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Attorneys for Defendants, Donald Farnelli, Township of Monroe, Monroe Township Police Department (incorrectly identified as the Monroe Township Police Department)

Plaintiff, GABRIELLE TUMAN vs. *Defendants,* ISABELLA BARNABIE, DONALD FARNELLI, TOWNSHIP OF MONROE, MONROE TOWNSHIP POLICE DEPARTMENT (incorrectly identified as the Monroe Township Police Department) And *Plaintiffs,* GLOUCESTER, SALEM, CUMBERLAND MUNICIPAL JOINT INSURANCE FUND, a/s/o DONALD FARNELLI and THE TOWNSHIP OF MONROE, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY vs. *Defendants,* ISABELLA BARNABIE and JENNIFER BARNABIE	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY Docket No. GLO-L-122-22 *Civil Action* **ORDER**

THIS MATTER having been brought before the Court by Birchmeier & Powell LLC, attorneys for defendants, Donald Farnelli, Township of Monroe, Monroe Township Police Department (incorrectly identified as the Monroe Township Police Department), for an Order granting Summary Judgment; and

THE COURT having considered the matter; and

FOR GOOD cause appearing;

IT IS on this 1st day of June, 2022, **ORDERED** that summary judgment is hereby granted as to defendants, Township of ~~Deptford~~ Monroe, and the plaintiffs' Complaint against these defendants is dismissed with prejudice.

Samuel J. Ragonese

Samuel J. Ragonese, J.S.C.

Please see attached memo.

Tuman v. Barnabie
GLO-L-000122-22

GABRIELLE TUMAN, Plaintiff, v. ISABELLA BARNABIE, DONALD FARNELLI, TOWNSHIP OF MONROE, AND MONROE TOWNSHIP POLICE DEPARTMENT, Defendants. And GLOUCESTER, SALEM, CUMBERLAND MUNICIPAL JOINT INSURANCE FUND; DONALD FARNELLI; AND THE TOWNSHIP OF MONROE, Plaintiffs, v. ISABELLA BARNABIE AND JENNIFER BARNABIE, Defendants.	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART GLOUCESTER COUNTY** **DOCKET NO.: L-122-22** **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

RELIEF REQUESTED

MOVING DEFENDANTS, Donald Farnelli, Township of Monroe, and Monroe Township Police Department, (hereinafter Monroe) represented by Erin R. Thompson, Esq., move for summary judgment.

PLAINTIFF, Gabrielle Barnabie, represented by John A. Mattiacci, Esq., opposes this Motion.

CO-DEFENDANT, Isabella Barnabie, represented by Robert M. Kaplan, Esq., also opposes this Motion.

Tuman v. Barnabie
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FACTUAL BASIS

1. This matter stems from a motor vehicle accident that occurred on February 21, 2020, on Route 322 in the Township of Monroe, County of Gloucester, and State of New Jersey.
2. At that time and place, Plaintiff, Gabrielle Barnabie, was a passenger in a vehicle owned and operated by Defendant, Isabella Barnabie.
3. Plaintiff alleges that the Barnabie vehicle collided with that of Defendant, Officer Donald Farnelli, of the Monroe Township Police Department.
4. Plaintiff filed the Complaint that initiated this action on February 2, 2022.

LEGAL ARGUMENT

Moving Defendants' Argument – Donald Farnelli, Township of Monroe, and Monroe Township Police Department

Moving Defendants, Donald Farnelli, Township of Monroe, and Monroe Township Police Department, move for summary judgment on grounds that Plaintiff failed to comply with the New Jersey Tort Claims Act.

N.J.S.A. 59:8-3 prescribes civil actions against a public entity or employee cannot be brought unless they comply with the requirements of the Tort Claims Act. Therein, a plaintiff must file a Notice of Claim informing the public entity or employee of the action within 90 days of its accrual. N.J.S.A. 59:8-8. The failure to do so permanently bars the plaintiff from asserting their claims.

N.J.S.A. 59:8-9 permits the late filing of this notice, but only under the court's discretion upon a showing of a sufficient reason for the plaintiff's failure to timely file. If permitting a late filing will substantially prejudice the public entity, then it will not be granted. Lutz v. Twp. of Gloucester, 153 N.J. Super. 461 (App. Div. 1977).

Here, Moving Defendants argue that Plaintiff failed to timely file a Tort Claims Notice under the Act, and that therefore, this matter is barred. They explain that the notice requirement was created: (1) to allow public entities at least six months for an administrative review, with the opportunity to settle meritorious claims prior to the bringing of the suit; (2) to provide the public entity with prompt notification of a claim so they may adequately investigate the facts and prepare a defense; (3) to afford the public entity a chance to correct the condition; and (4) to inform the State in advance of the indebtedness of liability they may be expected to meet. Leidy, supra at 455.

