially a very strong showing on prejudice,  
10 reasonable excuse, and any other facts and circumstances  
11 that are relevant to the case, that could get the  
12 petitioner over the threshold.

13 JUDGE RIVERA: Is your answer because they didn't  
14 - - - that that's not been raised, you don't know the  
15 answer?

16 MR. DI SILVIO: I'm sorry. What has not been - -  
17 -

18 JUDGE RIVERA: Is your answer that because this  
19 is not really in the case - - - that's how I understood  
20 your answer, it's not the argument that was made below,  
21 it's not what the court relied on, that, therefore, you  
22 can't answer my question? You don't know if there would be  
23 prejudice?

24 MR. DI SILVIO: I - - - it's possible that we  
25 could make a showing on prejudice. But because I looked at





1 the papers, our argument in this case was that the  
2 petitioner never shouldered their burden. So I don't  
3 believe we came up with a particularized showing. But  
4 everything in Jaime depends on this idea that there must  
5 always be records. And if an employee knows something,  
6 then that must be sufficient to prompt an investigation.  
7 There's problems on the outer bound of - - - you know,  
8 there are some reports that could be sufficient, there are  
9 some people's knowledge that might be sufficient. But the  
10 Appellate Division accepted the inverse and just vitiated  
11 the statutory protections that the legislature carefully  
12 considered in striking a balance between, on the one hand,  
13 equity for those who have been injured and the protection  
14 of the public fisc and the taxpayer funded services.  
15 Because in so many different ways, the Jaime analysis is  
16 just wrong and really muddying the waters that this court's  
17 case law had made clear. The First Department just ignored  
18 that. That's why a reversal is required in the Jaime  
19 matter and the Orozco matter, as well.

20 JUDGE RIVERA: You also agree, as did the other  
21 counsel, that there is no dispositive factor?

22 MR. DI SILVIO: I - - -

23 JUDGE RIVERA: That's not the way the statute  
24 read, not - - - reads, not the way we've interpreted. Or  
25 do you - - - do you understand it differently?

1 MR. DI SILVIO: I agree that the lack of actual  
2 knowledge wouldn't necessarily be fatal, but in this case  
3 it is.

4 JUDGE RIVERA: Because?

5 MR. DI SILVIO: Because there - - - he did not  
6 shoulder his burden on reasonable excuse; he offered  
7 nothing in the way of reasonable excuse. And his only  
8 argument on prejudice depends on the argument on actual  
9 knowledge. So if actual knowledge is out, we have nothing  
10 on the table.

11 JUDGE RIVERA: So then it's because - - - putting  
12 aside the actual knowledge, it's because he didn't come up  
13 with a reasonable excuse and because there's no prejudice,  
14 even though you told me you couldn't actually argue that -  
15 - -

16 MR. DI SILVIO: Well, there's no actual knowledge  
17 and the prejudice that - - -

18 JUDGE RIVERA: But - - - but you - - - I thought  
19 you had said, yes, you could have a case where actual  
20 knowledge is not the dispositive factor.

21 MR. DI SILVIO: If there were an argument to  
22 satisfy the initial burden on prejudice, which there isn't  
23 here.

24 JUDGE RIVERA: Um-hum.

25 MR. DI SILVIO: So this case is - - - you know,

1 not - - -

2 JUDGE RIVERA: What would - - - what would  
3 someone have to do to satisfy the burden - - -

4 MR. DI SILVIO: So - - -

5 JUDGE RIVERA: - - - on prejudice?

6 MR. DI SILVIO: On prejudice?

7 JUDGE RIVERA: Because it sounds like you're  
8 saying, yes, actual knowledge need not be a dispositive  
9 factor. But if you have the combination of - - - you know,  
10 actual knowledge, it's - - - you don't really have a  
11 reasonable excuse and you can't show prejudice, that's the  
12 trifecta; you can't get that late notice of claim motion  
13 granted?

14 MR. DI SILVIO: I mean - - - that's our general  
15 theory. But I also want to echo - - - apologies, I've lost  
16 my train of thought. But the - - - the point that my  
17 colleague was making about there are vehicles by which  
18 someone who is a pre-trial detainee at Rikers can create  
19 records showing that their rights have been violated. And  
20 we actually have some proof that this petitioner knew how  
21 to do that but didn't do it in connection with any of  
22 these. That could be sufficient on prejudice, because you  
23 could put together an event after the fact. But we have no  
24 records, we have no record support - - -

25 JUDGE TROUTMAN: You're referring to his having

1 filed grievances before?

2 MR. DI SILVIO: That's correct. They don't  
3 pertain to these incidents.

4 JUDGE TROUTMAN: And the paperwork that he refers  
5 to here isn't causally connected to what he claims  
6 occurred?

7 MR. DI SILVIO: That's correct. Because none of  
8 the grievance - - - I believe it was money in his account,  
9 and he refers to an altercation with a correctional  
10 officer. I don't believe is one of the named corrections  
11 officer. And there's no more information provided about  
12 what the altercation is. And I don't believe it's any of  
13 the dates that he identifies in the proposed notice of  
14 claim.

