To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Tort Claims Act: Application of Notice of Claim Provision in N.J.S. 59:8-8 to Third Party Contribution and Indemnification Claims
Date: June 5, 2023

Project Summary

The New Jersey Tort Claims Act ("TCA"),[1] provides public entities with "broad but not absolute immunity."[2] The TCA sets forth procedures for initiating a tort claim against a public entity, including a 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 . . . 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, and her parents filed a wrongful death action against the amusement park ("Morey Defendants"), who, in turn, filed third-party contribution and indemnification claims against the child's charter school, a public entity.[4] Neither the parents nor the Morey Defendants filed a notice of claim.[5] Relying on the Legislature's intent in enacting the TCA, as well as the plain language of N.J.S. 59:8-8, 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."[6]

The Commission authorized Staff to conduct outreach and research on the issue addressed by *Jones* in January 2019.[7] Given the time that has elapsed since this authorization, Staff seeks guidance from the Commission regarding the direction of the project.

Statute Considered

N.J.S. 59:8-8 provides 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. 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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[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.* at 147-48.
[6] *Id.* at 155.
[7] N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at *7, Jan. 17, 2019, www.njlrc.org (last visited June 1, 2023).

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.[8]

Background

The *Jones* case arose from the death an eleven-year-old after she 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, who 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, therefore, a public entity.[11]

The third-party complaint against PleasanTech alleged 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, as well as motions for various entities to appear as amici curiae.[18]

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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:15-5.2 (West 2023).
[14] *Jones*, 230 N.J. at 151.
[15] *Id.* (suggesting that "the jury should be permitted to allocate fault to it pursuant to N.J.S.A. 2A:15-5.2, notwithstanding the dismissal of the Morey [D]efendants' cross-claims against it").
[16] *Id.*
[17] *Id.*
[18] *Id.*

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 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 child's fall, as required by N.J.S. 59:8-8.[20]

In reaching its holding, the Court analyzed 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 [New Jersey] with respect to sovereign immunity to tort claims enjoyed by public entities."[24] To do so, the TCA provides public entities with "broad but not absolute immunity"[25] in accordance with the "guiding principle . . . that immunity from tort liability is the general rule and liability is the exception."[26]

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.[27] If the ninety-day notice of claim requirement is not fulfilled, "the claimant shall be forever barred from recovering against a public entity."[28] 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.[29]

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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 *Marcinczyk v. N.J. Police Training Comm'n*, 203 N.J. 586, 597 (2010)).
[26] *Id.* (quoting *D.D. v. Univ. of Med. & Dentistry of N.J.*, 213 N.J. 130, 134 (2013)).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 155 (quoting *McDade v. Siazon*, 208 N.J. 463, 475–76 (2011)).

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.[30]

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

Examining the language of N.J.S. 59:8-8, the *Jones* Court noted it is "expansively phrased."[31] The statute does "not distinguish between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity."[32] 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."[33]

Furthermore, 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.'"[34] 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."[35]

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."[36]

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

The issue addressed by *Jones* was one of first impression in the Supreme Court.[37] The Court noted that the "courts' published decisions addressing [the] issue reach[ed] divergent results."[38] The *Jones* Court noted that, "[i]n three published decisions, the Appellate Division and Law Division viewed a defendant's claim for contribution and indemnification to be beyond the reach of N.J.S.A. 59:8-8."[39] By contrast, "trial courts [in *Cancel v. Watson*[40] and *Kingan's Estate*

[30] *Id.* (citing *McDade v. Siazon*, 208 N.J. at 475-76).
[31] *Id.* at 157.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 155.
[38] *Id.*
[39] *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)).
[40] *Cancel v. Watson*, 131 N.J. Super. 320 (Law. Div. 1974), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980).

v. Hurston's Estate[41]] construed N.J.S.A. 59:8-8 to bar all claims, including contribution and indemnification claims, if the claimant failed to serve a [TCA] notice within the ninety-day period set forth in the statute."[42] Determining that the courts in *Cancel* and *Kingan* "properly focused on N.J.S.A. 59:8-8's plain language," the Court "concur[red] with the analysis" and holdings in these two cases, abrogating the three other cases.[43]

