SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2191-19

DOUGLAS MCGILL,

Plaintiff-Appellant,

v.

ANN KLEIN FORENSIC CENTER, STATE OF NEW JERSEY,

Defendants-Respondents.

Argued March 17, 2021 – Decided June 2, 2022

Before Judges Accurso, Vernoia and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0389-19.

Christopher A. Gray argued the cause for appellant (Sciarra & Catrambone, LLC, attorneys; Christopher A. Gray, of counsel and on the briefs; Frank C. Cioffi, on the briefs).

Michael R. Sarno, Deputy Attorney General, argued the cause for respondents (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa and Jane C.

Shuster, Assistant Attorneys General, of counsel;
Michael R. Sarno, on the briefs).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Plaintiff Douglas McGill appeals from a January 3, 2020 Law Division order denying his request for reimbursement of his counsel fees pursuant to N.J.S.A. 59:10-2.1, for his successful defense of a simple assault charge brought against him by the Department of Human Services for acts committed in the scope of his employment as a senior medical security officer at Ann Klein Forensic Center. The issue is whether McGill was required to have advised the Attorney General of the criminal charge within ten days of receipt of the summons pursuant to N.J.S.A. 59:10-3 to be entitled to reimbursement for his defense costs under N.J.S.A. 59:10-2.1.

Although failure to comply with N.J.S.A. 59:10-3 will result in a State employee forfeiting indemnification in a civil action seeking compensatory tort damages, see Chasin v. Montclair State Univ., 159 N.J. 418, 432-33, 436, 441 (1999), compliance with N.J.S.A. 59:10-3 is not required in order to entitle a State employee to reimbursement of the costs of a successful defense of a criminal action under N.J.S.A. 59:10-2.1. Accordingly, we reverse and

remand for the Law Division to determine and award plaintiff the reasonable costs of his successful defense to the simple assault charge.

The essential facts are easily summarized. In April 2018, a detective in the Department of Human Services Police Department filed a disorderly persons complaint against plaintiff in Trenton Municipal Court alleging he physically assaulted a patient at Ann Klein Forensic Center in violation of N.J.S.A. 2C:12-1(a)(1).[1] Plaintiff, a state employee, did not notify the Attorney General of the charge, N.J.S.A. 59:10-3, or seek representation pursuant to N.J.S.A. 59:10A-1 and -3. Instead, plaintiff hired private counsel, who eventually secured dismissal of the charge on a Reyes motion at trial in January 2019. See State v. Reyes, 50 N.J. 454, 458-59 (1967) (establishing the standard for determining the sufficiency of the evidence against an accused on a motion for acquittal at the close of the State's case).

A few weeks later, plaintiff filed a complaint in the Law Division seeking reimbursement for the costs of his defense pursuant to N.J.S.A. 59:10-

[1] The Department of Human Services placed plaintiff on the Central Registry of Offenders Against Individuals with Developmental Disabilities in the Department of Human Services, N.J.S.A. 30:6D-73(d), as a result of the incident giving rise to the disorderly persons complaint, and Ann Klein terminated his employment.

2.1, as well as an award of attorney's fees for the costs of the reimbursement action. N.J.S.A. 59:10-2.1 provides:

> If any criminal action is instituted against any State officer based upon an act or omission of that officer arising out of and directly related to the lawful exercise of his official duties or under color of his authority, and that action is dismissed or results in a final disposition in favor of that officer, the State shall reimburse the officer for the cost of defending the action, including reasonable attorney's fees and costs of trial and appeals.

The State moved to dismiss the complaint without prejudice based on plaintiff's failure to file a tort claim notice as required by N.J.S.A. 59:10-2.2 (requiring any claim for reimbursement under N.J.S.A. 59:10-2.1 "shall be filed within the time and in the manner provided for claims for damage or injury under chapter 8 of Title 59") and N.J.S.A. 59:8-8 (requiring a tort claim notice to be presented within 90 days of the accrual of a cause of action and requiring the claimant to wait six months after the filing of the notice to commence suit). Although plaintiff quickly corrected his failure to file a tort claims notice, the court dismissed the action without prejudice, allowing for its reinstatement after the obligatory six-month waiting period.

