MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

December 5, 2012

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Kaier, Jarod v. County of Erie - injury during firefighter training*
Document Received:	Order to Show Cause
Name of Claimant:	Jarod Kaier 181 Hillpine Road Cheektowaga, New York 14227
Claimant's attorney:	Richard A. Nicotra Andrews, Bernstein & Maranto, LLP 69 Delaware Avenue, Suite 1200 Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enclosure

SUPREME COURT OF BUFFALO
COUNTY OF ERIE :: STATE OF NEW YORK

JAROD KAIER

Plaintiff,

ORDER TO SHOW CAUSE

v.

COUNTY OF ERIE,

Index No.: 3920/12

Defendant.

Upon the annexed affidavit of merits of Richard A. Nicotra, Esq., sworn to on November 21, 2012, and upon all papers and proceedings heretofore had herein, let the COUNTY OF ERIE show cause at a Special Term of this Court to be held at the Erie County Supreme Court Building located at 92 Franklin Street, Buffalo, New York on the 12th day of December, 2012, at 10 o'clock in the noon of that day or as soon thereafter as counsel can be heard why an Order should not be entered herein (1) allowing Plaintiff leave to file a late notice of claim; (2) allowing Plaintiff leave to file a Summons and Complaint; and (3) granting such other and further relief as to the Court may seem just and proper, together with the costs of this motion.

PAID
11/21/2012/ 15:04:34
ERIE COUNTY CLERK
RCPT # 12181679
I 2012003920

DATED: Buffalo, New York
November 21, 2012

Yours, etc.

By: _____
HON. JOHN L. MICHALSKI, J.S.C.

GRANTED
NOV 26 2012
Laura Rodgers
COURT CLERK

216-NF +J

SUPREME COURT OF BUFFALO
COUNTY OF ERIE :: STATE OF NEW YORK

JAROD KAIER,

Plaintiff,

AFFIRMATION OF SERVICE

v.

COUNTY OF ERIE,

Index No.:

Defendant.

I, Richard A. Nicotra, affirm pursuant to CPLR § 2106, that the within Order to Show Cause was this date hand delivered to all counsel shown below at their respective addresses:

ERIE COUNTY DEPARTMENT OF LAW
95 Franklin Street
Buffalo, New York 14202

Richard A. Nicotra

Sworn to before me this

21 day of November, 2012

Notary Public

LISA A. QUIGLEY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 24, 2015

SUPREME COURT OF BUFFALO
COUNTY OF ERIE :: STATE OF NEW YORK

JAROD KAIER,

Plaintiff,

AFFIDAVIT OF MERIT

v.

COUNTY OF ERIE,

Index No.:

Defendant.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:
CITY OF BUFFALO)

Richard A. Nicotra, Esq., being duly sworn, deposes and says, upon information and belief:

1. I am an attorney at law duly licensed to practice in the State of New York, and am associated with the law firm of Andrews, Bernstein & Maranto, LLP, counsel to the plaintiff, JAROD KAIER. As such, I am fully familiar with the facts and circumstances herein.

2. I submit this affidavit of merit in support of Mr. Kaier's Order to Show Cause.

3. Mr. Kaier's own affidavit is appended hereto immediately after this affidavit.

FACTS

4. According to the Accident Report, on August 24, 2011, Jarod Kaier was training as a volunteer firefighter for the Bellevue Volunteer Fire District. During a supervised "bail out" drill, Jarod Kaier slid down a ladder and injured his left shoulder. Chief Brian Gould completed an Accident Report. The Accident Report is attached as Exhibit A.

5. Mr. Kaier wasto Sisters of Charity Hospital, St. Joseph Campus. See Exhibit A. Mr. Kaier was seen by Christian Krawczyk, DO. Dr. Krawczyk performed a physical

examination and took images of Mr. Kaier's left shoulder and scapula. The images were unremarkable and Mr. Kaier was diagnosed with a strained shoulder and instructed to follow up with his physician as needed. He was not prescribed any medication. Please see the records of Sisters of Charity Hospital attached as Exhibit B.

6. On August 25, 2011, Mr. Kaier submitted a claim for benefits to Chief Brian Gould, outlining his injury and the facts surrounding the occurrence. The claim for benefits is attached as Exhibit C.

