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Suing a Municipality

The prerequisites to filing suit against a public entity or employee

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Any person seeking to bring suit against a public entity or public employee must comply with several prerequisites. N.J.S.A. 59:8 et seq. First, the individual must file a timely notice of claim (90 days from accrual of cause of action) with the appropriate public entity. There are four reasons for this requirement: “(a) 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, (b) to provide the public entity with prompt notification of a claim in order to adequately investigate the facts and prepare a defense,” *Reale v. Wayne Township*, 132 N.J. Super. 100, 109 (Law Div. 1975), (c) to afford the public entity a chance to correct the condition complained of, and (d) to provide the public entity with an opportunity to be informed in advance concerning the indebtedness or liability that it may be expected to meet. *Beauchamp v. Amedio*, 164 N.J. 111, 121-22 (2000). A notice of claim is required to be filed with the public entity

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even when the action lies against the public employee. It must identify all the entities against whom the claim is brought. Notice need not be given to, nor identify, the public employee. The notice of claim must be in writing and signed by the claimant or a person on his behalf.

A notice of claim shall include: (1) the name and post office address of the claimant; (2) the post office address to which the person presenting the claim desires notices to be sent; (3) the date, place and other circumstances of the occurrence giving rise to the claim; (4) a description of the injury, damage or loss incurred at the time of the presentation of the claim; (5) the name(s) of the public entity(s) and public employee(s) causing injury, damage or loss; and (6) the amount claimed as of the date of the presentation of the claim, including the estimated amount of any prospective injury, damage or loss known at the time claim is made, together with the basis of the computation of amount claimed. At a minimum, the notice of claim must give some indication of the asserted basis of the public entity’s liability.

New Jersey courts have adopted the doctrine of “substantial compliance” to assess whether a claim may proceed

despite a defect in the notice. “Substantial compliance” exists when substantially all of the required information has been provided to the public entity in the form necessary to alert it to the facts and the nature and extent of the injuries. For example, a notice of claim has been held to comply substantially even though it had an incorrect date of the accident wherein hospital records attached to the notice contained the correct date. A notice of claim that provides an incomplete description of the “circumstances of the occurrence or transaction” giving rise to the claim has produced varied results. *Small v. Dep’t of Corrections*, 243 N.J. Super. 439 (App. Div. 1990); *Newberry v. Township of Pemberton*, 319 N.J. Super. 671 (App. Div. 1999). A claimant’s failure to state damages with specificity, particularly when the amount of damages is unknown at the time a notice of claim is filed, is unlikely to be detrimental to the claimant. A public entity may be estopped from asserting improper notice “where the interests of justice, morality and common fairness dictate that course.” *Hill v. Bd. of Educ. of Middletown Township*, 183 N.J. Super. 36, 40 (App. Div. 1982). In the context of opposing a notice of claim, a public entity will be estopped when (1) it failed to plead with specificity the affirmative defense of noncompliance; (2) its conduct has created “the objective impression that it was waiving the notice requirement”; and (3) the waiver was

reasonably relied on by plaintiff beyond the time where he could timely file notice.

A public entity may create its own claim form. It shall include the statutory requirements of N.J.S.A. 59:8-4 and may include requests for additional information and supporting documents, such as:

(1) written reports of claimant's attending physicians or dentists setting forth the nature and extent of injury and treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity; (2) a list of claimant's expert witnesses and any of their reports or statements relating to the claim; (3) itemized bills for medical, dental and hospital expenses incurred, or itemized receipts of payment for such expenses; (4) documentary evidence showing amounts of income lost; if future treatment is necessary, a statement of anticipated expenses for such treatment.

In addition, the claim form may (1) require claimant to submit to a physical or mental examination, and (2) permit the public entity to inspect records related to liability and damages, including medical records, employment records, and income tax returns. The doctrines of substantial compliance and estoppel are applicable to a claim form adopted by a public entity.

