NEW JERSEY LAW REVISION COMMISSION

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

September 11, 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 **November 20, 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[1]

The New Jersey Tort Claims Act ("TCA"),[2] provides public entities with "broad but not absolute immunity" from tort liability.[3] 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 . . . not later than the 90th day after accrual of the cause of action."[4]

In *Jones v. Morey's Pier, Inc.*, a child was killed after falling from an amusement park ride while on a school trip.[5] 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.[6] Neither party filed a notice of claim, and 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]

To mitigate the impact of its holding, the *Jones* Court also held that a party whose contribution claim is barred for failing to comply with the TCA notice provision may request an allocation of fault to the absent public entity tortfeasor.[8] Furthermore, although the Comparative Negligence Act permits recovery of the entire amount of damages from any tortfeasor party who is at least sixty percent at fault, a court may limit recovery to the amount attributable to the non-public entity party even if that party's percentage of fault is greater than sixty percent.[9]

The proposed modifications, set forth in the Appendix, change N.J.S. 59:8-8 in the TCA to reflect the complete holding in *Jones*. They clarify that contribution and indemnification claims brought against public entities are subject to the TCA's ninety-day notice provision, which is triggered by the accrual of the underlying claim. In addition, consistent with the "Legislature's clear objective . . . to fairly apportion liability for damages in accordance with the factfinder's allocation of fault,"[10] the proposed modifications add language stating that a court may (1) allocate fault to an absent public entity tortfeasor, and (2) limit the recovery of damages to reflect the

[1] Preliminary work on this project was conducted by Eileen Funnell, during her tenure as a Legislative Law Clerk with the NJLRC.
[2] N.J. STAT. ANN. §§ 59:1-1 to 59:12-3 (West 2023).
[3] *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).
[4] N.J. STAT. ANN. § 59:8-8 (West 2023).
[5] *Jones*, 230 N.J. at 147.
[6] *Id.*
[7] *Id.* at 155.
[8] *Id.* at 165-66.
[9] *Id.* at 169-70.
[10] *Id.* at 169.

percentage of fault allocated to the public entity tortfeasor even if the percentage of fault attributable to the non-public tortfeasor is sixty percent or more.

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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> 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
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> b. Two years have elapsed since the accrual of the claim; or
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> c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.
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> 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

The *Jones* case arose from the death of an eleven-year-old who fell from an amusement park ride while on a school trip.[12] Two years after the accident, the child's parents ("Plaintiffs") filed a lawsuit against the amusement park ("Morey Defendants"), who filed a third-party complaint against the child's school ("PleasanTech") seeking "contribution pursuant to the Joint Tortfeasors Contribution Law,[13] as well as common-law indemnification."[14] Neither the Plaintiffs nor the Morey Defendants served a notice of claim on PleasanTech, a charter school and, therefore, a public entity.[15]

The trial court "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

[11] N.J. STAT. ANN. § 59:8-8 (emphasis added).
[12] *Jones*, 230 N.J. at 149.
[13] N.J. STAT. ANN. §§ 2A:53A-1 to -48 (West 2023).
[14] *Jones*, 230 N.J. at 149 & 151.
[15] *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").

against a joint tortfeasor that is a public entity."[16] The Appellate Division denied PleasanTech's motion for leave to appeal and the Supreme Court granted the motion for leave to appeal.[17]

Analysis

Applicability of N.J.S. 59:8-8 to Contribution and Indemnification Claims

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 of claim on [PleasanTech] pursuant to N.J.S.A. 59:8-8 within ninety days of [the child]'s death."[18] 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.[19]

The Court analyzed the legislative intent underlying the enactment of the TCA generally, and N.J.S. 59:8-8 specifically,[20] as well as the plain language of the notice of claim requirement in N.J.S. 59:8-8,[21] and the case law interpreting the statute.[22]

Legislative Intent

The TCA embodies the "guiding principle . . . that immunity from tort liability is the general rule and liability is the exception."[23] 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, by "forever barr[ing]" recovery from a public entity for failure to comply with the statute.[24]

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.[25]

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[16] *Jones*, 230 N.J. at 150.
[17] *Id.*
[18] *Id.* at 150 & 153 ("All parties agree that neither plaintiffs nor the Morey defendants served a Tort Claims Act notice on [PleasanTech] within the time period prescribed by N.J.S.A. 59:8–8.").
[19] *Id.* at 157-58.
[20] *Id.* at 154.
[21] *Id.* at 157.
[22] *Id.* at 155-56.
[23] *Id.* at 154 (quoting *D.D. v. Univ. of Med. & Dentistry of N.J.*, 213 N.J. 130, 134 (2013)).
[24] *Id.* (explaining that 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").
[25] *Id.* at 155 (citing *McDade v. Siazon*, 208 N.J. at 475-76).