Therefore, given the plain language of N.J.S. 59:8-8 and its legislative purpose, the *Jones* 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."[44]

Divergence in Case Law Prior to *Jones*

Following the enactment of the TCA in 1972, the first decision to address whether the notice provision in N.J.S. 59:8-8 was applicable to contribution and indemnification claims was *Markey v. Skog*, which was decided by the Law Division in 1974.[45] Later that same year, the Law Division reached the opposite result when it addressed the issue again in *Cancel v. Watson*.[46]

The "*Markey*" line of cases, which permitted third-party claims although a defendant (or plaintiff) failed to file a notice of claim within ninety days of the accrual of the plaintiff's cause of action, was abrogated by the decision in *Jones*.[47] The *Jones* Court "concur[red] with the analysis set forth in" the "*Cancel*" line of cases, which reached the opposite conclusion.[48]

"Markey" Line of Cases

Markey v. Skog

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[41] *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). 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.

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

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

[44] *Id.* at 157-58. The Court further held that, pursuant to the Comparative Negligence Act and Joint Tortfeasors Contribution Law, "the jury should be instructed . . . that if it finds that . . . [PleasanTech's] negligence was a proximate cause of [the child's] death, it may allocate a percentage of fault to" PleasanTech. *Id.* at 169. In addition, if the jury allocates a percentage of fault to PleasanTech, "the trial court shall mold the judgment to reduce the Morey [D]efendants' liability to [P]laintiffs in accordance with the percentage of fault allocated to" PleasanTech. *Id.* at 170.

[45] *Markey v. Skog*, 129 N.J. Super. 192, 196 (Law. Div. 1974), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017).

[46] *Cancel v. Watson*, 131 N.J. Super. 320 (Law. Div. 1974), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980).

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

[48] *Id.*

In *Markey*, Plaintiffs were passengers in Defendant's car when he collided with a traffic island and they filed a negligence suit against Defendant within a few days of the accident.[49] The Defendant, however, did not file his third-party complaint for contribution against the New Jersey Department of Transportation ("Department") until almost a year later.[50] The Department argued that Defendant's third-party claims were barred because all tort actions brought against a public entity must comply with the notice provision in N.J.S. 59:8-8.[51]

The *Markey* Court stated that the Department's "argument misconceives not only the history, purpose and construction of the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A—1 et seq., but also the history and purpose of the [TCA]."[52] After examining the legislative history and purpose of the 1952 Joint Tortfeasors Contribution Law, the Court determined "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."[53]

Furthermore, the Court found that a "defendant cannot be deprived of his inchoate right by reason of *plaintiff's* loss . . . of his own right of direction action against the joint tortfeasor."[54] Common liability at the time the plaintiff's cause of action accrues gives rise to a joint tortfeasor's right of contribution, and regardless of whether the plaintiff's is able[55] or willing to bring a claim against a joint tortfeasor directly, "the party defendant has the right to implead the unjoined joint tortfeasor in plaintiff's action for the purpose of proving their common liability."[56]

The Court concluded that "the 90-day notice is not a condition precedent to the existence of liability on the part of the State," but "a condition only upon a plaintiff's right thereafter to pursue his remedy against the State."[57] This "loss of the remedy . . . does not operate retroactively,

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[49] *Markey*, 129 N.J. Super. at 195.
[50] *Id.*
[51] *Id.* at 197-98. *See also* N.J. STAT. ANN. § 59:8-3 (West 2023) ("[e]xcept as otherwise provided in this section, no action shall be brought against a public entity or public employee under this act[ ] unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter").
[52] *Markey*, 129 N.J. Super. at 199.
[53] *Id.* at 200 (explaining that "although a defendant is not necessarily bound to proceed against joint tortfeasors in the same action in which plaintiff seeks to establish his (defendant's) liability, he ordinarily will, nevertheless, do so because a single action is the most orderly and logical manner in which proof of common liability can be established – and it is, of course, common liability which is the substantive basis of the right of contribution").
[54] *Id.* at 200-01 (emphasis added).
[55] *Id.* at 201 (providing as an example a situation in which the "plaintiff is barred from pursuing his cause of action against one of two joint tortfeasors because the statute of limitations has run in respect of his own claim").
[56] *Id.* ("Any other rule would not only be contrary to the conceptual basis of the cause of action for contribution but would also be contrary to the policy of the contribution statute, which seeks to prevent plaintiffs, by their unilateral actions, from electing where to place the burden of a common fault."). *See also Dambro v. Union Cnty. Park Comm'n*, 130 N.J. Super. 450, 458 (Law. Div. 1974) ("*Markey* permitted a nonpublic defendant to seek contribution against the State when plaintiff had not given proper notice of the claim to the State within the time limitations of N.J.S.A. 59:8—8. The same right should extend to a public defendant seeking contribution.").
[57] *Id.* at 204.