A claim against the state for damage or injury arising under the NJTCA shall be filed either with (1) the attorney general or (2) the department or agency involved in the alleged wrongful act or omission, while a claim against a local public entity shall be filed with that entity. A completed notice of claim must be delivered or sent by certified mail to the public entity. A notice of claim is deemed to have been presented if it is actually received by the public entity. Service of a notice of claim constitutes constructive service on any employee of that entity. A notice of claim is deemed presented and received at the time it is mailed even if it is received by the entity after 90 days from accrual of the cause of action.

A notice of claim "shall be presented...not later than the ninetieth day after the accrual of the cause of action." Most often, a cause of action accrues when a tort is committed. A cause of action may also accrue at the time when the accident occurs or "when facts exist which autho-

alize one party to maintain an action against another."

The 90-day requirement for the filing of a notice of claim may be tolled if either the injury or the responsible party is unknown to the claimant. The claimant must exercise "reasonable diligence" to ascertain the responsible party in order to gain the benefit of the "discovery" rule.

Following the filing of a timely notice of claim, the claimant must wait six months before filing suit. This waiting period does not extend the two-year statute of limitations period. Stated differently, failure to file suit within two years of the accrual of a cause of action will result in dismissal of a claim even though a notice of claim was timely filed.

Infants and incompetents are excepted from the time requirement for filing a notice of claim. An infant who was injured by a tort committed by a public entity or public employee must file a claim within 90 days after his 18th birthday or within two years after its occurrence, whichever is later. Likewise, a claimant who while incompetent sustains injury at the hands of a public entity or public employee must file a notice of claim within 90 days after reaching sound mind.

There is an exception to the 90-day requirement of the notice of claim. A claimant who fails to file a notice of claim within 90 days may be permitted to file the notice within one year after the accrual of the claim provided that (1) the public entity or public employee has not been substantially prejudiced, and (2) the claimant demonstrates extraordinary circumstances for the failure to file the notice of claim. The claimant's application must be made by motion with supporting affidavits based on personal knowledge. However, under no circumstances may a suit under the NJTCA proceed against a public entity or public employee if it is filed more than two years from the time of the accrual of the claim.

The court has discretion to permit the filing of a late notice of claim after 90 days, but within one year, following the accrual of a claim. The court's decision will be upheld on appeal in the absence of a showing of mistaken exercise of that discretion. An order granting leave to file a late notice of claim is final and appealable as of right. Following one year from

the accrual of a cause of action against a public entity or public employee, a court lacks jurisdiction to relieve a claimant from the failure to have timely filed a notice of claim.

Substantial Prejudice

Substantial prejudice to a public entity exists when its ability to gain the information necessary to defend itself has been comprised. Generally, this implies the "loss of witnesses, the loss of evidence, fading memories, and the like." *Blank v. City of Elizabeth*, 318 N.J. Super. 106, 115 (App. Div.), *certif. granted*, 160 N.J. 479, *affirmed as modified*, 162 N.J. 150 (1999). In assessing whether a public entity has been prejudiced by a claimant's failure to timely file a notice of claim, courts have also examined (1) the entity's interest in expediting an investigation with the anticipation of reaching settlement before suit, and (2) the protection of the entity's access to information about the incident. Delay, without other factors, is not tantamount to substantial prejudice to justify denial of a late notice of claim motion. Neither is a change in condition of property.

A claimant must also show "extraordinary circumstances" for the failure to comply with the 90-day notice requirement. Despite this heightened burden, public policy favors that cases should be heard on their merits, and any doubts should be resolved in favor of allowing the late filing. Whether extraordinary circumstances exist must be determined on a case-by-case basis.

Courts consider a variety of factors to determine whether extraordinary circumstances exist. Generally, ignorance of the identity of a public entity alone as an alleged tortfeasor does not constitute extraordinary circumstances. Nor does attorney error. However, attorney error based on a justifiable misinterpretation of the law concerning the accrual of a cause of action has constituted extraordinary circumstances, while an attorney's ignorance of the 90-day period for filing a notice of tort claim without more does not. The complexity of a case stemming from a difficulty in determining potential defendants and severity of injuries has constituted extraordinary circumstances. ■