7. Mr. Kaier presented to Dr. Su Zhan at WNY Rehabilitation and Pain Management on November 2, 2011. Mr. Kaier described his pain as a tingling and numbness sensation in both hands and feet that was gradually getting worse. Dr. Zhan noted that Mr. Kaier suffered from headaches, left shoulder pain, and scapula pain. Dr. Zhan performed a physical examination and found neither dislocation nor subluxation of either upper or lower extremity joints. She also found that Mr. Kaier's upper extremity range of motion was within functional limits. She diagnosed Mr. Kaier with rotator cuff injury with impingement syndrome. Dr. Zhan referred Mr. Kaier to Buffalo Rehab Group for physical therapy and ordered an MRI of Mr. Kaier's left shoulder as well as an EMG and nerve conduction study. The medical records of WNY Rehabilitation and Pain Management are attached as Exhibit D.

8. Mr. Kaier presented to Buffalo Rehab Group on November 17, 2011. He was seen by Scott Tanski, PT. Mr. Tanski performed a physical examination and found that Mr. Kaier's left shoulder had limited range of motion. Mr. Tanski noted that nothing consistently decreased Mr. Kaier's pain. Mr. Kaier treated at Buffalo Rehab Group approximately three times per week through December 29, 2011. The medical records of Buffalo Rehab Group are attached as Exhibit E.

9. On November 18, 2011, Mr. Kaier presented to WNY Rehabilitation Medicine and Pain Management for an NCV/EMG study. The study revealed only evidence of right carpal tunnel syndrome and no other nerve impairment. The medical records of WNY Rehabilitation and Pain Management are attached as Exhibit D.

10. Mr. Kaier returned to WNY Rehabilitation Medicine and Pain Management on November 30, 2011. Mr. Kaier noted that his pain was chronic, and he rated it a four out of ten at its best. Dr. Zhan performed a physical examination and noted that Mr. Kaier continued to suffer from shoulder pain despite physical therapy. She recommended that, after Mr. Kaier's MRI was approved by his insurer, he receive the MRI and she could review his injury further. Mr. Kaier followed up with Dr. Zhan on February 7, 2012, after receiving his MRI. See Exhibit D.

11. On December 29, 2011, Mr. Kaier presented to Buffalo Rehab Group. He was seen by Sarah Mattson, PT. Ms. Mattson performed a physical examination and found that Mr. Kaier's range of motion had improved but was still limited and Mr. Kaier continued to suffer from associated pain. Ms. Mattson recommended Mr. Kaier receive an MRI of his left shoulder. Mr. Kaier continued to treat with at Buffalo Rehab Group approximately three times per week through January 27, 2012. See Exhibit E.

12. Mr. Kaier presented to Buffalo General Hospital on January 24, 2012 for an Foreign Body Detection Orbit. The test revealed several radiopaque densities. Further testing was required to determine the nature of the objects. On January 28, 2012, Mr. Kaier returned to Buffalo General for a CT scan. The scan revealed a foreign body surrounding the left globe containing calcific density. Please see the medical records from Buffalo General attached as Exhibit F.

13. On February 2, 2012, Mr. Kaier presented again to Buffalo General Hospital for a left shoulder MRI. The MRI revealed supraspinatus tendinosis with bursal side of frank and subdeltoid subacromial bursitis. See Exhibit F.

14. On February 7, 2012, Mr. Kaier returned to WNY Rehabilitation and Pain Management. Dr. Zhan performed a physical examination and reviewed Mr. Kaier's left shoulder MRI. Dr. Zhan noted that Mr. Kaier's left shoulder suffered a 25% limitation in range of motion. She maintained her diagnosis of left shoulder pain with impingement syndrome and added supraspinatus tendinosis. Dr. Zhan administered a cortisone injection to help Mr. Kaier manage his pain. Mr. Kaier continued to treat with Dr. Zhan approximately bi-monthly through August 30, 2012. See Exhibit E.

15. Mr. Kaier presented to Dr. Marc Fineberg at UB Orthopedic Center on May 21, 2012. Dr. Fineberg performed a physical examination and took x-rays of Mr. Kaier's left shoulder. Dr. Fineberg diagnosed Mr. Kaier with left shoulder pain with a probable labral tear. Dr. Fineberg recommended a left shoulder arthroscopy and possible labral repair. Mr. Kaier returned to UB Orthopedic for a pre-op physical on June 13, 2012. Please see the medical records of UB Orthopedic Center attached as Exhibit G.

16. On July 24, 2012, Mr. Kaier presented to Dr. Fineberg at Millard Fillmore Surgery Center for a left shoulder arthroscopy and posterior labral repair. Dr. Fineberg removed a .5 cm loose body from the axillary pouch. Damaged tissue was removed from the glenoid rim and flap tears of the labrum. Dr. Fineberg found that the surgery went well and scheduled Mr. Kaier for a follow up appointment. Please see the medical records of Millard Fillmore Surgery Center attached as Exhibit H.