for contribution purposes, to wipe out the right of action which existed before the bar to the remedy was raised by plaintiff's inaction."[58]

Consequently, the *Markey* Court held that "there is nothing in eithr [*sic*] the text, the history, or the policy of the Tort Claims Act which mandates the abrogation or limitation of the right of contribution as heretofore legislatively established and judicially construed."[59] The Court concluded that "in the absence of a clear legislative mandate to the contrary, the interest of the State both in obtaining repose and in having a timely opportunity for the investigation of claims against it must yield to the overriding equities which underpin the contribution laws."[60]

Ezzi v. DeLaurentis[61]

In *Ezzi*, the driver of one automobile involved in a two-car collision sued the driver of the second automobile for negligence almost two years after the accident.[62] A year later, the defendant moved to join the township as a third-party defendant, and, although neither the plaintiff nor defendant had served a notice of claim on the township, motion was granted.[63]

In deciding the township's motion for summary judgment, the *Ezzi* Court addressed two questions: whether "a defendant [may] implead a public entity as a joint tortfeasor despite plaintiff's failure to comply with N.J.S.A. 59:8-8;" and if so, whether "the right to implead a public entity in such a setting dependent on defendant's compliance."[64]

The *Ezzi* Court "cho[se] to follow the *Markey* decision on this issue," finding it "clear that [a] defendant's claim for contribution does not accrue until it has paid more than its pro rata share."[65] Therefore, "[t]he fact that such a claim is asserted outside of the time limits which would control a plaintiff should be irrelevant to its viability under the act."[66]

Accordingly, the *Ezzi* Court held that "plaintiff's failure to comply with the time and notice provisions of N.J.S.A. 59:8-8 will not bar defendants' third-party claim for contribution" against a public entity.[67] However, unlike in *Markey*, the *Ezzi* Court also dismissed the third-party complaint and held that a defendant must file its own notice of claim when its contribution claim accrues.[68]

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[58] *Id.*
[59] *Id.* at 205 (noting that the Court's conclusion "is in accord with the determination of the majority of jurisdictions which have considered this question in the context of governmental tort claims acts substantially similar to [the TCA]").
[60] *Id.*
[61] 172 N.J. Super. 592 (Law Div. 1980), abrogated by *Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017).
[62] *Id.* at 594.
[63] *Id.*
[64] *Id.* at 595.
[65] *Id.* (citing *McGlone v. Corbi*, 59 N.J. 86, 95 (1971)).
[66] *Id.*
[67] *Id.* at 600.
[68] *Id.* (dismissing the third-party claim "because of the defendants' own noncompliance," without prejudice, "[s]ince defendants' claim for contribution has yet to accrue").

Berretta v. Cannon[69]

In *Beretta*, the plaintiffs filed an action against their neighbor's son because he mistakenly turned on their water service when winterizing his father's home, which caused property damage to the plaintiff's home.[70] The defendant filed a third-party claim for contribution against the city's water department on the basis that a water department employee had directed him to the wrong water valve.[71] Again, neither party filed a notice of claim against the public entity.[72]

In addressing the issue, the *Beretta* Court explained that "there are four constructs" of N.J.S. 59:8-8 in these situations:

