NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Concerning Tort Claims Act Application of N.J.S. 59:8-8 Notice of Claim Provision to Contribution and Indemnification Claims

July 10, 2023

The New Jersey Law Revision Commission is required to "[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it" and to propose to the Legislature revisions to the statutes to "remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions." *N.J.S.* 1:12A-8.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **September 18, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary

The New Jersey Tort Claims Act ("TCA"),[1] provides public entities with "broad but not absolute immunity" from tort liability.[2] The TCA sets forth procedures for initiating a tort claim against a public entity, including the requirement in N.J.S. 59:8-8 that "[a] claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action."[3]

In *Jones v. Morey's Pier, Inc.*, a child was killed after falling from an amusement park ride while on a school trip.[4] Her parents filed a wrongful death action against the amusement park ("Morey Defendants"), which, in turn, filed third-party contribution and indemnification claims against the child's charter school, a public entity.[5] Neither the parents nor the Morey Defendants filed a notice of claim.[6] The Supreme Court determined that "a defendant's contribution and common-law indemnification claims against a public entity are barred when it fails to serve a notice of tort claim within the time limit imposed by N.J.S.A. 59:8–8."[7]

The proposed modifications to N.J.S. 59:8-8, set forth in the Appendix, reflect the holding in *Jones* and are intended to make clear that contribution and indemnification claims brought against public entities are subject to the TCA's ninety-day notice of claim provision.

Statute Considered

N.J.S. 59:8-8 provides that:

> <u>A claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action</u>. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:
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> > a. The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S.59:8-9; or
> >
> > b. Two years have elapsed since the accrual of the claim; or

[1] N.J. STAT. ANN. §§ 59:1-1 to 59:12-3 (West 2023).
[2] *Jones v. Morey's Pier, Inc.*, 230 N.J. 142, 154 (2017) (continuing that "[t]he Act's guiding principle is that immunity from tort liability is the general rule and liability is the exception.") (internal quotations omitted).
[3] N.J. STAT. ANN. § 59:8-8 (West 2023).
[4] *Jones*, 230 N.J. at 147.
[5] *Id.*
[6] *Id.* at 147-48.
[7] *Id.* at 155.

c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit a minor or a person who is mentally incapacitated from commencing an action under this act within the time limitations contained herein, after reaching majority or returning to mental capacity.[8]

Background

The *Jones* case arose from the death of an eleven-year-old who fell from an amusement park ride while on a school trip.[9] Two years after the accident, the child's parents ("Plaintiffs") filed a lawsuit against the Morey Defendants, which filed a third-party complaint against the child's school ("PleasanTech").[10] Neither the Plaintiffs nor the Morey Defendants served a notice of claim on PleasanTech, a charter school and public entity.[11]

The third-party complaint against PleasanTech alleged that the school "negligently organized, supervised and chaperoned the field trip . . . and [PleasanTech's] negligence proximately caused" the child's death.[12] The Morey Defendants "sought contribution pursuant to the Joint Tortfeasors Contribution Law,[[13]] as well as common-law indemnification."[14] PleasanTech moved for summary judgment on the basis that the Morey Defendants failed to comply with the notice of claim requirement in N.J.S. 59:8-8.[15] The Morey Defendants responded that N.J.S. 59:8-8 "applies only to claims asserted by plaintiffs."[16]

The trial court denied the summary judgment motion and "concluded that N.J.S.A. 59:8–8 does not require the service of a notice of claim as a prerequisite to a defendant's contribution or common-law indemnification claims against a joint tortfeasor that is a public entity."[17] The Appellate Division denied PleasanTech's motion for leave to appeal and the Supreme Court granted the motion for leave to appeal.[18]

Analysis

The Supreme Court considered "the legal consequences" of the fact that "neither [P]laintiffs nor the Morey [D]efendants served a Tort Claims Act notice on [PleasanTech] within