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" and that the statute does "not distinguish between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity."[26] 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."[27] 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."[28]

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

The issue addressed by *Jones* was one of first impression in the Supreme Court.[29] The Court noted that "courts' published decisions addressing [the] issue reach[ed] divergent results."[30] 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."[31]

By contrast, "trial courts [in *Cancel v. Watson*[32] and *Kingan's Estate v. Hurston's Estate*[33]] construed N.J.S.A. 59:8-8 to bar all claims, including contribution and indemnification claims, if

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[26] *Id.* at 157.

[27] *Id.* (interpreting 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'").

[28] *Id.*

[29] *Id.* at 155.

[30] *Id.*

[31] *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 Appellate Division 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." *Markey*, 129 N.J. Super. at 200. Therefore, "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 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); *see also S.P. Collier High Sch.*, 319 N.J. Super. at 475-76.

[32] *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).

[33] *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*).

the claimant failed to serve a [TCA] notice within the ninety-day period set forth in the statute."[34] 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.[35]

Given the plain language of N.J.S. 59:8-8, and its legislative purpose, 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."[36]

Applicability of Comparative Negligence Act and Joint Tortfeasors Contribution Law

The *Jones* Court acknowledged, however, that 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."[37] The Court explained that, "[in] some circumstances . . . the statutory scheme for the allocation of fault to joint tortfeasors, prescribed by the Comparative Negligence Act[[38]] and Joint Tortfeasors Contribution Law, may mitigate th[is] impact."[39]

The Comparative Negligence Act ("CNA") "was designed to further the principle that '[i]t is only fair that each person only pay for injuries he or she proximately caused.'"[40] Once the total damages and allocation of fault have been determined, "the trial court molds the judgment based on those findings,"[41] 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.'"[42]

In the event 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.'"[43] The Joint Tortfeasors Contribution Law ("Joint Tortfeasors Law") governs such contribution claims, and "was enacted to promote the fair sharing

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[34] *Jones*, 230 N.J. at 156.
[35] *Id.*; *see supra* note 31.
[36] *Id.* at 157-58.
[37] *Id.* at 158.
[38] N.J. STAT. ANN. §§ 2A:15-5.1 to -5.8 (West 2023).
[39] *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").
[40] *Id.* at 159 (quoting *Fernandes v. DAR Dev. Corp.*, 222 N.J. 390, 407 (2015)).
[41] *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)).
[42] *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)).
[43] *Id.* (quoting N.J. STAT. ANN. § 2A:15-5.3(e)).

of the burden of judgment by joint tortfeasors and to prevent a plaintiff from arbitrarily selecting his or her victim."[44]

Allocation of Fault to an Absent Tortfeasor

Allocation is not permitted when a party "could not under any circumstances be a joint tortfeasor under N.J.S.A. 2A:53A-2."[45] As the *Jones* Court pointed out, however, there are multiple contexts in which courts have allowed "a factfinder to allocate fault to an [absent] individual or entity, . . . and the allocation may reduce the amount of damages awarded to the plaintiff."[46]

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 of a party to comply with the notice of claim provision in N.J.S. 59:8-8.[47]

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."[48] Construing these statutes "as a unitary and harmonious whole,"[49] 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,"[50] and "harmonizes and furthers the three statutes' separate goals."[51]

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[44] *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").
[45] *Id.* at 161 (quoting *Town of Kearny v. Brandt*, 214 N.J. 76, 101 (2013)).
[46] *Id.* at 161. *See infra* at pp. 9-12.
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).
[47] *Id.* at 164.
[48] *Id.* at 164-65.
[49] *Id.* at 164.
[50] *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").
[51] *Id.*

Therefore, the Court instructed that if the jury finds "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.[52]

