

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Tort Claims Act: Time to File Notice of Claim For Damages Suffered as a Result of Injury to Minor Child
Date: May 8, 2023

MEMORANDUM

Project Summary

The time to file a notice of claim against a public entity pursuant to the New Jersey Tort Claims Act¹ (“TCA”) is “not later than the 90th day after accrual of the cause of action,” as set forth in N.J.S. 59:8-8.² Additionally, “a minor [is not prohibited] from commencing an action under this act within the time limitations contained herein, after reaching majority.”³

N.J.S. 2A:14-2 provides that an action for an injury “caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years next after the cause of any such action shall have accrued.”⁴ N.J.S. 2A:14-2.1 provides that an action by a parent “for damages suffered by him because of an injury to a minor child . . . may be commenced . . . within the same period of time as provided by law in the case of the said minor child so injured.”⁵

In *Estate of Dunmore v. Pleasantville Board of Education*, the Appellate Division considered the time frame for filing a notice of claim in an action by a mother for damages suffered as a result of witnessing the shooting death of her son.⁶ In a case of first impression, the *Dunmore* Court examined case law and the legislative purposes underlying N.J.S. 59:8-8 and N.J.S. 2A:14-2.1 in order to “harmoniz[e] the two statutes.”⁷ The Court held that “because the parent’s . . . claim essentially includes the elements of the minor’s claim . . . it is only logical to toll the notice requirements under the TCA for the parent’s . . . claim to coincide with the tolling period of the minor’s claim.”⁸

Statutes Considered

N.J.S. 2A:14-2.1 provides that:

Where a parent or other person has a claim for damages suffered by him because of an injury to a minor child caused by the wrongful act, neglect or default of any

¹ N.J. STAT. ANN. §§ 59:1-1 to 59:12-3 (West 2023).

² N.J. STAT. ANN. § 59:8-8 (West 2023).

³ *Id.* (“[n]othing 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”).

⁴ N.J. STAT. ANN. § 2A:14-2 (West 2023).

⁵ N.J. STAT. ANN. § 2A:14-1.2 (West 2023) (“Where a parent or other person has a claim for damages suffered by him because of an injury to a minor child caused by the wrongful act, neglect or default of any person within this State, an action at law upon such claim may be commenced by the said parent or other person within the same period of time as provided by law in the case of the said minor child so injured . . .”) (emphasis added).

⁶ *Est. of Dunmore v. Pleasantville Bd. of Educ.*, 470 N.J. Super. 382, 387 (App. Div. 2022).

⁷ *Id.* at 387.

⁸ *Id.* at 384.

person within this State, an action at law upon such claim may be commenced by the said parent or other person within the same period of time as provided by law in the case of the said minor child so injured, provided that, if an action is commenced by or on behalf of the said minor child, the said claim of the parent or other person shall be asserted and maintained in such action brought on behalf of the injured minor child either as a plaintiff or third party plaintiff and if not so asserted shall be barred by the judgment in the action brought on behalf of said injured minor child.⁹

N.J.S. 59:8-8 provides in relevant part:

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 chapter¹⁰ 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.

* * *

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.¹¹

Background

Dunmore arose from a shooting at a high school football game on November 15, 2019.¹² During the game, an individual fired into the stands and injured a ten-year-old child.¹³ The child's mother witnessed the shooting, and the child died from his injuries five days later on November 20, 2019.¹⁴ The child's estate and family, including his mother, filed claims related to his shooting and death in 2020.¹⁵

On February 14, 2020, both the child's estate and his family members emailed notices of claims to the Pleasantville Board of Education ("Board").¹⁶ The notices were sent "ninety-one days after the shooting and eighty-six days after [the child's] death."¹⁷ The claims included

⁹ N.J. STAT. ANN. § 2A:14-2.1.

¹⁰ N.J. STAT. ANN. § 59:8-1 *et seq.* (West 2023).

¹¹ N.J. STAT. ANN. § 58:8-8.

¹² *Dunmore*, 470 N.J. Super. at 384.

¹³ *Id.* at 384-85.