Again, Plaintiff failed to timely file a Tort Claims Notice, and similarly fails to show any extraordinary circumstances as to why this was that case. New Jersey courts have held that there is no indication that the legislature intended to extend the period to give notice until the party discovers a public entity is involved. See O'Neill v. City of Newark, 304 N.J. Super. 543 (App. Div. 1997). The date of accrual does not change when the plaintiff knows of the injury, but cannot identify the tortfeasor. Id. This includes situations where the plaintiff was aware that public

entities were involved, but only lacked the specific information of individuals involved. In re Roy, 142 N.J. Super. 594 (App. Div. 1976), cert. denied 71 N.J. 504 (1976).

For these reasons, Moving Defendants request the Court grant summary judgment in their favor.

Reply to Plaintiff, Gabrielle Barnabie

In their Reply to Plaintiff's Opposition, Moving Defendants argue that Plaintiff does not meet the standard for a late filing of notice. They argue that N.J.S.A. 59:8-9 mandates that a late filer must show extraordinary circumstances for their failure to timely file a notice, as well as a lack of substantial prejudice to the public entity in question. Beauchamp v. Amedio, 164 N.J. 111, 118 (2000); Leidy v. County of Ocean, 398 N.J. Super. 449, 457 (App. Div. 2008). Moving Defendants argue that this two-prong test is strictly applied to ensure that public entities and employees maintain as much immunity as the Act provides.

Here, they argue that a counselor's inattention or administrative shortcoming in filing notice does not constitute extraordinary circumstances. Zois v. N.J. Sports & Exposition Auth., 286 N.J. Super. 670, 674 (App. Div. 1996). They characterize Plaintiff's Opposition as an attempt to foist the blame on the County, rather than their own former attorney. There is no requirement for the County to respond to a Torts Claim Notice or apprise a plaintiff that they served the wrong party. See Leidy, 398 N.J. Super. at 457.

Moving Defendants argue that Plaintiff did not substantially comply with the Act through the correspondence sent by their former counsel. To that end, they maintain that the Police Department was never placed on notice of a potential tort claim. Furthermore, the mere fact that Officer Farnelli wished to be interviewed in connection with the investigation does not amount to a Tort Claims Notice.

Reply to Defendant, Isabella Barnabie

In their Reply to Co-Defendant's Opposition, Moving Defendants argue that indemnification and contribution claims are barred where a claimant fails to timely file a Tort Claims Notice. This issue was fully explained in this manner in Jones v. Morey's Pier, Inc., 230 N.J. 142. 158 (2017). In that same opinion, the New Jersey Supreme Court determined that a defendant who fails to timely file a notice of crossclaim or contribution may seek a proper allocation of fault at trial under the Comparative Negligence Act and Joint Tortfeasor's Contribution Law. Id. at 164-65; N.J.S.A. 2A:15-5.1; N.J.S.A. 2A:53A-1.

In this case, Moving Defendants argue that Co-Defendant never filed a Tort Claims Notice of a crossclaim, thus barring this claim moving forward. For this reason, they request that the Court dismiss all crossclaims for contribution, with prejudice.

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Plaintiff's Argument – Gabrielle Barnabie

Plaintiff, Gabrielle Barnabie, opposes this Motion on grounds that they substantially complied with the Tort Claims Act notice requirement.

Summary Judgment Standard

Plaintiff begins with a recitation of the long-observed summary judgment standard. This standard will not be recited here, as it can be found in the Court's opinion below.

Plaintiff, Through Her Former Counsel, Substantially Complied with the Notice Requirements of the Tort Claims Act, N.J.S.A. 59:8-3, and Moving Defendants Are Not Prejudiced in Any Way

Plaintiff argues that the substantial compliance doctrine maintains legitimate claims where technical defects might bar them. County of Hudson v. Dep't of Corr., 208 N.J. 1, 21, 26 A.3d 363 (2011) (quoting Lebron v. Sanchez, 407 N.J. Super. 204, 215, 970 A.2d 399 (App. Div. 2009)). In considering whether a party substantially complied, a court must review: (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not a strict compliance with the statute. H.C. Equities, LP v. Cty. of Union, 247 N.J. 366, 386, 254 A.3d 659, 671 (2021), citing Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353, 771 A.2d 1141 (2001) (quoting Bernstein v. Bd. of Trs., TPAF, 151 N.J. Super. 71, 76-77, 376 A.2d 563 (App. Div. 1977)).