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[8] N.J. STAT. ANN. § 59:8-8 (emphasis added).
[9] *Jones*, 230 N.J. at 149.
[10] *Id.*
[11] *Id.* at 150; *see also* N.J. STAT. ANN. § 18A:36A-6(b) (West 2023) ("[a] charter school [can s]ue and be sued, but only to the same extent and upon the same conditions that a public entity can be sued").
[12] *Jones*, 230 N.J. at 150-51.
[13] N.J. STAT. ANN. §§ 2A:53A-1 to -48 (West 2023).
[14] *Jones*, 230 N.J. at 151.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

the time period prescribed by N.J.S.A. 59:8-8."[19] Concluding that the notice of claim requirement is applicable to a defendant's claims for contribution from or indemnification by a public entity, the Court dismissed the Morey Defendant's claims against PleasanTech for failure to serve a notice of claim within ninety days of the accrual of the Plaintiffs' claims, as required by N.J.S. 59:8-8.[20]

The opinion reflects the Court's analysis of the legislative intent underlying the enactment of the TCA generally and N.J.S. 59:8-8 specifically,[21] the plain language of the notice of claim requirement in N.J.S. 59:8-8,[22] and the case law interpreting the statute.[23]

Legislative Intent

The TCA was enacted "to bring uniformity to the law in this State with respect to sovereign immunity to tort claims enjoyed by public entities."[24] To do so, the TCA's "'guiding principle' is that 'immunity from tort liability is the general rule and liability is the exception.'"[25]

The *Jones* Court explained that the "Legislature imposed a strict constraint on public entity liability" with the enactment of N.J.S. 59:8-8.[26] If the ninety-day notice of claim requirement is not met, "the claimant shall be forever barred from recovering against a public entity."[27] With the enactment of N.J.S. 59:8-8, the Legislature intended

> (1) to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit; (2) to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense; (3) to afford the public entity a chance to correct the conditions or practices which gave rise to the claim; and (4) to inform the State in advance as to the indebtedness or liability that it may be expected to meet.[28]

The Court concluded that interpreting the statute to allow the assertion of contribution or indemnification claims against a public entity absent a notice of claim "would undermine" the legislative purpose of N.J.S. 59:8-8.[29]

Plain Language of N.J.S. 59:8-8

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[19] *Id.* at 153 (no notice of claim was filed by either party).
[20] *Id.* at 157-58.
[21] *Id.* at 154.
[22] *Id.* at 157.
[23] *Id.* at 155-56.
[24] *Id.* at 154 (quoting *Tryanowski v. Lodi Bd. of Educ.*, 274 N.J. Super. 265, 268 (Law Div. 1994)).
[25] *Id.* (quoting *D.D. v. Univ. of Med. & Dentistry of N.J.*, 213 N.J. 130, 134 (2013)).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 157 (quoting *McDade v. Siazon*, 208 N.J. 463, 475–76 (2011)).
[29] *Id.* (citing *McDade v. Siazon*, 208 N.J. at 475-76).

Examining the language of N.J.S. 59:8-8, the *Jones* Court noted it is "expansively phrased."[30] The statute does "not distinguish between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity."[31] The Legislature "did not exempt from the tort claims notice requirement a defendant's claim for contribution and indemnification, or any other category of claims."[32]

To interpret the statutory language otherwise "would contravene the public policy stated by the Legislature in the [TCA]: 'public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein.'"[33] Consistent with this policy, the Court found the plain language of N.J.S. 59:8-8 should be "construed to allow the finding of liability against public entities only when permitted by the Act."[34]

The *Jones* Court determined, therefore, that N.J.S. 59:8-8 clearly "governs contribution and indemnification claims brought by defendants, as it governs direct claims asserted by plaintiffs."[35]

Case Law Interpreting N.J.S. 59:8-8

The Court noted that "courts' published decisions addressing [the] issue reach[ed] divergent results."[36] One line of cases in the lower courts "viewed a defendant's claim for contribution and indemnification to be beyond the reach of N.J.S.A. 59:8-8."[37]