Following reinstatement of the action, the State moved again to dismiss. It argued plaintiff's failure to comply with N.J.S.A. 59:10-3 was fatal to his claim. N.J.S.A. 59:10-3 provides:

> A State employee shall not be entitled to indemnification under this act unless within 10 calendar days of the time he is served with any summons, complaint, process, notice, demand or pleading, he delivers the original or a copy thereof to the Attorney General or his designee. Upon such delivery the Attorney General may, pursuant to the provisions of P.L.1972, c. 48 Senate Bill No. 993 now pending before the Legislature, assume exclusive control of the employee's representation and such employee shall cooperate fully with the Attorney General's defense.

The court agreed and dismissed the action with prejudice. This appeal followed.

The case turns on an interpretation of the Tort Claims Act, an issue we review de novo. See Maison v. Transit Corp., 245 N.J. 270, 286 (2021). Ostensibly relying on Helduser v. Kimmelman, 191 N.J. Super. 493, 502-03 (App. Div. 1983), the State prevailed in the Law Division on its argument that reimbursement of criminal defense costs is conditioned on the employee having made a request for defense to the Attorney General under N.J.S.A. 59:10A-1 that the Attorney General denied, just as in the case of the recovery

of civil defense costs.[2] Plaintiff countered, and reasserts here, that N.J.S.A. 59:10-2.1 does not require him to have given notice to the Attorney General under N.J.S.A. 59:10A-1 because he was not seeking "indemnification" but "reimbursement," and the Tort Claims Act treats reimbursement and indemnification differently.

We disagree with both positions. The Tort Claims Act uses reimbursement and indemnification interchangeably, as have our courts in interpreting the Act.[3] See, e.g., N.J.S.A. 59:10-2 (providing the State "shall

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[2] In Helduser, two members of the state police were indicted on criminal charges arising in the course of their duties; one was charged with homicide for having shot and killed an unarmed twenty-one-year-old motorist he stopped for speeding and the other for the possession and distribution of 250 pounds of marijuana he was supposed to be transporting for destruction. 191 N.J. Super. at 495. Both were tried and acquitted, and the Attorney General refused reimbursement of their defense costs. Id. at 495-96. Analyzing the several provisions in chapter 10 of the Tort Claims Act, we found the language "appropriate to civil actions," not criminal proceedings, and thus held the Attorney General had no obligation to defend or indemnify either officer. 191 N.J. Super. at 501-04, 506. Helduser was decided in 1983, more than five years before the Tort Claims Act was amended to add N.J.S.A. 59:10-2.1 to -2.3.

[3] This is not surprising to us as the terms are largely synonymous. Black's defines "indemnity" as: "1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort" and "reimbursement" as "Repayment . . . Indemnification." Black's Law Dictionary 886, 1476 (10th ed. 2014).

pay or reimburse" an employee who establishes he was "entitled to indemnification"); Chasin, 159 N.J. at 429 n.3 (noting the 1989 amendment to the Act "mandat[ing] indemnification for state officers in criminal actions"). But contrary to the State's position, the Act plainly treats indemnification or reimbursement of a State employee's defense costs in criminal actions differently from those incurred in the defense of a civil action.

The history of the Tort Claims Act as the Legislature's response to our Supreme Court's abrogation of the doctrine of sovereign immunity to tort claims in Willis v. Dep't of Conservation & Econ. Dev., 55 N.J. 534 (1970), is well known, see Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 404-11 (1988), and need not be recounted here. What is important to know is that the provisions of all twelve substantive chapters of the Act as first enacted in 1972 were included in the Report of the Attorney General's Task Force on Sovereign Immunity. See Malloy v. State, 76 N.J. 515, 519 n.1 (1978) (noting the task force "drafted the New Jersey Tort Claims Act"); Margolis and Novack, Claims Against Public Entities vi (Gann, 2022) (noting "the Act was based upon findings and recommendations submitted in the Attorney General's Task Force Report, and incorporated almost entirely the proposed statutory provisions contained therein").