Where Tort Claims Act violations are in question, the court will determine whether notice was given timely and in writing and did not deprive the public entity of effective notice but was made in a manner that was technically deficient. H.C. Equities, LP, at 386, citing D.D., 213 N.J. at 159, 61 A.3d 906.

Defendants Are Not Prejudiced in Any Way by the Form of Notice Provided to Them by Plaintiff's Prior Counsel

Here, Plaintiff argues that regardless of whether a proper Tort Claims Act packet was sent to Moving Defendants, Monroe Township received a letter from Plaintiff's former counsel within the 90-day period. This letter identified that they represented Plaintiff, including Plaintiff's identity, the date and location of the accident, and the alleged injuries suffered.

At that point, Moving Defendants had already investigated the circumstances surrounding the accident, including its potential cause. This included interviewing Officer Farnelli, preserving dash cam footage, interviewing Co-Defendant, conducting an Internal Affairs investigation, and more. All of this, Plaintiff argues, placed Moving Defendants in a position where they were aware of the pendency of this action, and on top of that, in possession of significant evidence related to it. Furthermore, Plaintiff contends that Co-Plaintiff, Kayla McKeever, provided a Tort Claims Notice to Moving Defendants related to this same event.

Plaintiff maintains that Moving Defendants would only be prejudiced by being forced to litigate a meritorious claim, which courts have noted is not the kind of prejudice that defeats this analysis. Otherwise, Moving Defendants will suffer no prejudice by permitting this suit to proceed.

Plaintiff's Former Counsel Took Good Faith Steps to Comply with the Statute

Plaintiff attests that their former attorney corresponded with Moving Defendants and completed a Tort Claims Notice in compliance with the Act. They maintain that the packet was sent in the early days of the pandemic. Plaintiff's current counsel was advised that the Law Offices of John T. Dooley was operating completely remotely. Plaintiff's former counsel's notice was apparently sent to the County of Gloucester and referenced the Township of Monroe. Regardless, it was sent within the 90-day window, indicating their good faith efforts to comply with the Act

Also, within the statutory period, Plaintiff's former counsel sent a letter to the Monroe Township Municipal Building. This was on March 4, 2020. The letter identified Plaintiff, the date and time of the accident, its location, and the alleged injuries suffered. It also requested records and additional information. On June 19, 2020, Captain Lewis of the Monroe Township Police Department called Plaintiff's former counsel for a recorded statement.

Plaintiff distinguishes this case from others in which no steps were taken to comply with the Tort Claims Act. While Plaintiff's current counsel cannot speak for their former counsel, they can acknowledge that extensive steps were taken to comply with the Act. They prepared the Tort Claims Notice packet, but erroneously mailed it to the County, rather than the Township, during the beginning days of remote work.

However, Moving Defendants clearly still received notice of the action, which included all of the important details required in the Act. Thus, Plaintiff urges the Court to find that there was substantial compliance.

Plaintiff's Former Counsel Generally Complied with the Purpose of the Statute

Next, Plaintiff argues that the actions of their former counsel reasonably complied with the purpose of the Act, which is to apprise public entities of potential actions against them so they may more efficiently investigate the incident. H.C. Equities, LP v. Cty. of Union, 247 N.J. 366, 384, 254 A.3d 659, 670 (2021) (internal citations omitted).

Here, Plaintiff's counsel sought to provide this very notice, even though it was not delivered properly. The information provided was more than sufficient to provide Moving Defendants with the required notice under the Act, evidenced by the fact that the Township performed an immediate investigation into the incident. Again, Plaintiff believes this satisfies the Tort Claims Act.

The Township Received Reasonable Notice of Petitioner's Claim

As Plaintiff has already pointed out, Moving Defendants clearly received adequate notice of this claim, and in a manner that comports with the Tort Claims Act. Plaintiff's former counsel provided Moving Defendants with all of the key information required, within the 90-day period. Additionally, Moving Defendants had commenced their own investigation of the incident before any notice from Plaintiff's counsel was ever received. More conclusively, Co-Plaintiff provided a Tort Claims Notice related to the same incident. Taken together, Plaintiff argues that the Court must find that sufficient notice was provided.

Taking All Facts and Inferences in Favor of Plaintiff, There Was a Reasonable Explanation Why There Was Not a Strict Compliance with the Statute

Again, Plaintiff has already explained the reasons why there was not strict compliance with the Act. Plaintiff's former counsel was adapting to the changes imposed by the pandemic, and in trying to do so, erroneously mailed the notice to the County, instead of the Township.