Applicability of Sixty Percent Threshold in CNA

Following an allocation of fault by the jury, a party may 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," pursuant to N.J.S. 2A:15-5.3(a).[53] In *Jones*, the Court held that, to "best further[] the Legislature's equitable intent," the Morey Defendants would only be liable for their own percentage of fault *even if* the jury allocated sixty percent or more of the fault to them.[54]

In coming to this conclusion, the *Jones* Court agreed with the Appellate Division decision in *Burt v. West Jersey Health System*.[55] The *Burt* Court reasoned that permitting the plaintiff to recover the full amount of damages from the undismissed tortfeasor "would deprive [them] of their right to seek contribution from the [dismissed] defendants."[56] The Appellate Division in *Burt* concluded that the undismissed tortfeasors "should not be prejudiced by the failure of plaintiff to file the required Affidavit of Merit."[57]

The *Jones* Court concluded that the same concerns arose in that case: "[i]f the jury were to allocate sixty percent or more of the fault . . . to the Morey defendants, and the Morey defendants were required to pay one hundred percent of the damages . . . , they would similarly be denied the benefit of their contribution claim."[58] The Supreme Court found that, "[i]n the setting of this case, that result would defeat the Legislature's clear objective: to fairly apportion liability for damages in accordance with the factfinder's allocation of fault."[59]

Proposed Modifications

During the July 20, 2023, Commission meeting, the Commission discussed whether to modify the statute in accordance with the aspect of the *Jones* holding relating to allocation of fault.[60] The Commission also suggested modifying the CNA to reflect the potential consequences

[52] *Id.* at 166.
[53] N.J. STAT. ANN. § 2A:15-5.3(a).
[54] *Jones*, 230 N.J. at 169.
[55] *Id.* at 167. *See Burt v. W. Jersey Health Sys.*, 339 N.J. Super. 296 (App. Div. 2001).
[56] *Burt*, 339 N.J. Super. at 308.
[57] *Id.*
[58] *Jones*, 230 N.J. at 169.
[59] *Id.*
[60] N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at 7-8, July 20, 2023, www. njlrc.org (last visited Aug. 30, 2023).

of failing to comply with the notice provision in the TCA, "given that the circumstances [of *Jones*] involve claims that could *not* be brought against a public entity."[61]

Modifications to N.J.S. 59:8-8 in the TCA

As noted above, the proposed modifications to N.J.S. 59:8-8 reflect the complete *Jones* holding. Specifically, the proposed modifications clarify that the notice of claim provision is applicable to contribution and indemnification claims and specify that the ninety-day time period is triggered by the accrual of the *underlying* cause of action.

In addition, the proposed modifications provide notice to parties that (1) an allocation to an absent tortfeasor may be sought by the remaining tortfeasor(s), and (2) the court may limit the remaining tortfeasor's liability to their own percentage of fault, notwithstanding the provision of the CNA that would otherwise authorize recovery of the full amount of the damages from the party because it is determined to be 60% or more responsible for the total damages.

Modifications to the CNA

For the reasons set forth below, Staff has not proposed any modifications to the CNA that (1) reflect the principle that fault may be apportioned to a defendant who is absent because of a failure to comply with N.J.S. 59:8-8; or, (2) provide that a defendant is not liable for more than the percentage of fault allocated to him, notwithstanding the sixty percent threshold in the CNA.

First, courts have found that fault may be allocated to an absent tortfeasor who is absent for a variety of reasons.[62] The *Jones* opinion cited to four decisions permitting allocation to absent defendants, including those absent due to settlement, bankruptcy discharge, operation of the statute of repose, and the plaintiff's failure to serve an Affidavit of Merit.[63]

Additionally, the *Jones* Court discussed two cases in which fault was allocated to a defendant who was not absent, but whose liability for damages was limited by statute.[64] In one of

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[61] *Id.* at 7.

[62] *See Jones*, 230 N.J. at 161-64 (collecting cases which "held in several settings that even if the claims against a defendant are dismissed by virtue of the operation of a statute, apportionment of fault to that defendant is required by the [CNA] and the Joint Tortfeasors . . . Law").