17. Mr. Kaier presented to Dr. Fineberg on August 1, 2012. Dr. Fineberg observed that Mr. Kaier was recovering well. Mr. Kaier returned to Dr. Fineberg on August 30, 2012. Dr. Fineberg noted that Mr. Kaier would be transitioned into a sling for the next two weeks. See Exhibit G.

18. On August 30 2012, Mr. Kaier also presented to Dr. Su Zhan at WNY Rehabilitation and Pain Management. Dr. Zahn performed a physical examination and continued to prescribe Celebrex and a topical patch to help Mr. Kaier manage his pain. Mr. Kaier continues to treat with Dr. Zhan. See Exhibit E.

19. Mr. Kaier returned to Buffalo Rehab Group on September 4, 2012. He was seen by Scott Tanski, PT. Mr. Tanski performed a physical examination and found that Mr. Kaier had pain and decreased range of motion consistent with a labral repair. Mr. Kaier continues to treat at Buffalo Rehab Group approximately three times per week. See Exhibit E.

20. On October 9, 2012, Mr. Kaier presented to Dr. Rehmatullah for an independent medical examination. Dr. Rehmatullah found that Mr. Kaier's injuries were the result of his accident, that he was temporarily partially disabled, and that he required an additional four weeks of physical therapy. Please see the medical records of Dr. Rehmatullah attached as Exhibit I.

ARGUMENT

CLAIMANT IS ENTITLED TO SERVE A LATE NOTICE OF CLAIM.

20. "The Court, in its discretion, may extend the time to serve a notice of claim." Gen. Mun. Law § 50-e (5). In making its determination, the Court can consider "all. . . relevant facts and circumstances." Id. "No one factor is dispositive." Hilton v. Town of Richland, 216,

A.D.2d 921, 921 (4th Dept. 1995). However, "'[o]ne of the factors that should be accorded great weight is whether [the municipality] received actual knowledge of the facts constituting the claim in a timely manner'" Bazer v. Town of Walworth, 277 A.D.2d 994, 994 (4th Dept. 2000) (quoting In re Canty v. City of New York, 273 A.D.2d 467, 468 (2d Dept. 2000). Other factors that are considered are whether the Claimant made an excusable error in misidentifying the respondent, and whether the delay in serving the notice of claim substantially prejudiced the respondent. Greene v. Rochester Housing Auth., 273 A.D.2d 895, 895 (4th Dept. 2000).

THE COUNTY OF ERIE HAD ACTUAL NOTICE OF THE ESSENTIAL FACTS OF THE CLAIM.

21. When a County official is at the scene of an accident and fills out a report detailing the accident, the County has actual notice of the essential facts of the claim. Bazer v. Town of Walworth, 277 A.D.2d at 994; See also Henderson v. Town of Van Buren, 281 A.D.2d 282, 284 (4th Dept. 2001) (holding that Town had actual notice of facts constituting a claim for sexual harassment when Town Supervisor was notified immediately after the first occurrence).

22. Here, the injury report was completed by Fire Chief Brian Gould. See Exhibit A. The report indicates the time, date, and location of the accident. Id. It identifies a witness. Id. It indentifies nature of the injury and the way in which it occurred. Id. It further indicates whether safety equipment was in use and in proper working order. Id. All of this information was provided by or to Fire Chief Gould immediately following the accident. Id. Additionally, the accident occurred during a County sponsored training session, on County equipment, operated by County employees. Id. Since County officials were made aware of all of this information and were present at the time of the accident, the COUNTY OF ERIE had actual notice of the essential facts of the claim.

CLAIMANT HAS SHOWN A REASONABLE EXCUSE FOR HIS DELAY IN SERVING A NOTICE OF CLAIM.

23. The Claimant's delay in learning the seriousness and extent of his injuries is a reasonable excuse for delay. See Hack v. City of Syracuse, 256 A.D.2d 1226, 1226 (4th Dept. 1998) (holding that Plaintiff's allegation "that the nature and extent of her injuries were unknown to her at [the] time" satisfied the reasonable excuse requirement); see also Wemett v. Onondaga County, 64 A.D.2d 1025, 1025 (4th Dept. 1978) (holding that Petitioner could file a late notice of claim when she was initially told that her medical expenses would be a mere $277, and after the 90-day time limit she learned her injuries were more extensive and would require surgery). When the Claimant's injury is not readily apparent and is not diagnosed until after the 90-day limit, the delay is excusable. Id. See also Raizner v. City of New York, 174 A.D.2d 423, 423 (1st Dept. 1991) (holding that Petitioner's delay in giving notice of claim was excusable when he was initially diagnosed with a sprained ankle and after the time limit found that he had torn his medial meniscus).