The Substantial Compliance Doctrine Should Be Applied to Defeat Summary Judgment

Finally, Plaintiff argues that it is in the interest of justice to deny summary judgment on grounds that they substantially complied with the notice requirement of the Tort Claims Act. Moving Defendants were still notified of this claim, and promptly conducted an investigation as to any potential liability.

Moving Defendants also suffered no prejudice. They were made aware of Plaintiff's former representation during the 90-day period, along with other details about the accident. Once their investigation began, they learned that their officer was traveling at almost double the speed limit, without any lights or sirens on, and collided with the Barnabie vehicle.

Not only that, but, again, Moving Defendants received a Tort Claims Notice from Co-Plaintiff in this matter. Plaintiff will ultimately seek to consolidate these two actions, meaning that the circumstances of the accident will be litigated either way.

Plaintiff argues that it would constitute a miscarriage of justice if they were barred from pursuing their claims based on the mere technicality of their noncompliance. For this reason, and those outlined above, they request that the Court deny summary judgment.

Co-Defendant's Argument – Isabella Barnabie

Co-Defendant, Isabella Barnabie, opposes this Motion on grounds that their crossclaim for contribution stands, regardless of Plaintiff's failure to file a Tort Claims Notice.

They argue that pursuant to Markey v. Skog, a defendant's crossclaim for contribution may be asserted even where the plaintiff has failed to comply with the Tort Claims Act. 129 N.J. Super.

192 (Law Div. 1974). In other words, even where the plaintiff has failed to provide timely notice, a defendant may maintain an action against the tortfeasing public entity under the New Jersey Joint Tortfeasors Contribution Law. N.J.S.A. 2A:53-1. A plaintiff's compliance with the Tort Claims Act is not a condition precedent to liability of the public entity, because a defendant's right to contribution does not ripen until they are forced to pay more than their share of a judgment.

In this case, Co-Defendant argues that even though Plaintiff failed to comply with the Act, this has no effect on their right to contribution from Moving Defendants. Co-Defendant requests that if the Court grants summary judgment in favor of Moving Defendants, the Order must contain some indication that their crossclaims survive.

ANALYSIS

Summary Judgment Standard

In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court explained the summary judgment standard as follows: "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." It should be kept in mind that the mere existence of issues of fact does not preclude summary judgment, unless a view of those facts most favorable to the opposing party adequately grounds some claim for relief. Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963).

In Brill, the Supreme Court of New Jersey adopted the standard for summary judgment used by the Federal Courts. The Brill Court instructed the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 536. The Brill Court emphasized that the thrust of its decision is "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Here, Moving Defendants prove that these proper circumstances have indeed presented themselves.

The Tort Claims Act sets forth specific notice requirements that must be met by a plaintiff, with the failure to comply resulting in the barring of their claims. N.J.S.A. 59:8-8. Specifically, claims will be barred if: (1) the plaintiff fails to file their claim with the public entity within 90 days of accrual of the claim, except as otherwise provided in section 59:8-9; (2) 2 years have elapsed since the accrual of the claim; or (3) the claimant or their authorized representative enters into a settlement agreement with respect to the claim. Id.

N.J.S.A. 59:8-9 allows a plaintiff to bring their claim against a public entity after the 90-day period has passed when that entity would not be prejudiced by such an action. Additionally, a plaintiff must make a motion, supported by an affidavit, spelling out extraordinary circumstances leading to their failure to timely file notice within one year if seeking to file a late notice. Whether this exception will be applied is within the discretion of the Court. However, in no event will the exception be applied more than 2 years after the accrual of the claim. N.J.S.A. 59:8-9.

In considering whether a party substantially complied with the Tort Claims Notice requirement, the Court must review: (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not a strict compliance with the statute. H.C. Equities, LP v. Cty. of Union, 247 N.J. 366, 386, 254 A.3d 659, 671 (2021), citing Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353, 771 A.2d 1141 (2001) (quoting Bernstein v. Bd. of Trs., TPAF, 151 N.J. Super. 71, 76-77, 376 A.2d 563 (App. Div. 1977)).

For the Court to assess whether this letter was substantial notice, the Court looks to the six required categories of information to be supplied by a claimant under N.J.S.A. 59:8-4:

a. Name and post office address of claimant;
b. Post office address to which person presenting the claim desires notices to be sent;
c. The date, place and circumstances of the occurrence which gave rise to the claim asserted;
d. General description of the injury, damages or loss so far as it may be known;
e. Name of public entity, employee or employees causing the injury, damages or loss, if known; and
f. The amount claimed as of the date of presentation, including the estimated amount of any prospective injury, damage or loss, in so far as it may be known, together with the basis of computation.