[63] *See Young v. Latta*, 123 N.J. 584, 596 (1991) (holding "that a non-settling defendant may seek a credit in every case in which there are multiple defendants, whether or not a cross-claim for contribution has been filed") *and Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 110-11 (2004) (holding that fault may be apportioned to a tortfeasor who is absent because he "has received a bankruptcy discharge and been dismissed from the case before commencement of the trial"); *Town of Kearny v. Brandt,* 214 N.J. 76, 103 (2013) (holding that "[a]llocation of fault to the dismissed defendants . . . does not subvert the statute of repose's purpose"); *Burt*, 339 N.J. Super. at 305 (where defendants were dismissed because plaintiff failed to serve a timely Affidavit of Merit on them, the Court "direct[ed] that at trial the [non-dismissed] defendants shall be permitted to assert the alleged negligence of the [dismissed] defendants, provided they have competent evidence to support that contention [because t]o hold otherwise would deny them the right to pursue their statutory right to contribution").

[64] *Jones*, 230 N.J. at 163-64.

these cases, jury was instructed to allocate fault to a defendant although the charitable immunity statute limited its liability to $10,000.[65] In the other, the plaintiff's injury was not eligible for pain and suffering damages from the public entity tortfeasor, pursuant to the TCA, but fault was allocated to the public entity regardless.[66]

Beyond the cases examined by the Court in *Jones*, there are decisions permitting allocation of fault to defendants who were absent from trial because they were a phantom vehicle in the context of uninsured motorist ("UM") law,[67] or a settling defendant who could not have been a party to the action because the court lacked jurisdiction.[68] By contrast, the court did not permit allocation when the defendant was a fictitious party outside the context of the UM law,[69] or was not liable in tort due to the exclusivity of the workers' compensation scheme.[70]

Modifying the CNA to reflect the holding in *Jones* may unintentionally indicate that this principle is applicable *only* to situations in which a tortfeasor is absent due to a failure to comply with the notice provision in N.J.S. 59:8-8, despite the courts' broad application of the principle in numerous other areas.

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[65] *Johnson v. Mountainside Hosp.*, 239 N.J. Super. 312, 319 (App. Div. 1990) (finding that apportionment of fault was appropriate despite the $10,000 "limit on [one defendant']s liability conferred by the charitable immunity statute" which would likely reduce plaintiff's recovery). *See* N.J. STAT. ANN. § 2A:53A-8 (West 2023); *see also* L.1991, c. 187, § 48, eff. July 31, 1991 (increasing cap from $10,000 to $250,000 in 1991).

[66] *Bolz v. Bolz*, 400 N.J. Super. 154, 162 (App. Div. 2008) (explaining that although the non-public entity tortfeasor "cannot seek contribution from [the public entity tortfeasor] because the jury specifically found that plaintiff did not meet the TCA threshold of substantial permanent injury . . . [, t]he jury found both [tortfeasors] negligent [and therefore, the non-public entity tortfeasor] is entitled to know the extent of his own negligence or fault"). *See* N.J. STAT. ANN. § 59:9-2(d) (West 2023) ("No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury [except] in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00").

[67] *Krzykalski v. Tindall,* 232 N.J. 525, 537 (2018) (holding that, notwithstanding the "fictitious parties" rule in N.J. Ct. R. 4:26-4, "'phantom vehicles' driven by known but unidentified motorists that play a part in an accident presumptively may be allocated fault in accordance with the JTCL, the CNA, and the laws requiring UM coverage"). *See also* N.J. CT. R. 4:26-4 (West 2023) ("if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name" but "[n]o final judgment shall be entered against a person designated by a fictitious name").

[68] *Carter by Carter v. Univ. of Med. & Dentistry of New Jersey-Rutgers Med. Sch.*, 854 F. Supp. 310, 315 (D.N.J. 1994) (finding that the "splitting of the action for purely jurisdictional purposes does not vitiate [the settling defendant]'s status as a settling defendant insofar as [the New Jersey] action is concerned"); *Kranz v. Schuss*, 447 N.J. Super. 168, 178 (App. Div. 2016) (rejecting attempts to distinguish *Carter* in case where plaintiff brought medical malpractice action against New Jersey doctors following a settlement with New York doctors although "the New York defendants were never parties to [the New Jersey] suit, nor could they have been, because it is undisputed that New Jersey lacked personal jurisdiction over them").

