

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver and Julianna Dzwierzynski**  
**Re: Indemnification of Non-State Personnel by the State Under the Torts Claim Act**  
**(*Kaminskas v. Office of the Attorney General*, 236 N.J. 415 (2019)).**  
**Date: July 20, 2020**

## MEMORANDUM

### Executive Summary

The New Jersey Tort Claims Act and the statutes concerning Municipalities and Counties both address the identity of the party required to provide a defense for an employee against whom legal action is brought in connection with their employment.<sup>1</sup> The Tort Claims Act states that the Attorney General shall, upon the request of a current or former employee of the State, provide for the defense of any action brought against the employee on account of an act or omission in the scope of their employment.<sup>2</sup> The governing body of a county is required to provide a member of the county police or park police with the necessary means for the defense of any action or legal proceeding arising out of or incidental to the performance of the officer's duties.<sup>3</sup>

County employees are, with some frequency, called to act as an 'arm of the State' in criminal cases.<sup>4</sup> The services these individuals are required to perform does not arise from, nor is it incidental to, the performance of their duties as county employees.<sup>5</sup> Instead, their services are provided for the sole benefit of, and at the exclusive direction of, the State.

The statutes do not address a situation in which a county officer is called upon to participate in a State criminal prosecution, and is subsequently sued in a civil action by the criminal defendant.

In *Kaminskas v. State*, the New Jersey Supreme Court considered the Attorney General's denial of the requests by two county police officers to indemnify them in a civil action brought against them for alleged misconduct that occurred while they performed services to aid in the prosecution of a criminal case.<sup>6</sup>

### Statute Considered

#### **N.J.S. 59:10A-1 provides:**

Except as provided in section 2 hereof, the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any

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<sup>1</sup> N.J.S. 59:10A-1; N.J.S. 40A:14-117.

<sup>2</sup> N.J.S. 59:10A-1.

<sup>3</sup> N.J.S. 40A:14-117.

<sup>4</sup> *Kaminskas v. Office of the Attorney General*, 236 N.J. 415, 417 (2019).

<sup>5</sup> *Id.* See N.J.S. 40A:14-17.

<sup>6</sup> *Id.* at 415.

action brought against such State employee or former State employee on account of an act or omission in the scope of his employment [...]

**N.J.S. 40A:14-117 provides:**

Whenever a member or officer of a county police, or county park police, department or force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county, or county park commission, as the case may be, shall provide said member or officer with necessary means for the defense of such action or proceeding[....]

**Background**

In 2006, Emmanuel Mervilus was arrested and charged with first-degree robbery, aggravated assault, and third-degree possession of a weapon for an unlawful purpose.<sup>7</sup> He agreed to take a polygraph examination.<sup>8</sup> The Union County Prosecutor’s Office did not employ a polygraphist, and therefore requested the services of Lieutenant Kaminskas, an officer with the Union County Police Department.<sup>9</sup>

At trial, Lieutenant Kaminskas testified that the polygraph exam was a “truth indicator” and that in his opinion Mervilus “wasn’t telling the truth.”<sup>10</sup> Mervilus was subsequently convicted of first-degree robbery and aggravated assault.<sup>11</sup> On appeal, the court found that Lieutenant Kaminskas’ testimony was improper, since it may have led the jury to “perceive polygraph evidence as infallible.”<sup>12</sup> On remand, Mervilus was acquitted of all charges.<sup>13</sup>

In November 2014, Mervilus filed a complaint against Lieutenant Kaminskas, his Chief (collectively, “the officers”), and two Union County prosecutors, asserting claims for wrongful prosecution and conviction under federal and state statutes and the common law.<sup>14</sup> Each of the civil defendants requested that the Attorney General defend and indemnify them in the civil suit pursuant to *Wright v. State*.<sup>15</sup> The Attorney General only agreed to defend and indemnify the county prosecutors, asserting that *Wright* does not extend to county police officers and that N.J.S. 40A:14-117 requires each county to defend its own police officers.<sup>16</sup>

On appeal, the officers contended that they were entitled to both defense and indemnification by the Attorney General because they were “non-state employee who [were]

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<sup>7</sup> *Id.* at 418.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 419.

<sup>14</sup> *Id.*

<sup>15</sup> See *Wright v. State*, 169 N.J. 422 (2001) (holding that the State could be vicariously liable, under the Tort Claims Act for the alleged torts of county prosecutors and subordinates, as well as indemnification and legal defense).