24. Claimant delay in learning the extent of his injuries is identical to Hack, Wemett, and Raizner. 256 A.D.2d at 1226; 64 A.D.2d at 1025; 174 A.D.2d at 423. Claimant sought medical treatment immediately following his accident. See Exhibit A. His physical examination and x-ray imaging did not reveal any particular damage to claimant's shoulder. See Exhibit B. Claimant continued to treat with a Pain Management Specialist and Physical Therapists for months to relieve his pain and improve his range of motion. See Exhibit D; see also Exhibit E. Although Claimant had received medical treatment, it was not until May 21, 2012, nearly nine months from his accident, that Claimant learned his injury was more serious than his initial diagnosis.

25. As in Wemett, the Claimants injury was not readily apparent and was not diagnosed until after the 90-day limit had expired. 256 A.D.2d at 1226. The Claimant's delay in this case is particularly reasonable because he was receiving consistent medical care and his physicians assured him that the pain would subside and the injury was minimal. Since Claimant's underestimation of the extent of his injuries is reasonable and more persuasive than cases that have been found to be excusable, Claimant's delay in notifying the County is excusable.

THE COUNTY OF ERIE HAS NOT BEEN PREJUDICED BY THE DELAY.

26. The COUNTY OF ERIE has the burden of showing the delay in serving the notice of claim "substantially prejudiced" them. Greene v. Rochester Housing Auth., 273 A.D.2d at 895. A delay is not prejudicial if the defendant had an opportunity to conduct an investigation when it received actual notice of the claim, regardless of whether it actually conducted such an investigation. Rose v. Rochester Housing Auth., 52 A.D.3d 1268, 1269 (4th Dept. 2008).

27. The COUNTY OF ERIE had ample opportunity to conduct an investigation. They were fully aware of all of the facts of the case, including the identities of employee witnesses. See Exhibit A. The accident occurred during a County sponsored training session on County equipment operated by County employees. Thus, the COUNTY OF ERIE could have conducted a full investigation at anytime. If they chose not to has no bearing on whether they have been "substantially prejudiced." Rose, 52 A.D.3d at 1269. Therefore, the COUNTY OF ERIE has not been substantially prejudiced by the delay in notice.

CONCLUSION

28. The Claimants are entitled to file a Late Notice of Claim because the COUNTY OF ERIE had actual notice of the essential facts constituting the claim, the delay in notice is excusable, and the COUNTY OF ERIE has not been substantially prejudiced by the delay.

29. With the Court's leave, the attached Summons and Complaint naming the COUNTY OF ERIE will be filed and served. See Exhibit J.

30. There has been no previous application for the relief sought herein.

WHEREFORE, your deponent respectfully requests that this Court grant an Order permitting the Claimant to serve a late Notice of Claim upon Respondent COUNTY OF ERIE, to amend the Summons and Complaint, and for such other further and different relief as the court deems just and proper.

Richard A. Nicotra, Esq.
ANDREWS, BERNSTEIN & MARANTO, LLP
Attorney for Defendant
Office and Post Office Address
420 Franklin Street
Buffalo, New York 14202
Telephone: (716) 842-2200

Sworn to before me this

21 day of November, 2012

Notary Public

LISA A. CUIGLEY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 24, 2015

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

JAROD KAIER

Petitioner,

vs.

COUNTY OF ERIE

Defendant.

AFFIDAVIT

Index No.

JAROD KAIER, being duly sworn deposes and says:

1. I am the applicant herein, and I submit this affidavit in support of the within motion.

2. This Affidavit is submitted in support of plaintiff's order to show cause.

3. On August 24, 2012 I was involved in an accident while training with the Bellevue Volunteer Fire District.

4. At the time of the accident, I was practicing a "bail out" technique when I fell and caught my arm in the ladder, injuring my shoulder.

5. At the time of the accident I was in the presence of County employees and under their supervision.

6. Following the accident, I went to Sisters of Charity Hospital where I was diagnosed with a strained shoulder and told to follow up with my personal physician.

7. For several months I received pain management treatment and physical therapy. I continued to be in pain and on May 21, 2012, I presented to Dr. Marc Fineberg at UB Orthopedic Center.

8. Dr. Fineberg recommended a left shoulder arthroscopy and performed that surgery on July 24, 2012. A loose body as well as damaged tissue was removed from my shoulder.

9. As a result of my fall I have suffered significant injuries to my shoulder requiring surgery.

WHEREFORE I respectfully pray for the relief being asked for in the accompanying order, for all of which no previous application has heretofore been made.

JAROD KAIER

Sworn to before me this
20 day of November, 2012

Notary Public

LISA A. QUIGLEY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires October 24, 2015