

**To: New Jersey Law Revision Commission**  
**From: Erik Topp**  
**Re: *Alberts v. Gaeckler***  
**Bystander Liability in Torts Claim Act, N.J.S. 59:1-1 et seq.**  
**Date: October 10, 2017**

## MEMORANDUM

### Executive Summary

In *Alberts v. Gaeckler*,<sup>1</sup> the Law Division considered a plaintiff's rights in raising claims against public entities under the Tort Claims Act (TCA), N.J.S. 59:1-1 et seq.

The Court determined that a plaintiff asserting bystander liability claims against the state "must comply with the notice requirements of the TCA" and that the filing date of an amended complaint alleging bystander liability damages may not relate back to the date of the original filing.<sup>2</sup>

### Background

The case examined a pair of tort actions raised by a married couple, Linda and Randy Alberts.<sup>3</sup>

The Court began its opinion by explaining that it addressed

two related issues not previously addressed by any Court of the State of New Jersey in any reported opinion:

(1) Is a claimant, who is asserting a bystander liability claim, required to comply with the notice requirements of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -14-4 in order to assert the bystander liability claim against a public entity or, does the filing of a timely tort claim notice (TCN) in accordance with N.J.S.A. 59:8-8 by the claimant who sustains the personal injury satisfy the notice requirements of the TCA for purposes of asserting the bystander liability claim?

(2) If a separate TCN is not required to assert a bystander liability claim, does the two-year statute of limitations on personal injury actions bar a bystander liability suit if filed more than two years after accrual of the cause of action when the underlying personal injury suit is filed before the limitations period expires; or,

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<sup>1</sup> *Alberts v. Gaeckler*, 446 N.J. Super. 551 (Law Div. 2014).

<sup>2</sup> *Id.* at 556.

<sup>3</sup> *Id.* at 556-57.

does the filing date of the amended complaint asserting the bystander liability claim relate back to the date of filing of the original complaint?<sup>4</sup>

In the instant case, Linda was allegedly injured on a public bike path maintained by Atlantic County, and sought compensation for her injuries.<sup>5</sup> Randy asserted a loss of consortium claim stemming from Linda's injuries, but Linda's initial complaint "contain[ed] no allegation that could be interpreted as averring a claim for damages based upon an indirect claim for negligent infliction of emotional distress or a bystander liability claim."<sup>6</sup> While Linda filed a timely claim, complying with the N.J.S. 59:8-8 requirement that a notice be filed to the public entity against which the action is raised within 90 days of the incident, Randy filed no such claim.<sup>7</sup>

Linda's complaint was filed within the two-year statute of limitations applicable to the TCA, but after the two-year statute of limitations had run, the Alberts filed notice to amend their complaint to incorporate a claim on behalf of Randy.<sup>8</sup> The Plaintiff asserted that

she implicitly advised defendant that Randy made observations of her injury at the scene of the accident because her spouse is identified as one of the "individuals who were witnesses to or who have knowledge of the facts of the incident which gave rise to the claim." Plaintiff suggests that based on the information provided in the TCN, defendant could have conducted a reasonable investigation to determine whether a *Portee* claim by plaintiff's spouse existed and was being asserted by Randy.

The court acknowledges that the TCN could be interpreted as suggesting that there may be a claim for damages by Randy for the loss of consortium of his wife. However, the TCN does not contain any information that could possibly be construed as a description of the injuries sustained by Randy as a result of being an eyewitness to the injuries of his wife. *N.J.S.A. 59:8-4(d)*. The TCA simply references that plaintiff's husband was a potential witness to the incident. [emphasis in original]<sup>9</sup>

The Alberts Court noted that the Appellate Division held, in *Milacci v. Mato Realty*, that a spouse is not necessarily required to file separate notice under the TCA for loss of spousal services.<sup>10</sup> Still, the court concluded that the Alberts's attempts to comply with the TCA were substantially insufficient, as the notice initially filed neither explicitly nor implicitly suggested that

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<sup>4</sup> *Id.* at 556.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 557.

<sup>8</sup> *Id.* at 558.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 562 (citing *Milacci v. Mato Realty*, 217 N.J. Super. 297 (App. Div. 1987)).

Randy intended to make a bystander claim.<sup>11</sup> In making this determination, the court noted that Linda and Randy's claims were significantly different, unlike the *Milacci* claims, require different investigations that merit separate filings.<sup>12</sup> In *Milacci*, the Court

reasoned that a separate notice of claim was not required for a spouse to assert a per quod claim because to require a separate TCN would mean that the spouse making the per quod claim would have to complete a lengthy claim form and the information called for as to both claims "would be identical in virtually every aspect." The investigation conducted by the public entity to determine the merits of the claim would necessarily cover the same ground as the investigation of the per quod claim. If the TCN filed by the injured party simply contained the words "and on behalf of my husband," the per quod claim would be in compliance with the notice requirements of the TCA...

A TCN filed on behalf of a party asserting a bystander liability claim would not be virtually identical to the claim filed on behalf of the injured party. The public entity would of necessity have to investigate the location of plaintiff in the bystander liability suit at the time of the tort to determine if the contemporaneous observation requirement of a *Portee* claim can be satisfied. In addition, investigation would have to be conducted to determine whether the bystander liability plaintiff required medical or psychological treatment because he or she witnessed the injury to determine whether plaintiff suffered serious emotional distress as a proximate result of observing the incident.<sup>13</sup>

The relevant portion of the statute states the following:

A claim shall be presented by the claimant or by a person acting on his behalf and shall include:

- a. The name and post office address of the claimant;
- b. The post-office address to which the person presenting the claim desires notices to be sent;
- c. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
- d. A general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
- e. The name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and

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<sup>11</sup> *Id.* at 562–63.

<sup>12</sup> *Id.* at 564–65.

<sup>13</sup> *Id.* at 564.

f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.<sup>14</sup>

### **Conclusion**

This case presents an issue that, in practice, may be resolved fairly easily by following the guidance of the Court Rules and longstanding precedent.<sup>15</sup> However, as the statute is not explicitly clear that derivative claims do not require separate notice under the TCA, and that independent claims do require separate notice under the TCA, there is potential for litigants to mistakenly refrain from raising claims and to be forever barred from bringing those claims as a result.

Accordingly, Staff seeks authorization to conduct additional research and outreach to determine whether modifying the TCA to clarify the rules for providing notice of complaints would aid in interpreting the law and potentially eliminate the need for further litigation regarding the issue raised in *Alberts v. Gaeckler*.

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<sup>14</sup> N.J.S. 59:8-4.

<sup>15</sup> *Id.* at 569 (citing *Rule* 4:9-3 (regarding relation back of amended complaints) and *Young v. Schering Corp.*, 275 N.J. Super. 221 (App. Div. 1994), *aff'd*, 141 N.J. 16 (1995) (stating that “an entirely new and distinctly different cause of action cannot by means of an amendment be introduced after the statute has tolled the action)).