> 1. The claim against the [public entity] for contribution cannot be maintained, because the plaintiff did not make the [public entity] a direct party defendant and the statute does not provide for the exposure of governmental entities to "remote" causes of action. . . . [as held in *Cancel*] 2. The [public entity] may only be sued upon notice and compliance with the six month statutory waiting period, after defendant has paid more than their *pro rata* share of the judgment that plaintiff has obtained against defendant. . . . 3. The [public entity] may only be joined as a third party upon notice and compliance with the six-month waiting period. . . . [as held in *Ezzi*] 4. Normal principles of third party practice were not intended to be affected by the statute.[73]

After considering the balance of the competing interests in each interpretation, the Court determined that "[i]t is clear . . . that the purposes of the [TCA] are best served by allowing the public entity an opportunity to be heard at the earliest possible moment and certainly before the parameters as to the extent of its monetary exposure is forever fixed."[74]

The *Beretta* Court held that the notice provision in N.J.S. 59:8-8 was "not . . . intended to affect the court mandated rules of third party practice," and consequently, allowed "the public entity to be proceeded against by way of third party complaint," although no notice of claim was filed by either the plaintiff or defendant.[75]

S.P. v. Collier High School[76]

The decision in *S.P.* involved a negligence action against a high school, its principal, the town and the board of education filed by a female student who was sexually harassed by another

[69] 219 N.J. Super. 147 (Law. Div. 1987).
[70] *Id.* at 149-50.
[71] *Id.* at 150.
[72] *Id.*
[73] *Id.* at 151-52.
[74] *Id.* at 154.
[75] *Id.* at 155 (adding that "the public entity will be given the statutory time period to investigate this matter if they so desire and proceedings will be stayed").
[76] 319 N.J. Super. 452 (App. Div. 1999), *abrogated by Jones v. Morey's Pier, Inc.*, 230 N.J. 142 (2017).

student on the school bus.[77] The high school principal filed a third-party complaint against the board of education for indemnification.[78] The female student filed a notice of claim more than ninety days after her eighteenth birthday and the defendants did not file a notice of claim.[79]

After examining the development of the case law on the issue, the *S.P.* Court concluded that the defendant "was not required to comply with the Tort Claims Act's notice requirement before he could join the Board as a third-party defendant."[80]

The Court held 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."[81] Furthermore, the Court held that a "third-party complaint can be filed without a prior notice of claim."[82]

"Cancel" Line of Cases

Cancel v. Watson[83]

Cancel involved a personal injury action arising from an injury suffered by the plaintiff during a softball game in a town park.[84] Five months after the game, the plaintiff filed suit against the defendant, and three months after that, the defendant filed third-party claims against the city and the city recreation department.[85] As in *Markey*, no notice of claim was served on the public entities by any party.[86]

Finding that "nowhere in the [TCA] is the commencement of third-party proceedings against a public entity exempted from the general procedures set forth therein," the *Cancel* Court determined that "a party defendant may not join a public entity as a third-party defendant unless the party plaintiff has acted affirmatively against the public entity under N.J.S.A. 59:8-8."[87] The *Cancel* Court also identified several provisions of the TCA which made "clear that the Legislature intended to discourage the joinder of public entities as third-party defendants."

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[77] *Id.* at 457.
[78] *Id.*
[79] *Id.* (finding that the female student had not met her burden of demonstrating "extraordinary circumstances," her claims against the town and board of education were dismissed).
[80] *Id.* at 474.
[81] *Id.* at 475 (holding so "despite . . . the denial of plaintiff's claim against the public entities for failure to give timely notice of the claim").
[82] *Id.* at 475-76. *See also Major Tours, Inc. v. Colorel*, 799 F. Supp. 2d 376, 407 (D.N.J. 2011) ("the Tort Claims Act notice requirements do not bar claims for indemnity, because they are not said to have accrued until the plaintiff recovers a judgment").
[83] 131 N.J. Super. 320 (Law. Div. 1974), disapproved of by *D'Annunzio v. Borough of Wildwood Crest*, 172 N.J. Super. 85 (App. Div. 1980).
[84] *Id.*at 322.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 324.