¹⁴ *Id.* at 385.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

“wrongful death and survivor claims,” as well as a negligent infliction of emotional distress claim (“*Portee*¹⁸ claim”) filed by the child’s mother.¹⁹

With respect to all but the *Portee* claim, the trial court found that the notice of claim was filed within the ninety-day limit in N.J.S. 54:8-8 because those claims accrued on the date of the child’s death (November 20, 2019).²⁰ The trial court also found that the *Portee* claim was timely, but on the basis that the “notice of claim was filed within ninety days or within three months of the date of the accrual of the cause of action.”²¹ The Board appealed.²²

Analysis

The *Dunmore* Court addressed whether notice of the mother’s *Portee* claim was timely under the ninety-day statute of limitations in N.J.S. 54:8-8.²³ Regarding the trial court’s finding that the “ninety-day deadline under N.J.S.A. 59:8-8 to file a tort claims notice is equivalent to three months,”²⁴ the Court determined that the statutory language is “specific, clear, and unambiguous.”²⁵ The Appellate Division concluded that “when the Legislature said ninety days it meant ninety days and not three months.”²⁶

Because the mother’s “cause of action accrued on the day of the shooting,” the Board argued that “her tort claims notice – filed ninety-one days after the shooting – was late.”²⁷ The mother argued that the time to file her notice of claim should be tolled for the same period that N.J.S. 59:8-8 provides for the child to file a notice of claim.²⁸ In support of her position, she cited N.J.S. 2A:14-2.1, which tolls the time for a parent to file a claim for damages suffered “because of an injury to a minor child” for the same period “provided by law in the case of the said minor child so injured.”²⁹

The Court determined that, pursuant to N.J.S. 2A:14-2.1, “the time for [the mother] to file her own lawsuit for her individual claims of emotional distress was also tolled until the Estate [of her deceased son] instituted suit.”³⁰ N.J.S. 59:8-8, however, “is silent as to whether [the mother’s] ninety-day deadline to file a tort claims notice for her *Portee* claim . . . was also tolled.”³¹

¹⁸ See *Portee v. Jaffee*, 84 N.J. 88, 101 (1980) (“cause of action . . . for the negligent infliction of emotional distress requires proof of the following elements: (1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress”).

¹⁹ *Dunmore*, 470 N.J. Super. at 385.

²⁰ *Id.*

²¹ *Id.* at 386 (emphasis added).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 387.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ N.J. STAT. ANN. § 2A:14-2.1. See also *Dunmore*, 470 N.J. Super. at 387.

³⁰ *Dunmore*, 470 N.J. Super. at 388.

³¹ *Id.*

The *Dunmore* Court explained that “[p]rior case law has established that the savings provision under N.J.S.A. 59:8-8 tolls the requirement for a minor to file a tort claims notice until ninety days after a minor’s eighteenth birthday.”³² Acknowledging that “[t]here is no precedent squarely on point stating N.J.S.A. 59:8-8 also permits tolling of a parent’s *Portee* claim,” the Court reviewed two decisions which “defin[ed] the principles” it relied on to reach its holding:³³ *Rost v. Board of Education of Borough of Fair Lawn*³⁴ and *Mansour v. Leviton Manufacturing Co.*³⁵

- *Rost v. Board of Education of Borough of Fair Lawn*

The *Dunmore* Court explained that the issue in *Rost* was “whether a parent’s consequential damages for injuries to his child were barred” due to his untimely notice of claim under N.J.S. 59:8-8.³⁶ The *Rost* court reversed the lower court’s finding that “the child’s accrual date to file a notice was tolled,” but the statute “did not include a similar tolling period for the parent’s claims.”³⁷

The Appellate Division in *Rost* reasoned that the lower court’s holding “might have the indirect effect of requiring notice of the infant’s claim to be presented within the time limitations prescribed by N.J.S.A. 59:8-8.”³⁸ The *Rost* Court concluded that such a result was “contrary to the express statutory provision relating to notice of infant claims and is not consonant with the legislative intent implicit in N.J.S.A. 59:8-8 or expressed in N.J.S.A. 2A:14-2.1.”³⁹

- *Mansour v. Leviton Manufacturing Co.*

The *Dunmore* Court also described the facts in *Mansour*.⁴⁰ In that case, the injured child was an infant and a products liability suit was filed thirteen years after the accident.⁴¹ In addition, the child’s father sued his former attorney for professional negligence because he failed to file a *Portee* claim on the father’s behalf within the two-year statute of limitations applicable to negligence claims.⁴² *Mansour* addressed the “issue of whether N.J.S.A. 2A:14-2.1 tolled a parent’s

³² *Id.* (citing *S.P. v. Collier High Sch.*, 319 N.J. Super. 452, 464 (App. Div. 1999) (“[f]ailure to satisfy the ninety-day requirement constitutes a bar to recovery against the public entity unless the claimant is a minor . . . at the time the cause of action accrues in which case the matter is tolled . . . until plaintiff’s eighteenth birthday . . .”); *Hill v. Middletown Bd. of Educ.*, 183 N.J. Super. 36, 39 (App. Div. 1982) (“the time within which a child must give notice is tolled until after he reaches majority”); *Vedutis v. Tesi*, 135 N.J. Super. 337, 341 (Law Div. 1975) (“the statute expressly preserves infant plaintiff’s right to file a notice of claim throughout the period of her minority”), *aff’d o.b.*, *Vedutis v. S. Plainfield Bd. of Educ.*, 142 N.J. Super. 492 (App. Div. 1976)).