15 But to go back to Judge Rivera's concern, there  
16 are things that a detainee can do if their rights are being  
17 violated. And so they don't even need to know about the  
18 notice of claim statute to be able to file a grievance, to  
19 be able to file some other complaint, to be - - - seek to  
20 have an officer disciplined. There are ways to do this.  
21 But here - - -

22 CHIEF JUDGE WILSON: That seems to go more to  
23 notice than to prejudice, right? I mean, if he even sent  
24 grievances like that in, you might still be prejudiced  
25 because evidence has evaporated or whatever by the time he

1 sent it in. It's really more - - -

2 MR. DI SILVIO: That's possible. But at least  
3 then there would be a threshold showing on prejudice so  
4 that we'd have something in the mix to be balanced. Here  
5 we have - - -

6 CHIEF JUDGE WILSON: Counsel, I'm not following  
7 whether it's a threshold showing on prejudice rather than  
8 substitute notice.

9 MR. DI SILVIO: Because if all it - - - well, it  
10 depends on the contents of the grievances of the  
11 complaints. But the fact of the matter is that someone can  
12 put the municipality on notice separate from timely filing  
13 a notice of claim. That's not what happened here. And  
14 it's - - - you know, it - - - here we just have the  
15 presumption that there must be records. There must have  
16 been caused by some correctional officer. They must know  
17 this. So there must be actual knowledge.

18 JUDGE RIVERA: If I can ask one other - - - one  
19 last one? I think, what if a inmate is afraid - - - this  
20 may be a little bit of what you were being asked before - -  
21 - is afraid to complain, feels that they will be retaliated  
22 against and said - - - looks and says, I've just got to  
23 hold out a certain number of months - - - thirteen months,  
24 fourteen months, two years, whatever it is, then I'm going  
25 to file?

1 MR. DI SILVIO: So I - - - I mean that could - -  
2 -

3 JUDGE RIVERA: And then they do. Once they're  
4 released, then they do.

5 MR. DI SILVIO: So that might go to reasonable  
6 excuse. And the statute does say all relevant facts and  
7 circumstances, so there could be a case where the argument  
8 is made that those are the facts and so there's such a  
9 strong showing on reasonable excuse. Maybe the time is  
10 very short so the balance of factors might, depending on  
11 the facts and circumstances of the case, weigh in favor of  
12 leave there. But none of those factors are present here.

13 JUDGE RIVERA: Thank you.

14 JUDGE HALLIGAN: Counsel, one last question.  
15 If I can, Chief?

16 CHIEF JUDGE WILSON: Of course.

17 JUDGE HALLIGAN: Can you give us a quick sense of  
18 the other types of tort claims that the city faces? And if  
19 you happen to know what percentage of your docket - - -  
20 your tort docket is in the corrections context, as opposed  
21 to other types of tort claims? Just roughly, if you happen  
22 to know.

23 MR. DI SILVIO: I don't happen to know, but I do  
24 believe that we cite statistics that we've compiled in the  
25 city in either our opening brief or our reply brief. And I

1 would go - - - I would go back there if I were reporting  
2 back to you - - -

3 JUDGE HALLIGAN: I'd appreciate it.

4 MR. DI SILVIO: - - - to look at those, because I  
5 - - - they might break them down by carceral setting, by  
6 police activity, more ways like that; but it is a  
7 substantial number. And the problem here is that basically  
8 the First Department has blessed a - - - a framework where  
9 up until one year and ninety days after the fact, if it  
10 involves police, if it involves a carceral setting, there  
11 must be actual knowledge and that is just not - - -

12 JUDGE HALLIGAN: But I assume - - - my question  
13 was I assume that you have some set of claims that are  
14 outside of the carceral and - - -

15 MR. DI SILVIO: That's correct.

16 JUDGE HALLIGAN: - - - police context. And - - -  
17 and so just very briefly, what types of claims might that  
18 encompass?

19 MR. DI SILVIO: So it could be - - - you know, a  
20 trip and fall claim, a motor vehicle collision involving a  
21 city vehicle, whether as the - - - you know, the one that  
22 hits it or the one that hits the car that then hits the  
23 person who's injured. There's so many different variations  
24 on it that it's such a frustrating answer, I know, to say  
25 it depends on the facts and circumstances of these - - -

1 each case. But it is the case that the First Department's  
2 errors here don't draw any distinction, and that  
3 distinction is not based on a good faith reading of either  
4 the statute or this court's case law.

5 JUDGE HALLIGAN: Thank you.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. DI SILVIO: Thank you, Your Honors.

8 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of City of New York v. Jaime and Orozco, No. 15, 16 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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