For instance, N.J.S. 59:9-1 requires that tort claims against public entities be heard "by a judge sitting without a jury," in contrast to a plaintiff's constitutional right to demand a jury trial.[88] As a result, "the addition of a public entity as a third-party defendant is made to create significantly greater complications than those normally associated with the addition of third parties."[89]

In addition, at the time *Cancel* was decided, the TCA endorsed the "'Mississippi rule' of comparative negligence in N.J.S.A. 59:9-4," while tort actions against private entities were governed by "the Wisconsin rule of comparative negligence."[90] The *Cancel* Court described the two doctrines of comparative negligence as "incompatibl[e]," and indicative of "a legislative bias against joinder of tort claims against public and private entities."[91] Finally, the Court pointed to "further manifestations of the Legislature's bias against joinder of public entities in otherwise private litigation" in N.J.S. 59:9-2, which proscribes certain types of recovery against public entities available against private parties.[92]

The *Cancel* Court recognized that the TCA allows "for situations where a governmental agency is a joint tortfeasor" in N.J.S. 59:9-3, but does not provide any "procedure to be invoked to adjudicate whether or not the parties are joint torfeasors [*sic*]."[93] Noting that "[i]t may well be that either legislation or a new court rule is required to fill the gap," the Court concluded that, "in view of the procedural problems [described in its opinion], joinder of a governmental entity as an additional defendant . . . would neither solve the problem nor contribute to the administration of justice."[94]

The *Cancel* Court held that a "party defendant in a personal injury action [may not] file a third-party complaint for indemnification and contribution against a public entity where the party plaintiff has failed to present a claim against such public entity directly under N.J.S.A. 59:8—8."[95]

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[88] *Id.* Shortly after the *Cancel* opinion issued, the Legislature amended N.J.S. 59:1-1 to permit a jury trial at the plaintiff's request. *See* L.1975, c. 3, §1, eff. Jan. 22, 1975; *see also* Statement to Assembly Bill 2307, 196th Leg., 1974 Sess. (Nov. 18, 1974) (noting the conflict between the TCA requirement "that all claims against a public entity or a public employee acting within the scope of his employment be heard by a judge sitting without a jury" and "the right of trial by jury [when] claims involv[e] defendants other than public entities or public employees acting within the scope of their employment," and explaining that, as a result, in resolving claims involving both kinds of defendants "certain issues of the case [are] determined by a judge without a jury while other issues in the same case [are] determined by the jury" which gives rise to "a potential for inconsistent findings by the judge and jury and great confusion in seeking to hear and dispose of these cases involving such multiple defendants," and specifically recognizing that "[c]ross claims for contribution and indemnification add to the difficulty").

[89] *Cancel*, 131 N.J. Super. at 324.

[90] *Id.* In the same bill that amended N.J.S. 59:9-1 to permit trial by jury in TCA actions, the Legislature also amended N.J.S. 59:9-4 to conform with the "Wisconsin rule" of comparative negligence used in tort actions against private entities. *See* L.1975, c. 3, §1, eff. Jan. 22, 1975; *see also* Statement to Assembly Bill 2307, 196th Leg., 1974 Sess. (Nov. 18, 1974) ("The comparative negligence provisions of the Tort Claims Act have been replaced by those of the general law.").

[91] *Id.*

[92] *Id.* at 324-25; *see* N.J. STAT. ANN. § 59:9-2 (West 2023).

[93] *Id.* at 326; *see also* N.J. STAT. ANN. § 59:9-3 (West 2023).

[94] *Id.*

[95] *Id.* at 323.

Kingan's Estate v. Hurston's Estate[96]

Kingan was decided a year after *Cancel* and held consistently with that decision.[97] *Kingan* involved an automobile accident that the defendant alleged was caused by a "hazardous area which prevented [the] driver from having a reasonable are of vision in order to observe approaching traffic."[98] As a result, the defendant filed a third-party complaint against the city and municipality.[99]

In denying the defendant's motion to join the public entity parties, the *Kingan* Court rejected his argument "that a prior decision of this court in *Cancel* . . . is incorrect, . . . and further, assuming *Cancel* to have been correct when written, legislative changes in the New Jersey Tort Claims Act . . . have rendered Cancel obsolete."[100]

Finding that his argument "overlook[ed] the fundamental philosophy of *Cancel,*" the Court concluded there would be "no sense in the Legislature carefully prescribing that a notice be given to governmental agencies if the courts can emasculate the statute's intent by judicial construction."[101]