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[30] *Id.* at 157.
[31] *Id.*
[32] *Id.*
[33] *Id.* (quoting N.J. STAT. ANN. § 59:1-2 (West 2023)).
[34] *Id.*
[35] *Id.*
[36] *Id.* at 155.
[37] *Id.* at 155-56 (citing *S.P. v. Collier High Sch.*, 319 N.J. Super. 452 (App. Div. 1999), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017) and *Ezzi v. DeLaurentis*, 172 N.J. Super. 592 (Law Div. 1980), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017) and *Markey v. Skog*, 129 N.J. Super. 192 (Law Div. 1974), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017)).

In *Markey*, the third-party complaint for contribution was filed when the plaintiff brought suit a year after his accident and none of the parties served a notice of claim on the public entity-third-party defendant. *Markey*, 129 N.J. Super. at 195. After examining the legislative history and purpose of the 1952 Joint Tortfeasors Contribution Law, the *Markey* Court determined that "a defendant's right to contribution from a joint tortfeasor is . . . an inchoate right which does not ripen into a cause of action until he has paid more than his pro rata portion of the judgment obtained against him by the plaintiff." *Id.* at 200. Therefore, the Court held that "the viability of the right of a nonpublic defendant to seek contribution from a public entity as a joint tortfeasor is [not] dependent upon plaintiff having complied with the [notice of claim provision in] N.J.S.A. 59:8-8." *Id.* at 196.
Subsequently, the *Ezzi* Court held that, although a defendant's third-party contribution claim is not barred by the failure to file a notice of claim within ninety days of the accrual of the *plaintiff's* claim, the defendant must comply

By contrast, trial courts in *Cancel v. Watson*[38] and *Kingan's Estate v. Hurston's Estate*[39] "construed N.J.S.A. 59:8-8 to bar all claims, including contribution and indemnification claims, if the claimant failed to serve a Tort Claims Act notice within the ninety-day period set forth in the statute."[40] Determining that the holdings in *Cancel* and *Kingan* "properly focused on N.J.S.A. 59:8-8's plain language," the *Jones* Court "concur[red] with the analysis" and holdings in these two cases, abrogating the three other cases.[41]

The Court held "that when a defendant does not serve a timely notice of claim on a public entity pursuant to N.J.S.A. 59:8–8 . . . , the Tort Claims Act bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity."[42]

Comparative Negligence Act and Joint Tortfeasors Contribution Law

The Court acknowledged, however, that application of its holding "may deprive a defendant of its right to pursue a claim against a joint tortfeasor before the defendant is aware that the claim exists."[43] The Court explained that, "[in] some circumstances . . . the statutory scheme

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with N.J.S. 59:8-8 by filing a notice of claim within ninety days of the accrual of the contribution claim. *Ezzi*, 172 N.J. Super. at 600.

Additional decisions in *Berreta* and *S.P. Collier High School* held that a third-party complaint for contribution may be asserted against a public entity without a prior notice of claim to the public entity. *See Berretta v. Cannon*, 219 N.J. Super. 147, 155 (Law. Div. 1987) ("interpret[ing] N.J.S.A. 59:8–8 as not being intended to affect the court mandated rules of third party practice and to allow the public entity to be proceeded against by way of third party complaint"); *see also S.P. Collier High Sch.*, 319 N.J. Super. at 475-76 (holding that "a defendant can assert a third-party action against a public entity beyond ninety days of the accrual of plaintiff's cause of action when the defendant's cause of action accrues thereafter such as here by the right of contribution or indemnification stemming from plaintiff's action," and "further hold[ing] that the third-party complaint can be filed without a prior notice of claim").

[38] *Cancel v. Watson*, 131 N.J. Super. 320, 322 & 324 (Law. Div. 1974), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980) (identifying provisions of the TCA which made "clear that the Legislature intended to discourage the joinder of public entities as third-party defendants" and holding that "joinder should not be permitted" if the plaintiff did not comply with the ninety-day notice provision in N.J.S. 59:8-8).