As to (a), the March 4, 2020, letter does not provide any information about Gabriel Tumans post office address. But, as to (b), clearly, the letter directs notice be sent to Plaintiff's former counsel. As to (c), the date and place of the accident are set forth in the "Re:," but circumstances are not provided. As to (d), there is no description of injury or damages though the letter advises of representation for such. As to (e), though the letter is written to the "Monroe Township Municipal Building," *there is no indication anywhere that Monroe Township is being sought to be held liable.* There is no assertion that Plaintiff has been injured due to cause or fault of Monroe or its employee. As to (f), there is no amount asserted for compensation or any indication of the extent of injury or hospitalization or even of a demand at all. Thus, there is no computation.

Plaintiff attests that their former counsel, Dooley, took meaningful steps, in good faith, to comply with the Act. According to Exhibit 2 of Plaintiff's opposition, Dooley apparently completed a form titled "Notice of Tort Claim Form Against Gloucester County and/or Its Entities." However, there is no indication this form was ever supplied to Monroe Township, or its Police Department,

and it is not asserted how it could reasonably be expected to have been delivered in some way to Monroe. Plaintiff then argues that notice was given by Dooley to Monroe via the letter of March 4, 2020, advising that he represented Gabriel Tuman for "injuries and damages sustained in an accident which occurred on February 21, 2021" and asking, "[a]t your earliest convenience, please forward a complete copy of the investigation file".

Neither the Gloucester County Tort Claim form nor the March 4, 2020, letter can be said to have reached a level of communication of a claim being made against Monroe. Certainly, the County Claim form would not have communicated notice other than to Gloucester County, and there is nothing in the March 4, 2020, letter to suggest that anything more than a copy of an investigation file seeking "witness statements" was requested. As the above analysis of the six statutory elements proves, though some information is provided by the March 4 letter, it cannot be said that the information was substantially in compliance with N.J.S.A. 59:8-4.

Leidy v. Ocean County, 398 N.J. Super. 449 (App. Div. 2008) emphasizes that a plaintiff must act with due diligence. In Leidy, the plaintiff was found to have the responsibility to look at a road map to discern what counties may be responsible for maintenance of the area where his motorcycle crashed. The Court said:

> [T]he record is barren of any reasonable efforts undertaken by plaintiff during the ninety-day period to ascertain ownership, control or operation of the portion of the roadway and adjacent area in question. Equally lacking is any explanation as to how or when plaintiff actually acquired knowledge of Monmouth County's jurisdiction.
>
> [Id. at 461.]

The failure to identify the Monroe Township Police Department as a "cause" of injuries suffered by Plaintiff, and to put the municipality on notice of such a claim is critical to the ability of Monroe to defend itself. While notice of another claimant may have served to eliminate much prejudice, there is still no substantial compliance that can be found with the majority of the elements required by 59:8-4, despite the burden of due diligence. Both the form notice, which may or may not have been sent to Gloucester County, and the March 4 letter, do not appear as due diligence to the Court when the statute is easily accessible and advises what must be done.

Plaintiff has argued O'Donnell v. New Jersey Turnpike Auth., 236 N.J. 335 (2019) where the plaintiff sought leave to file an amended late notice of tort claim 197 days after the accident. The Court there found "extraordinary circumstances" had been shown to allow the filing, when considered with the separate claim of another operator notifying the Turnpike Authority that they were also involved in the crash. This case is readily distinguishable, as there was some effort by the second plaintiff's counsel to obtain the identity of the proper roadway agency. Though the first attorney had filed a Tort Claim Notice with the Bureau of Risk Management of the State of New Jersey, second counsel filed an amended notice of tort claim within the one-year period for "extraordinary circumstances." Here, no motion to serve late notice was *ever* filed, and there is

no proof the Gloucester County form was ever served on Gloucester County. The NJTA also relied primarily on D.D. v. University of Medicine & Dentistry of New Jersey, 213 N.J. 130, 157-58, 61 A.3d 906 (2013), for the proposition that an attorney's "inattention or even malpractice" does not constitute an extraordinary circumstance sufficient to excuse noncompliance with the ninety-day filing deadline under the Tort Claims Act.

For these reasons, the Court will grant summary judgment in favor of Moving Defendants. As to Co-Defendant's crossclaim for contribution, the Court will also find it is preserved under the holding of Jones v. Morey's Pier, 230 N.J. 142 (2017) so that allocation of fault may be made by the jury at time of trial.

DETERMINATION

Therefore, Moving Defendants' Motions are GRANTED.