Post-*Jones* Case Law

Following the decision in *Jones*, two decisions have addressed this issue: *Butler v. Badr School*[102] and *Irving v. Board of Chosen Freeholders of Burlington County*.[103] In both cases, the court relied on the reasoning and holding in *Jones* to dismiss third-party claims for contribution against public entities when the defendant's notice of claim was not filed within ninety days of the accrual of the plaintiff's cause of action.[104]

Bills

There have been three bills introduced since 2016 that deal with the notice provision in

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[96] 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).
[97] *Id.* at 383.
[98] *Id.*
[99] *Id.* at 384.
[100] *Id. See also supra* notes 88 & 90.
[101] *Id.*at 384.
[102] 2021 WL 451012, at *1 (N.J. Super. Ct. App. Div. Feb. 9, 2021) (plaintiff, who was injured on the sidewalk outside the Badr School, notified the defendant of her injures seven months later, and the defendant promptly served a notice of contribution and indemnification claims on the city).
[103] 2021 WL 717388, at *1-2 (D.N.J. Feb. 24, 2021) (plaintiff filed a third amended complaint naming the defendants more than ninety days after his cause of action accrued and the defendants filed a notice of claim for contribution against the New Jersey Administrative Office of the Courts within ninety days of receiving the complaint).
[104] *See Butler*, 2021 WL 451012, at *5 (holding that the "notice of claim was not timely filed in accordance with N.J.S.A. 59:8-8 because it [was] not file[d] . . . within ninety days of the accrual of plaintiff's cause of action"); *see also Irving,* 2021 WL 717388, at *10 (reiterating the holding in *Jones* that the accrual date of the plaintiff's cause of action against the public entity triggers the ninety-day notice provision in N.J.S. 59:8-8, the *Irving* defendants' third-party contribution and indemnification claims were dismissed for failure to file a timely notice of claim).

N.J.S. 59:8-8.[105] Two are identical bills introduced in consecutive legislative sessions and none of the bills moved beyond referral to either the Assembly or Senate Judiciary Committee.[106]

During the 2016 legislative session, Assembly Bill No. 4042 was introduced to "clarif[y] notice requirements for third party claims under [the TCA]."[107] The bill proposed extended the time for "a plaintiff or defendant presenting a claim in the original action" to file a notice of a third-party claim until "the 90th day after presenting the original notice of claim."[108]

In addition, identical bills were introduced in the 2018 and 2020 legislative sessions, which proposed to "eliminate[] pre-lawsuit, notice of claim requirements for suits filed against any State or local public entity or public employee under [the TCA] or "New Jersey Contractual Liability Act" ["CLA"].[109] The bills eliminate the notice provision language from N.J.S. 59:8-8 entirely.[110]

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

Conclusion

The decision in *Jones* 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 third-party claim for contribution or indemnification against a public entity.[111] Since a significant amount of time has elapsed since the decision in *Jones*, Staff requests guidance from the Commission regarding the continued direction of the project.

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[105] A.B. 3952, 219th Leg., 2020 Sess. (Apr. 13, 2020); S.B. 2880, 218th Leg., 2018 Sess. (Aug. 27, 2018); A.B. 4042, 217th Leg., 2016 Sess. (Jul. 21, 2016).
[106] *See* New Jersey Legislature website: A.B. 3952 (https://www.njleg.state.nj.us/bill-search/2020/A3952); S.B. 2880 (https://www.njleg.state.nj.us/bill-search/2018/S2880); A.B. 4042 (https://www.njleg.state.nj.us/bill- search/2016/A4042).
[107] A.B. 4042, 217th Leg., 2016 Sess., at 2 (Jul. 21, 2016).
[108] *Id.*
[109] A.B. 3952, 219th Leg., 2020 Sess. (Apr. 13, 2020) and S.B. 2880, 218th Leg., 2018 Sess. (Aug. 27, 2018).
[110] A.B. 3952, 219th Leg., 2020 Sess., at 2-3 (Apr. 13, 2020) and S.B. 2880, 218th Leg., 2018 Sess., at 2-3 (Aug. 27, 2018).
[111] *Jones*, 249 N.J. at 155.