[39] *Kingan's Est. v. Hurston's Est.*, 139 N.J. Super. 383 (Law. Div. 1976), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980) (holding consistently with *Cancel*).

In *D'Annunzio*, the Appellate Division considered whether the prohibition in N.J.S. 59:9-2(e) on suing public entities pursuant to a subrogation provision, barred an insurer that settled a third-party claim from bringing a contribution claim against a public entity that is a joint tortfeasor with its named insured. *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85, 87 (App. Div. 1980). In deciding this issue, the *D'Annunzio* Court aligned itself with the reasoning in *Markey* regarding "the nature of a claim for contribution," and in so doing, "disapproved" the holdings of *Cancel* and *Kingan*. *Id.* at 91-92.

[40] *Jones*, 230 N.J. at 156.

[41] *Id.*; *see supra* note 39.

[42] *Id.* at 157-58.

[43] *Id.* at 158.

for the allocation of fault to joint tortfeasors, prescribed by the Comparative Negligence Act[[44]] and Joint Tortfeasors Contribution Law, may mitigate th[is] impact."[45]

The Comparative Negligence Act ("CNA") embodies the principle that "[i]t is only fair that each person only pay for injuries he or she proximately caused."[46] Once the total damages and allocation of fault have been determined, "the trial court molds the judgment based on those findings,"[47] but a plaintiff is entitled to "recover '[t]he full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages.'"[48]

In the event that a defendant is "compelled to pay more than the percentage of damages corresponding to the jury's allocation of fault to that defendant," the remedy is "a claim for 'contribution from the other joint tortfeasors.'"[49] The Joint Tortfeasors Contribution Law ("Joint Tortfeasors Law") governs such contribution claims, and "was enacted to promote the fair sharing of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim."[50]

Generally, allocation is not permitted when a party "could not under any circumstances be a joint tortfeasor under N.J.S.A. 2A:53A-2."[51] In some circumstances, however, courts allow "a factfinder to allocate fault to an [absent] individual or entity, . . . and the allocation may reduce the amount of damages awarded to the plaintiff."[52] For instance, when a plaintiff has settled with one defendant prior to trial, "a non-settling defendant may seek a credit in every case in which there are multiple defendants," regardless of whether a contribution claim has been made against the settling defendant.[53] Courts subsequently expanded this principle to include instances in which the claims against a defendant "were discharged in bankruptcy,"[54] a defendant was "dismissed

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[44] N.J. STAT. ANN. §§ 2A:15-5.1 to -5.8 (West 2023).
[45] *Jones*, 230 N.J. at 158 (noting that a "common-law indemnification claim . . . is distinct from [a] statutory contribution claim [as n]either the Comparative Negligence Act nor the Joint Tortfeasors Contribution Act governs a common-law indemnification claim, and an allocation of fault pursuant to those statutes is unrelated to such a claim").
[46] *Id.* at 159 (quoting *Fernandes v. DAR Dev. Corp.*, 222 N.J. 390, 407 (2015)).
[47] *Id.* (citing N.J. STAT. ANN. § 2A:15-5.2(d) (West 2023)). Damages are further reduced "by the percentage of negligence attributable to the person recovering." *Id.* at 159 (citing N.J. STAT. ANN. § 59:9-4 (West 2023)).
[48] *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(a) (West 2023)). A plaintiff is entitled to recover "[o]nly that percentage of the damages directly attributable to [a] party's negligence or fault" when the party is responsible for less than sixty percent of the total damages. *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(c)).
[49] *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(e)).
[50] *Id.* at 160 (quoting *Holloway v. State*, 125 N.J.S 386, 400-01 (1991)); *see also* N.J. STAT. ANN. § 2A:53A-3 (West 2023) (when "any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share").
[51] *Id.* at 161 (quoting *Town of Kearny v. Brandt*, 214 N.J. 76, 101 (2013)).
[52] *Id.* at 161. In *Bolz v. Bolz*, both plaintiff and defendant were barred "from asserting claims against a public entity and public employees because the plaintiff [did not] sustain[] an injury meeting the statutory criteria" of the Tort Claims Act. *Id.* at 163 (citing *Bolz v. Bolz*, 400 N.J. Super. 154, 159 (App. Div. 2008)). The Appellate Division held, however, "that the defendant 'was entitled to have the jury determine each party's percentage of negligence or fault in causing the injury,'" and if the defendant in the action was found "to be less than sixty percent at fault, 'he would be responsible to pay damages only for his percentage of fault.'" *Id.* (quoting *Bolz*, 400 N.J. Super. at 160-61).
[53] *Id.* (quoting *Young v. Latta*, 123 N.J. 584, 596 (1991)).
[54] *Id.* at 162 (citing *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 113-16 (2004)).