[69] *Bencivenga v. J.J.A.M.M., Inc.*, 258 N.J. Super. 399, 407 & 409-10 (App. Div. 1992) (relying on the fictitious party rule in N.J. Ct. R. 4:26-4, due process and "strong policy reasons," the Court concluded that "the most equitable result, in [a case where the defendant, who assaulted plaintiff in a club, was not named by the club], is to preclude the unnamed intentional tortfeasor's conduct from the fault comparison for purposes of allocating liability").

[70] *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.*, 103 N.J. 177, 193 (1986) (holding allocation was no appropriate because "the Worker's Compensation Act removes the employer from the operation of the Joint Tortfeasors . . . Law," and therefore, "the employer . . . is not subject to the provisions of the Joint Tortfeasors . . . Law, and a third-party tortfeasor may not obtain contribution from an employer").

Attempting to modify the CNA to either (1) specify the many different circumstances in which fault may or may not be allocated to an absent tortfeasor; or (2) codify the nuanced principles that permit fault to be allocated to an absent tortfeasor,[71] could result in statutory language that is too narrow and too broad. Modifications adding specific language would certainly be extensive and possibly unwieldy, and, again, might suggest or give rise to arguments that circumstances not included in the statute are not subject to the allocation principle.

By contrast, adding more general language could inadvertently broaden the scope of the statute to reach situations in which allocation to an absent party would not otherwise have been permitted.[72] In most of the decisions discussing allocation of fault to absent tortfeasors, courts conduct an in-depth examination of the governing statutes, both in terms of policy[73] and language,[74] and often rely on equitable factors to reach a holding.[75]

These concerns are even more compelling when considering a modification to the CNA permitting courts to disregard the sixty percent requirement if a tortfeasor is absent due to a failure to comply with the notice of claim provision in the TCA. The Supreme Court held in one other context that the sixty percent threshold does not apply, which creates a risk that modifying

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[71] *See Town of Kearny*, 214 N.J. at 102-03 ("From the governing statutes and our case law, we can derive several guiding principles. First, the [CNA] and the Joint Tortfeasors Contribution Law promote 'the distribution of loss in proportion to the respective faults of the parties causing that loss[,]' [and] the statutes' objectives are best served when the factfinder evaluates the fault of all potentially responsible parties. . . . Second, our courts have barred apportionment where, as a matter of law, defendant could not under any circumstances be a joint tortfeasor under *N.J.S.A.* 2A:53A–2. . . . Third, apportionment of fault under the [CNA] and the Joint Tortfeasors Contribution Law does not turn on whether the plaintiff is in a position to recover damages from the defendant at issue. . . . Fourth, a claimant's failure to conform to a statutory requirement for asserting claims against a given defendant does not necessarily bar apportionment of that defendant's fault at trial.").

[72] *See e.g. Jhong Sik Kim v. Fingeroth*, 2015 WL 4390702 (App. Div. July 20, 2015). In *Jhong Sik Kim*, the Appellate Division compared the outcome in *Bencievenga*, *see supra* at n.68, with *Cockerline v. Menendez*. *Id.* at *3; *see Cockerline v. Menendez*, 411 N.J. Super. 596, 619 (App. Div. 2010) (holding that "preclud[ing] defendants from seeking an apportionment of liability against the phantom vehicles does not advance the purposes of the UM law and frustrates the purposes of the joint tortfeasor and comparative fault law"). The *Jhong Sik Kim* Court observed that, pursuant to *Cockerline*, "the mere fact that a co-defendant is never identified and remains a fictitious party does not bar apportionment as a matter of law." *Jhong Sik Kim*, 2015 WL 4390702, at *3. The Court "look[ed] to the underlying reasoning to reconcile *Cockerline* with *Bencivenga*" and observed that, "in *Cockerline,* equity favored the defendant [while] equity favored the plaintiff in *Bencivenga*." *Id.*

[73] *See Jones*, 230 N.J. at 164–65 (examining the goals and legislative histories of the CNA, the Joint Tortfeasors Law and the TCA); *see Ramos*, 103 N.J. at 183 (1986) (pointing out that the WCA "is built upon the principle that it provides the exclusive remedy against the employer for a work-related injury sustained by an employee," which renders the Joint Tortfeasors Law inapplicable); *see also Carbajal v. Patel*, 468 N.J. Super. 139, 153 (App. Div. 2021) (comparing the objectives of the UM law with the purposes of the CNA and Joint Tortfeasors Law).

