

To: New Jersey Law Revision Commission
From: Kiersten Fowler
Re: Meaning of “physical examination” and the scope of immunity in N.J.S. 59:6-4
(Parsons ex rel. Parsons v. Mullica Tp. Bd. of Educ.)
Date: July 10, 2017

MEMORANDUM

Executive Summary

In *Parsons ex rel. Parsons v. Mullica Tp. Bd. Of Educ.*, the New Jersey Supreme Court addressed the issue of whether New Jersey’s Tort Claims Act (“TCA”), N.J.S. 59:6-4, immunizes public entities and their employees for failure to report the results of a preventative public health examination.¹ In an opinion by Justice Fernandez-Vina, the Court held that such conduct falls within the purview of N.J.S. 59:6-4.² This conclusion was based on an extensive analysis that both defined the components of “physical examination” and explored the Legislature’s intent regarding the scope of public entity immunity pursuant to N.J.S. 59:6-4.³

Background

Rachel Parsons was a student at Mullica Township Elementary School from 2001 until approximately 2004, during which time the school nurse, Judith M. Grasso, R.N., C.S.N., administered visual acuity tests to all students as part of public health initiatives.⁴ Parsons was given two visual acuity tests, one during the 2001-02 academic year, and the other in 2004.⁵ Parsons failed both tests with regard to her right eye, however, her parents were not notified of the results until after the second test in 2004.⁶ Thereafter, Parsons was “diagnosed with amblyopia in her right eye, a condition that went undetected by her private doctors before and after the first screening.”⁷

In November 2013, Parsons and her parents filed a complaint against the Board of Education, which operated the Mullica Township Elementary school, and against Grasso, alleging that the defendants “breached their duty to timely notify Parson’s parents of the earlier test results pursuant to N.J.A.C. 6A:16-2.2(1)(6)”⁸. N.J.A.C. 6A:16-2.2, titled “Required health services,” reads in relevant part that:

- (1) Each district board of education shall ensure that students receive health screenings. . . .
2. Screening for visual acuity shall be conducted biennially for students in kindergarten through grade 10. . . .

¹ *Parsons ex rel. Parsons v. Mullica Tp. Bd. Of Educ.*, 226 N.J. 297, 299 (2016).

² *Id.* at 301.

³ *Id.*

⁴ *Id.* at 301.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 302.

⁸ *Id.*

5. Screenings shall be conducted by a school physician, school nurse, or other school personnel properly trained. . . .
6. The school district shall notify the parent of any student suspected of deviation from the recommended standard.⁹

The defendants moved for summary judgment, alleging that, despite their failure to notify Parsons's parents of the deficiency, they had immunity pursuant to the TCA¹⁰, which provides that:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others. For the purposes of this section, "public employee" includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.¹¹

Plaintiffs argued that the failure to communicate the results of the visual acuity test should not fall under the immunity granted by N.J.S. 59:6-4 because reporting an examination's results is not within the definition of "physical examination" in the statute."¹² This argument is based on an interpretation of the statutory language in N.J.S. 59:6-4 that the failure to disclose the results was to be considered "a separate and distinct act" from the physical examination itself.¹³ Plaintiffs also asserted that Grasso's "failure to communicate the results should be considered a ministerial act, which is not afforded immunity pursuant to N.J.S. 59:3-2."¹⁴ Lastly, plaintiffs contend that Grasso is liable because N.J.S. 18A:40-4.5 only applies to scoliosis screenings.¹⁵

The trial court denied the defendants' motion for summary judgment, holding that defendants were not immunized under TCA because a visual acuity test was "an examination or diagnosis for the purpose of treatment."¹⁶ The trial court also found that N.J.S. 18A:40-4.5 only immunizes school nurses from liability resulting from scoliosis examinations, but does not include other health screenings.¹⁷ The Appellate Division reversed the trial court's denial of summary judgment, holding "that a visual acuity test constitutes 'physical examination' under N.J.S.A. 59:6-4."¹⁸ The Appellate Division emphasized that "immunity for public entities is the general rule and liability is the exception."¹⁹ Supporting this conclusion, the Appellate Division

⁹ N.J.A.C. 6A:16-2.2.