pursuant to the statute of repose,"[55] and a defendant "was not liable to pay damages in excess of a statutory limit."[56]

With these considerations in mind, the *Jones* Court examined "whether the objectives of the Tort Claims Act, the Comparative Negligence Act and the Joint Tortfeasors Contribution Law are furthered by an allocation of fault" to a public entity that is not part of an action because of the failure to comply with the notice of claim provision in N.J.S. 59:8-8.[57]

The legislative policy underlying the TCA is "to ensure prompt notice to public entities of potential claims against them," while the legislative purpose of the Comparative Negligence Act and the Joint Tortfeasors Law is to make "a fair apportionment of damages as among joint defendants in accordance with the factfinder's allocation of fault."[58] Construing these statutes "as a unitary and harmonious whole,"[59] the *Jones* Court concluded that "[a]uthorizing the Morey [D]efendants to seek an allocation of fault to [PleasanTech] is an equitable result in the circumstances of [the] case,"[60] and "harmonizes and furthers the three statutes' separate goals."[61]

The Court instructed that if the jury found "that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s injuries and death," the jury should allocate fault to both the Morey Defendants and PleasanTech.[62] The *Jones* Court further instructed that "the trial court shall mold the judgment to reduce the Morey defendant's liability to plaintiffs in accordance with the percentage of fault allocated to the Association."[63]

Post-*Jones* Case Law

Following the decision in *Jones*, two appellate courts addressed the applicability of the notice of claim provision to contribution and indemnification claims against public entities: *Butler v. Badr School*[64] and *Irving v. Board of Chosen Freeholders of Burlington County*.[65]

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[55] *Id.* at 163 (citing *Kearny*, 214 N.J. at 103-04).
[56] *Id.* (citing *Johnson v. Mountainside Hosp.*, 239 N.J. Super. 312, 319-20 (App. Div. 1990)).
[57] *Id.* at 164.
[58] *Id.* at 164-65.
[59] *Id.* at 164.
[60] *Id.* at 165 (noting that "[t]he equities . . . weigh against [P]laintiffs," because the Plaintiffs' strategic choice to bring the claim first in a Pennsylvania forum "deprived the Morey [D]efendants of the opportunity to preserve their right to file a cross-claim against" PleasanTech and further noting that "the procedural posture of [the] case allows for a fair determination of [PleasanTech]'s alleged fault").
[61] *Id.*
[62] *Id.* at 166.
[63] *Id.* at 170 (concluding that, although CNA permits a plaintiff to recover the total amount of damages from a joint tortfeasor more than sixty percent at fault, when the tortfeasor is unable to recover the excess amount from the absent tortfeasor, as was the situation in *Jones*, the "ruling [should] limit[] the defendants' liability to the percentage allocated by the jury, even if that percentage met the sixty-percent threshold" in the CNA given "the Legislature's clear objective: to fairly apportion liability for damages in accordance with the factfinders' allocation of fault").
[64] 2021 WL 451012, at *1 (N.J. Super. Ct. App. Div. Feb. 9, 2021).
[65] 2021 WL 717388, at *1-2 (D.N.J. Feb. 24, 2021).