³³ *Id.*

³⁴ 137 N.J. Super. 79 (App. Div. 1975).

³⁵ 382 N.J. Super. 594 (App. Div. 2006).

³⁶ *Dunmore*, 470 N.J. Super. at 388.

³⁷ *Id.* at 389.

³⁸ *Id.* (citing *Rost*, 137 N.J. Super. at 78-79).

³⁹ *Id.* (quoting *Rost*, 137 N.J. Super. at 79).

⁴⁰ *Id.*

⁴¹ *Id.* (“an infant was injured when an electric wok filled with hot liquid fell off the countertop and spilled onto her, causing serious injuries”) (citing *Mansour*, 382 N.J. Super. at 596).

⁴² *Id.* See also *Mansour*, 382 N.J. Super. at 597.

Portee claim” in the context of a products liability action.⁴³

The father’s attorney moved for summary judgment, arguing that “there was no basis for a negligence claim because any *Portee* claim was tolled under N.J.S.A. 2A:14-2.1.”⁴⁴ The trial court agreed that the statute of limitations for the father’s *Portee* claim had been tolled, and the Appellate Division granted leave to appeal.⁴⁵

The *Mansour* Court explained that N.J.S. 2A:14-2.1 tolls a parent’s claim “because ‘the underlying assumption of the tolling statute is that proof of the child’s cause of action is an essential element of the parent’s cause of action.’”⁴⁶ Finding that the *Portee* claim “requires ‘all of the same proofs on liability as the underlying negligence/products liability action,’” the court determined that “[i]t would make little or no sense to allow, much less effectively require, separate lawsuits.”⁴⁷

The *Mansour* Court held that “[t]olling the *Portee* claim in tandem with the child’s claim was consistent with the purposes behind the entire controversy doctrine—avoiding ‘multiple lawsuits on related claims involving the same parties,’ the ‘risk of inconsistent results,’ and ‘promot[ing] judicial economy.’”⁴⁸

The principles underlying the *Rost* and *Mansour* holdings “require a similar determination” in *Dunmore*.⁴⁹ N.J.S. 2A:14-2.1 “preserves the parent’s claims until the child brings their claim” when the parent’s claim arises from damages caused by the injury to the child.⁵⁰ Failing to toll the period for filing the parent’s notice of claim pursuant to N.J.S. 59:8-8 “would result in the absurd situation that the parent’s cause of action would likely be brought before a judge and jury for trial, perhaps years or decades before the child’s lawsuit was initiated.”⁵¹

Reading the two statutes “in *pari materia*, [the Court] conclude[d] the tolling of a notice of tort claim must also be extended for a parent’s *Portee* claim to promote uniformity and predictability.”⁵² Although acknowledging that the “purposes underlying the claims notification requirement of [(1)] prompt notification of a claim to adequately investigate the facts and prepare a defense and [(2)] permitting an administrative review with the opportunity to settle meritorious claims[,] may be thwarted by tolling a parent’s *Portee* claim,” the Court found that “the Legislature

⁴³ *Dunmore*, 470 N.J. Super. at 389.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 390 (quoting *Mansour*, 382 N.J. Super. at 603).

⁴⁷ *Id.* (quoting *Mansour*, 382 N.J. Super. at 604).

⁴⁸ *Id.* (quoting *Mansour*, 382 N.J. Super. at 604).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 391.

already determined those policies were not paramount in the instance of a minor’s claims when it enacted N.J.S.A. 59:8-8.”⁵³

Consequently, the *Dunmore* Court held that, because the child’s time to file a notice of tort claim was tolled until his death, his mother’s time to file the notice of her *Portee* claim was similarly tolled until that date and “her notice was timely under N.J.S.A. 59:8-8.”⁵⁴

Pending Bills

There are no bills pending that involve either N.J.S. 2A:14-2.1 or N.J.S. 59:8-8.

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 59:8-8 would benefit from a modification clarifying that the provision tolling the time for a child to file a notice of claim also tolls a parent’s notice when the claim arises from damages resulting from the child’s injury, as held by the Appellate Division in *Estate of Dunmore v. Pleasantville Board of Education*.

⁵³ *Id.* (internal quotations omitted).

⁵⁴ *Id.*