[74] *See Town of Kearny*, 214 N.J. at 98 (addressing "whether the terms 'each party' and 'all the parties to a suit,'. . . encompass defendants who have been granted dismissals pursuant to the statute of repose"); *see also Bencivenga*, 258 N.J. Super. at 406 (relying on "the plain and ordinary meaning of the statutory language" to find that apportionment to the absent tortfeasor was not appropriate).

[75] *See Jones*, 230 N.J. at 165 (finding "[t]he equities . . . weigh against plaintiffs"); *see also Kranz*, 447 N.J. Super. at 180 (noting that the Court "might [have] conclude[d] the lack of concurrent litigation mattered if defendants were in fact prejudiced by the delay in prosecuting the New Jersey suit, but we fail to see any prejudice to defendants' contribution rights").

language to reflect *Jones* could be understood as limiting the application of the statute.[76] Furthermore, Staff does not recommend attempting to incorporate a general rule because, in both cases, the determination relied, at least in part, on the particular facts and circumstances of the cases.[77]

In light of these concerns, and given the robust and comprehensive common law that has developed with respect to the meaning and scope of the language in N.J.S. 2A:15-5.2 and 5.3, Staff does not propose any modifications to the CNA.

Pending Bills

There are currently no pending bills involving 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 claims for contribution or indemnification brought against a public entity.[78] The Court also held that in circumstances like those found in *Jones,* a court may permit an allocation of fault to the absent public entity tortfeasor and reduce the plaintiff's recovery by the amount allocated to the public entity, notwithstanding N.J.S. 2A:15-5.3 in the Comparative Negligence Act.[79]

The proposed modifications to N.J.S. 59:8-8 reflect the holding in *Jones*, both to clarify the applicability of the notice of claim requirement to contribution and indemnification claims against a public entity and to provide notice that a court may allocate fault to an absent public entity tortfeasor and reduce the plaintiff's recovery accordingly.

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[76] *See Burt*, 339 N.J. Super. at 308 ("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").

[77] *See id.* at 306 n.2 & 308-10 (finding that "defendants should not be prejudiced by the failure of plaintiff to file the required Affidavit of Merit" but also explicitly limiting its holding to "cross-claimants . . . assert[ing] a cross-claim" and declining to address whether a defendant "seek[ing] to implead a new defendant by way of third-party complaint . . . must file an Affidavit of Merit"); *see also Jones*, 230 N.J. at 169 (finding that "den[ying the Morey defendants] the benefit of their contribution claim," would, "[i]n the setting of this case, . . . defeat the Legislature's clear objective: to fairly apportion liability for damages in accordance with the factfinder's allocation of fault").

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

[79] *Id.* at 166 & 169.

APPENDIX

The proposed modifications to **N.J.S. 59:8-8, Time for presentation of claims**, (shown with ~~strikethrough~~, *italics*[80] and underlining), follow:

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

a. A claim relating to a cause of action for death or for injury or damage to person or to property, including ~~cross-claims and third party~~ claims for contribution and common law indemnification, shall be presented as provided in this chapter[ ] not later than the 90th day after accrual of the cause of action for death or for injury or damage to person or to property. 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.~~ 1. 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.~~ 2. Two years have elapsed since the accrual of the claim; or

~~c.~~ 3. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the claim.

b. If a party's contribution claim is barred pursuant to this section or N.J.S.A. 59:8-9, the court *may*[81] *[shall]*[82]:

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[80] Italicized language was derived from language proposed by Commissioner Bell after the July 2023 Commission meeting. *See Memo Re: Application of Notice of Claim Provision to Contribution and Indemnity Claims - Supplemental Memorandum [2 pages]*, From Bernard W. Bell, Commissioner to Whitney G. Schlimbach, Counsel, and Laura C. Tharney, Executive Director, NJLRC (August 21, 2023) (on file with NJLRC).