In addition, in *Carbajal v. Patel*, the Appellate Division diverged from the *Jones* Court's conclusion regarding allocation when a joint tortfeasor is absent, in the context of an uninsured motorist claim.[66]

Butler v. Badr School

In *Butler*, Plaintiff tripped and fell on the sidewalk outside the Badr School ("Defendant") and sent a letter to Defendant seven months later notifying of her intent to sue.[67] Defendant served a notice of claim on Jersey City ("City") within two weeks, "advis[ing] that [Defendant] intended to seek contribution and indemnification from the City in any action filed by [P]laintiff."[68] More than a year after being injured, Plaintiff filed a claim against Defendant, who filed its third-party complaint against the City.[69] The trial court dismissed the third-party complaint "because it was not served within ninety days of the accrual of [P]laintiff's claims," as required by *Jones*.[70]

The Appellate Division affirmed the trial court's dismissal, citing the reasoning and holding in *Jones*, because "N.J.S.A. 59:8-8 requires that a defendant asserting a claim for indemnification or contribution against a public entity file a notice of claim within ninety days of the accrual of the plaintiff's claim."[71] In addition, the *Butler* Court held that Defendant "shall be entitled to request that the jury allocate fault based on the alleged negligence of the City as permitted by the Court in *Jones*."[72]

Irving v. Board of Chosen Freeholders of Burlington County

In *Irving*, Plaintiff's lawsuit stemmed from an attempt to renew a weapons carry license, which was denied based on the results of Plaintiff's criminal background check.[73] Plaintiff alleged the notation that he "had been committed or adjudicated mentally incompetent" was false and filed a complaint against Burlington County and the County Adjuster ("Defendants"), among others, as the entities that entered the information into the database.[74] In turn, Defendants sought contribution and indemnification from the State of New Jersey Administrative Office of the Courts ("NJAOC"), a public entity.[75]

[66] 468 N.J. Super. 139, 146 (App. Div. 2021).
[67] *Butler*, 2021 WL 451012, at *1.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at *5.
[72] *Id.*
[73] *Irving*, 2021 WL 717388, at *2.
[74] *Id.*
[75] *Id.* (also bringing "contractual claims against [NJAOC] arguing that '[t]o the extent erroneous information . . . was entered into [the database], . . . [NJAOC], breached their express or implied contractual obligations to'" Defendants).

Defendants served a notice of claim on NJAOC two months after Plaintiff's third amended complaint was filed in May 2020.[76] The *Irving* Court found, however, that the "latest possible date of accrual [was] December 12, 2019 [when] Plaintiff . . . allege[d] he first 'learned the placement of a false record . . . was a direct result of the conspiracy between [Defendants]."[77] Relying on the opinion in *Jones*, the Court held that Defendants "cannot successfully argue they timely served their Notice of Claims relating to the contribution and indemnification claims arising from Plaintiff's conspiracy claims because such notice was not served" by March 2020.[78]

The *Irving* Court further addressed "[t]he harshness of the 90-day accrual rule" by affirming that NJAOC "should be treated as a settling defendant for purposes of liability allocation," and Defendants should be "permitted to seek an allocation of fault at trial."[79]

Carbajal v. Patel

In *Carbajal*, the Appellate Division addressed the intersection of the Comparative Negligence Act and the Joint Tortfeasors Law in the context of an uninsured motorist ("UM") claim.[80] The case arose from an auto accident in which the "jury found two tortfeasors responsible for the accident: [Defendant] (sixty percent) and the driver of a phantom vehicle (forty percent)."[81]

Since the CNA permits recovery from a joint tortfeasor found to be sixty percent responsible, Plaintiff was "entitled to full recovery of damages from [Defendant]," who is then able to seek contribution from the other joint tortfeasor.[82] However, because the joint tortfeasor in *Carbajal* was a phantom vehicle, Defendant was obliged to seek contribution from Plaintiff's UM carrier, which had a policy limit below the forty percent fault allocated to the phantom vehicle by the jury.[83]