¹⁰ *Parsons*, 226 N.J. at 302.

¹¹ N.J.S. 59:6-4.

¹² *Parsons*, 226 N.J. at 302.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 303 (quoting N.J.S. 59:6-4).

¹⁷ *Id.* at 303.

¹⁸ *Id.* (citing *Parsons*, supra, 440 N.J. Super. at 89).

¹⁹ *Id.* at 303-04 (quoting *Kemp by Wright v. State*, 147 N.J. 294, 299 (1997)).

opined that the communication of test results is included in an adequate physical examination because:

[i]n common experience, physical examinations involve a three step process: arranging to have an examination; conducting the examination; and reporting the results of the examination. The exceptions plaintiffs seek to carve out of N.J.S.A. 59:6-4 would excise from such examinations their necessary concluding step.²⁰

Ultimately, the Appellate Division held that the immunity for public health screenings pursuant to N.J.S. 59:6-4 superseded any general liability for negligent ministerial acts pursuant to N.J.S. 59:2-3 and 59:3-2.²¹ The Appellate Division quoted from *State v. Gerald*, stating: “[It is a] well established rule that where two statutes appear to be in conflict, and one is general in nature and the other specific, the conflict is resolved in favor of the more specific statute ‘as a more precise manifestation of legislative intent.’”²²

Before the New Jersey Supreme Court, plaintiffs argued that the Appellate Division’s holding essentially “rewrote” N.J.S. 59:6-4 by creating an unsupported “three-step” definition of “physical examination” that ignores the statute’s plain language.²³ Plaintiff’s cited to medical dictionaries that define “physical examination” in way that does not encompass the communication of results, but rather, the examination itself.²⁴ Plaintiffs contended that a plain reading of the statutory language made it clear that the immunity scope should only extend to a failure to perform an adequate physical or mental examination, and that the Appellate Division’s three-step test *would render the State’s medical reporting laws meaningless* by broadening the scope of immunity to allow public health entities to completely disregard reporting requirements [emphasis added].²⁵ Plaintiffs added that “immunizing defendants from liability pursuant to N.J.S.A. 59:6-4 would ‘render meaningless’ the safeguards in N.J.A.C. 6A16:2.2(1)(6) because there would be no statutory enforcement mechanism to ensure compliance.”²⁶

Defendants asserted that “excluding the reporting of an examination’s results from the definition of a ‘physical examination’ runs contrary to a patient’s common expectation of discussing their results with a medical professional.”²⁷ Second, defendants argue that the visual acuity test falls under the immunity provided by N.J.S. 59:6-4 because the tests promote public health.²⁸ Third, defendants contend that a visual acuity test should be considered a physical examination because the test is substantially similar to a group of public health examinations that are given as examples in the Comments to N.J.S. 59:6-4.²⁹ Lastly, defendants argue that because

²⁰ *Id.* at 304 (quoting *Parsons*, supra, 440 N.J.Super. at 90-91).

²¹ *Id.* (quoting *Parsons*, supra, 440 N.J.Super. at 94).

²² *State v. Gerald*, 113 N.J. 40, 83 (1988) (quoted by *Parsons*, supra, 440 N.J.Super. at 94).

²³ *Parsons*, 226 N.J. at 304.

²⁴ *Id.* at 304-05.

²⁵ *Parsons*, 226 N.J. at 305.

²⁶ *Id.* (citing *Paper Mill Playhouse v. Millburn Twp.*, 95 N.J. 503, 521-22 (1984); *Zimmerman v. Bd. Of Review*, 132 N.J.Super. 316, 322-23 (1975)).

²⁷ *Id.* at 306.

²⁸ *Id.*

²⁹ *Id.* (See Comment to N.J.S.A. 59:6-4.)