<sup>16</sup> *Id.*

acting as an ‘arm of the State.’”<sup>17</sup> In addition, they argued that their “actions in [the criminal case] did not arise of and were not incidental to their employment with the county police department, but were instead undertaken for ... the sole benefit and at the exclusive direction of the [State] in all matters connected to [the] case.”<sup>18</sup>

The Appellate Division affirmed the decision of the Attorney General. The Court determined that N.J.S. 40A:14-117 requires each county to defend its police officers. Additionally, the Court said that the Attorney General’s duty to defend applies only to “active and former ‘state employees.’”<sup>19</sup> Finally, the Appellate Division reasoned that the “narrow exception established in *Wright*... applies only to county prosecutors and their employees” and that it would be inappropriate to extend *Wright* to cover county police officers since doing so would “create an unnecessary conflict between N.J.S.A 40A:14-117 and N.J.S.A. 59:10A-1 to-6.”<sup>20</sup>

The officers’ petition for certification was granted.<sup>21</sup>

### **Analysis**

The New Jersey Tort Claims Act (TCA) requires the Attorney General to provide for the defense of State employees, or former employees, in an action brought against them on account of an act or omission in the scope of their employment.<sup>22</sup>

The term “employee” is defined in the TCA<sup>23</sup> in N.J.S. 59:1-3 as “an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service.” The term does not include those who are considered independent contractors.<sup>24</sup>

At the county level, law enforcement officers may find themselves subject to litigation. Similar to the protections set forth in the TCA, N.J.S. 40A:14-117 provides that, “[w]henver... a[n] officer of a county police ... is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county... shall provide [the]... officer with necessary means for the defense of such action.”<sup>25</sup> To qualify for indemnification, the action or legal proceeding must arise out of or be incidental to the performance of the officer’s duties.<sup>26</sup>

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<sup>17</sup> *Id.* at 420.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 420.

<sup>21</sup> *Id.*

<sup>22</sup> N.J.S. 59:10A-1

<sup>23</sup> N.J.S. 59:1-3.

<sup>24</sup> N.J.S. 59:10A-1.

<sup>25</sup> N.J.S. 40A:14-117 also covers members of a county police force, and the county park police department or force. For purposes of this memorandum and in the interest of succinctness, references have been limited to those of county police officers similar to those in *Kaminskas v. Office of the Attorney General*, 236 N.J. 415 (2019).

<sup>26</sup> N.J.S. 40A:14-117.

County officers may be called upon to provide the State with services that would otherwise be unavailable to a Prosecutor's Office. In *Kaminskas*, the county officer administered polygraph examinations on behalf of the Prosecutor's Office because that office did not employ a polygraphist.<sup>27</sup> Services provided by a county officer while acting as an 'arm of the State' may be unrelated to the officer's work with the county, neither arise out of nor incidental to that work. The county officer in *Kaminskas* contended that the work giving rise to the litigation against him was neither "part of" nor "incidental to" his county employment.<sup>28</sup> Instead, he argued that the work was "for the sole benefit and at the exclusive direction of the [State]."<sup>29</sup> The Attorney General, however, maintained that county officers "remain under their employing county's control at all times."<sup>30</sup> The Court determined that the county officer's work for the State "[arose] out of...the performance of [their] duties" and therefore found that N.J.S. 40A:14-117 mandated that the County, not the State, provide indemnification to the officers in the civil action.<sup>31</sup>

*Kaminskas v. Office of the Attorney General* points out that there is a class of individuals who may not be covered by either N.J.S. 59:10A-1 or N.J.S. 40A:117. *Kaminskas* shows that county officers subsequently sued for their role in a State prosecution may find themselves in a situation in which both the State and the County decline to assist in the defense of the action. Such a result may discourage counties from allowing their officers to work with the State in criminal prosecutions.<sup>32</sup>

### **Pending Legislation**

To this date, there is no legislation currently pending regarding either N.J.S.A. 59:10A-1 or N.J.S.A. 40A: 14-117.

### **Conclusion**

Staff requests authorization to conduct additional research to determine whether N.J.S.A. 59:10A-1 or N.J.S.A. 40A: 14-117 would benefit from modification to address the circumstances found in this case.

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<sup>27</sup> *Kaminskas*, 236 N.J. at 418.

<sup>28</sup> *Id.* at 420.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 421-22. The County of Hudson and the New Jersey Association of Counties contend that "when county police officers work under the prosecutor's supervision, they are not supervised by the county...."

<sup>31</sup> *Id.* at 427.

<sup>32</sup> *Id.* at 422.