Relying on the outcome in *Jones* and another Appellate Division decision, *Burt v. West Jersey Health System*,[84] Defendant argued that the lower court had correctly "molded the verdict to reduce [P]laintiff's full recovery" given Defendant's inability to obtain full contribution from

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[76] *Id.* at *9.
[77] *Id.* at *10.
[78] *Id.* (holding similarly with respect to the contract claims against NJAOC because the Contractual Liability Act ("CLA") "operates in a manner that is roughly similar to . . . the [TCA]," in that the CLA similarly "bars any contractual recovery if the contractor 'fails to notify the appropriate contracting agency within 90 days of the accrual of his claim' absent leave of the court").
[79] *Id.* at *11.
[80] *Carbajal*, 468 N.J. Super. at 145.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Burt v. W. Jersey Health Sys.*, 339 N.J. Super. 296, 308 (App. Div. 2001) (holding similarly to *Jones* and "conclud[ing] that a plaintiff who fails to file an Affidavit of Merit against a licensed professional is not entitled to recover the full amount of damages from a remaining licensed professional who is deemed to be sixty percent or more responsible for the total damages").

Plaintiff's UM carrier.[85] The *Carbajal* Court distinguished *Jones* and *Burt* because "the *plaintiffs* in those cases disrupted the Legislature's clear objective to fairly apportion liability for damages in accordance with the factfinder's allocation of fault through their own actions."[86]

The *Carbajal* Court further determined that "[t]he goal and purpose of the UM law is different than that which underlies the [Joint Tortfeasors Law] and the CNA," in that the UM law is intended to "make the victim whole, but not provide a windfall or . . . a double recovery."[87] The Court found that permitting Plaintiff to recover the total damages from Defendant, who was found to be at least sixty percent at fault, although Defendant could not obtain full contribution from the absent joint tortfeasor (the UM carrier), was consistent with the plain language, history and purpose of the CNA and the Joint Tortfeasors Law, as well as the goals of UM law.[88]

As demonstrated by the decisions in *Jones* and *Carbajal*, the question of whether to allocate fault to absent tortfeasors, and whether to reduce a plaintiff's full recovery by the absent tortfeasor's allocation of fault, depends on the law governing the claims[89] and the equities of the individual case.[90] Therefore, the proposed modifications to N.J.S. 59:8-8 do not reflect this aspect of the *Jones* holding and there are no modifications proposed to either the CNA or the Joint Tortfeasors Law.

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[85] *Carbajal*, 468 N.J. Super. at 145 ("the [trial] judge entered judgment by molding the verdict in [Defendant]'s favor. He required [Defendant] to pay $120,000 (sixty percent), plus costs and prejudgment interest . . . and ordered the UM carrier to pay [P]laintiff $15,000, the UM policy limit. Doing so shortchanged plaintiff $65,000, the balance of the jury's $200,000 verdict.").

[86] *Id.* at 157 (internal quotations omitted) (emphasis added) (explaining that in *Jones*, "the plaintiff had failed to file a timely notice of tort claim under the [TCA]" and in *Burt*, "the plaintiff had failed to obtain an affidavit of merit").

[87] *Id.* at 153 (internal quotations omitted).

[88] *Id.* at 156 ("Holding [Defendant] fully responsible for the verdict award in this regard comports with the plain language of the JTCL and the CNA, is consistent with the legislative policies and purposes of both those statutes, and—in accordance with the UM scheme—forecloses [P]laintiff's ability to otherwise receive double recovery.").