N.J.A.C. 6A:16-2.2 is a regulation promulgated by the State Dept. of Education, and thus is not controlling over how N.J.S. 59:6-4 should be interpreted.³⁰

The New Jersey Supreme Court determined that reporting the results of Parsons' visual acuity test is within the purview of N.J.S. 59:6-4 immunity.³¹ The Court referred to the case law stating that "immunity for public entities [under the TCA] is the general rule and liability is the exception."³² The Court found that the immunities provided by the TCA are absolute and if there is any ambiguity in its application than it must be resolved in favor of immunity.³³

Before reaching this conclusion, the Court delved into the legislative history of N.J.S. 59:6-4 to determine whether visual acuity tests fall under the definition of "physical examination."³⁴ The Court relied on the *Task Force Report*, submitted in conjunction with the TCA draft and later reprinted as a Comment to N.J.S. 59:4-2 which stated that the "immunity granted pertains to the failure to perform adequate public health examinations, such as public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants."³⁵ That language was amended in 1983 "to provide immunity for matters 'pertain[ing] to the failure to perform adequate public health examinations, such as tuberculosis, scoliosis, hearing, eye, mental, and other examinations for public health purposes."³⁶ The Court inferred that it was the legislative intent that visual acuity tests fall within the definition of "physical examination" pursuant to N.J.S. 59:6-4.

The Court also turned to sources outside of the statutory language to determine whether an "adequate physical examination" included the communication of results to either the patient or the patient's guardians because "[t]he TCA does not expressly define a 'physical examination' or its components."³⁷ The Court used the Mayo Clinic's definition of "eye exam" to conclude that a complete examination includes the integral component of communicating the test results to the patient,³⁸ indicating that this conclusion "is consistent with the patient's reasonable expectation that a medical professional will explain the diagnosis and any relevant treatment options before leaving the medical center."³⁹

Finally, the Court held that using N.J.S. 59:6-4 to immunize the defendants' conduct does not "render meaningless" any provisions in N.J.A.C. 6(A):16-2.2(l), which mandates that the school district shall notify parents of any student who deviates from recommended standards

³⁰ *Id.* at 307.

³¹ *Id.* at 312.

³² *Id.* at 308 (quoting Kemp, supra, 147 N.J. at 299).

³³ *Id.* (see *Kyriakos v. N.J. Dep't of Human Servs.*, 216 N.J.Super. 308, 312, certif. denied, 108 N.J. 182 (1987); *Perona v. Twp. Of Mullica*, 270 N.J.Super. 19, 30 (1994)).

³⁴ *Id.* at 309.

³⁵ *Id.* at 309-10 (quoting Comment to N.J.S.A. 59:6-4).

³⁶ *Id.* at 310 (quoting S. Labor, Indus. & Professions Comm. Statement to S. No. 524 (1982)).

³⁷ *Id.* at 311.

³⁸ *Id.* at 311-12 (citing Mayo Clinic Staff, *Overview, Eye Exam*, Mayo Clinic, <http://www.mayoclinic.org/tests-procedures/eye-exam/home/ovc-20189446> (last visited Aug. 4, 2016); citing also Mayo Clinic Staff, *Results, Eye Exam*, Mayo Clinic, <http://www.mayoclinic.org/tests-procedures/eye-exam/details/results/rsc-20189727> (last visited Aug. 4, 2016)).

³⁹ *Id.* at 312.

during screenings conducted by trained school persons; among these required screenings is a biennial vision acuity test.⁴⁰

Conclusion

Staff seeks authorization to conduct additional research and outreach in order to determine if a modification of the statutory language would be appropriate in light of the broad application of the provisions pertaining to required physical examinations, and the fact that those impacted by the statute would likely benefit from statutory language that provides clear guidance.

The attention paid by the New Jersey Supreme Court to secondary source materials in interpreting the statutory provisions suggests that, in its current form, the statutory language might not be as clear as it could be.

⁴⁰ N.J.A.C. 6A:16-2.2(1)(1-6)