[81] *Id.* (proposing "that a court *may* direct the jury to allocate a percentage of liability to the government entity that is immune given the plaintiff's and the defendant's failure to file a tort claim against the government entity" but also noting that "*Jones v. Morey's Pier*, unless revisited and overturned by the Court, goes the rest of the way in mandating that courts do exactly that"). *See Jones*, 230 N.J. at 170 (reminding potential litigants 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 Tort Claims Act 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 . . . Law [and 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 Tort Claims Act notice on that entity—*may* lose the benefit of an allocation of fault to the public entity in accordance with those statutes") (emphasis added); *see also supra* at n.50 (setting forth the equitable considerations cited by the Supreme Court in *Jones*).

[82] *Jones*, 230 N.J. at 169-70 ("if the Morey defendants present evidence at trial that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s death, the jury should be instructed to determine whether the Morey defendants have met their burden of proof on those issues. The jury should be instructed that if it finds that the Morey defendants have proven that [PleasanTech] was negligent and that [PleasanTech]'s negligence was a proximate cause of [the child]'s death, it may allocate a percentage of fault to [PleasanTech] pursuant to *N.J.S.A.* 2A:15–5.2. If the jury allocates a percentage of fault to [PleasanTech], the trial court shall mold the judgment to reduce the Morey defendants' liability to plaintiffs in accordance with the percentage of fault allocated to [PleasanTech]").

1. permit the finder of fact to allocate a percentage of fault to the absent public entity tortfeasor,[83] provided the party *gives fair and timely notice*[84] *of the intent to pursue allocation and meets their burden of proof of the public entity's negligence or fault*[85]; and,

2. mold the judgment to reduce damages by the percentage of fault allocated to the public entity,[86] *if* N.J.S.A. 2A:15-5.3(a) *would otherwise authorize recovery of the full amount of the damages from the party because it is determined to be 60% or more responsible for the total damages.*

c. 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.

COMMENT

The proposed modifications to N.J.S. 59:8-8 add language to subsection (a) derived from the Supreme Court's opinion in *Jones v. Morey's Pier, Inc.*, clarifying that claims for contribution and common-law indemnification are subject to the ninety-day notice of claim requirement in the TCA, and that the ninety-day period is triggered by the accrual of the underlying cause of action.[87]

In addition, the modifications add a new subsection (b) that provides notice to parties that the court may allow an allocation of fault to the absent public entity tortfeasor in certain circumstances. As held by the *Jones* Court, the party seeking allocation must present "prima facie evidence of the [absent public entity tortfeasor]'s negligence" to have the issue of allocation considered by the jury.[88] The *Jones* Court also observed that the plaintiffs had ample notice of the defendant's intent to seek allocation, and the formulation of the notice requirement ("fair and timely") is derived from the Supreme Court decision in *Young*, which governs tortfeasors absent due to settlement.[89]

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[83] *Id.* at 149 ("hold[ing] . . . that the trial court should afford the Morey defendants an opportunity to present evidence at trial that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s death. If the Morey defendants present prima facie evidence, the trial court should instruct the jury to determine whether any fault should be allocated to" PleasanTech).

[84] *Young,* 123 N.J. at 597 ("The conclusion we reach today, as the Appellate Division cautioned, does not give a non-settling defendant free rein to assert the liability of a settling defendant without first providing the plaintiff with fair and timely notice."); *see also Jones*, 230 N.J. at 165 (observing that "[t]he parties have long been on notice of the Morey defendants' intention to seek the apportionment of a percentage of fault to [PleasanTech] at trial").

[85] *Jones*, 230 N.J. at 166 (instructing that "if the Morey defendants present prima facie evidence of [PleasanTech]'s negligence when the case proceeds to trial, the trial court should instruct the jury to determine whether the Morey defendants have proven by a preponderance of the evidence that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s injuries and death").

[86] *Id.* at 149 ("[s]hould the jury find that [PleasanTech] was negligent and that its negligence was a proximate cause of [the child]'s death, the trial court should mold any judgment entered in plaintiffs' favor . . . to reduce the damages awarded to plaintiffs by the percentage of fault that the jury allocates to" PleasanTech).

[87] *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.").

[88] *Id.* at 166.

[89] *Young*, 123 N.J. at 597.

The new subsection also permits the court to mold the judgment to reduce the amount of damages by the percentage of fault allocated to the public entity tortfeasor, even if the fault allocated to the non-public entity tortfeasor meets the sixty percent threshold in N.J.S. 2A:15-5.3(a).[90]

[90] N.J. STAT. ANN. § 2A:15-5.3 (". . . the party so recovering may 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").