[89] *See e.g. Jones*, 230 N.J. at 164 (considering "whether the objectives of the [**TCA**], the Comparative Negligence Act and the Joint Tortfeasors Contribution Law are furthered by an allocation of fault" to an absent tortfeasor) (emphasis added); *Kearny*, 214 N.J. at 103-04 (concluding that "[a]llocation of fault to the dismissed defendants . . . does not subvert the **statute of repose**'s purpose to give construction defendants "the right not to have to defend ancient claims or obligations") (emphasis added); *Brodsky*, 181 N.J. at 115 (distinguishing "an employer's immunity from suit under the Workers' Compensation Act . . . from a joint tortfeasor's discharge in **bankruptcy**" in the context of allocating fault to an absent tortfeasor) (emphasis added); *Carbajal*, 468 N.J. Super at 154 ("[c]onsidering the plain text and policy goals of the JTCL, the CNA, and the **UM scheme**" to determine whether the plaintiff's recovery should be reduced by the allocation of fault to the absent tortfeasor) (emphasis added); *Burt*, 339 N.J. Super. at 303 (addressing "questions of first impression [that] consider the interplay between the Comparative Negligence Act, . . . the Joint Tortfeasors Contribution Law, . . . and the **Affidavit of Merit Act** . . . ") (emphasis added).

[90] *See e.g. Jones*, 230 N.J. at 165 (concluding that "[t]he equities thus weigh against plaintiffs, whose . . . strategy thus deprived the Morey [D]efendants of the opportunity to preserve their right to file a cross-claim against [PleasanTech]" and cautioning that "[a] plaintiff that is aware of a potential cause of action against a public entity - and litigates the case in a manner that deprives a defendant of an opportunity to serve a [TCA] notice on that entity - risks a reduction in any damages award by virtue of an allocation of fault under the [CNA] and the Joint Tortfeasors Contribution Law [and that] a defendant that is aware of its potential cross-claim against a public entity that may be a joint tortfeasor—but foregoes its opportunity to serve a [TCA] notice on that entity—may lose the benefit of an allocation of fault to the public entity in accordance with those statutes"). (emphasis added).

Pending Bills

There are currently no pending bills that address the notice of claim provision in N.J.S. 59:8-8.

Conclusion

In *Jones*, the Supreme Court resolved a long-standing split in the lower courts regarding the applicability of the notice provision in N.J.S. 59:8-8 to a defendant's claims for contribution or indemnification against a public entity.[91] The proposed modifications to N.J.S. 59:8-8 reflect the holding in *Jones* that a defendant must serve a notice of claim pursuant to N.J.S. 59:8-8 to maintain contribution and indemnification claims against a public entity.

[91] *Jones*, 230 N.J. at 155.

APPENDIX

The proposed modifications to **N.J.S. 59:8-8**, Time for presentation of claims, (shown with ~~strikethrough~~, and <u>underlining</u>), follow:

N.J.S. 59:8-8. Time for presentation of claims

A claim relating to a cause of action for death or for injury or damage to person or to property<u>, including cross-claims and third-party claims for contribution and common-law indemnification,</u> shall be presented as provided in this chapter[ ] not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

a. The claimant failed to file the claim with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S.59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit a minor or a person who is mentally incapacitated from commencing an action under this act within the time limitations contained herein, after reaching majority or returning to mental capacity.

Credits

L.1972, c. 45, § 59:8-8, eff. July 1, 1972. Amended by L.1994, c. 49, § 4, eff. June 23, 1994; L.2013, c. 103, § 133, eff. Aug. 7, 2013.

COMMENT

The proposed modifications to N.J.S. 59:8-8 add language derived from the Supreme Court's opinion in *Jones v. Morey's Pier, Inc.*,[92] clarifying that cross- and third-party claims for contribution and common-law indemnification are subject to the ninety-day notice of claim requirement in the TCA. The phrase "common-law" is included in the proposed language because the Supreme Court's holding specified that "common-law indemnification" claims against public entities are excluded.[93] No other modifications are proposed with respect to the statute.

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[92] *Id.* at 157-58 ("Accordingly, we hold that when a defendant does not serve a timely notice of claim on a public entity pursuant to N.J.S.A. 59:8–8 and is not granted leave to file a late notice of claim under N.J.S.A. 59:8–9, the Tort Claims Act bars that defendant's cross-claim or third-party claim for contribution and common-law indemnification against the public entity.").

[93] *Id.*