As Justice Garibaldi explained in Chasin, an appeal involving a State employee seeking reimbursement in a civil, non-tort case, a significant goal of the Act was "to supersede the patchwork of statutory provisions providing for the defense and indemnification of state employees," replacing it with a "unified scheme" that would logically explicate the Attorney General's duty to defend and indemnify employees in civil cases. 159 N.J. at 425-30. In the unified scheme of the 1972 Act, "[t]he State's duty to indemnify an employee," defined in chapter 10, "parallels the duty to defend" set forth in chapter 10A.[4] Id. at 426. Because the Act imposes no duty to defend an employee facing criminal charges, but merely preserves the Attorney General's pre-Act authority to do so, N.J.S.A. 59:10A-3, the Chasin Court endorsed our holding in Helduser, 191 N.J. Super. at 510-11, that the Attorney General had no obligation to reimburse members of the State Police for the costs of their successful defense to criminal charges arising out of incidents in the course of their employment, separate and apart from their failure to have ever requested

[4] Chapter 10A of the Act was actually a companion bill to the proposed legislation that became the Tort Claims Act, necessitated "primarily for the purpose of satisfying the needs for representation of State employees and former State employees resulting from the passage of Senate Bill No. 969, the New Jersey Tort and Contractual Claims Act." Helduser, 191 N.J. Super. at 505. See 1972 Task Force Comment to N.J.S.A. 59:10A-6.

the Attorney General provide them a defense in those matters. Chasin, 159 N.J. at 429-31.

Following Helduser, however, the Senate and Assembly in 1989 passed identical bills resulting in N.J.S.A. 59:10-2.1 to -2.3, mandating the reimbursement of the costs of a successful defense of criminal charges based on "an act or omission of that officer arising out of and directly related to the lawful exercise of his official duties or under color of his authority." N.J.S.A. 59:10-2.1. The 1989 amendment, which became effective immediately upon the governor's signature on April 24, 1989, disrupted the symmetry of the unified scheme of the Act in which the Attorney General's duty to indemnify paralleled the duty to defend. That poses a challenge to those attempting to understand how sections 59:10-2.1 to -2.3 fit within the Act's indemnification provisions in chapter 10, of which they are obviously a part, Bower v. Bd. of Educ. of E. Orange, 149 N.J. 416, 430 (1997), and which statutory rules of construction would ordinarily indicate be read together "in the light of the general intent of the act so that the auxiliary effect of each individual part of a section is made consistent with the whole," Febbi v. Bd. of Review, Div. Emp. Sec., 35 N.J. 601, 606 (1961).

The State relies on that canon of construction, arguing N.J.S.A. 59:10-2.1 must be read in pari materia with the other chapter 10 "Indemnification" provisions of which it is a part. It maintains the insertion of N.J.S.A. 59:10-2.1 to -2.3 between two other indemnification provisions, N.J.S.A. 59:10-1, establishing the general right of employees to indemnification, and N.J.S.A. 59:10-3, conditioning that right on the ten-day notice to the Attorney General, makes clear N.J.S.A. 59:10-2.1 is an indemnification provision subject to and governed by N.J.S.A. 59:10-3. The State argues adopting plaintiff's position that reimbursement under N.J.S.A. 59:10-2.1 is not conditioned on notice to the Attorney General under N.J.S.A. 59:10-3 would "lead to an absurd statutory result and interrupt the [Tort Claims Act's] consistent statutory scheme for indemnification of State employees because it would mean that the notice requirement under N.J.S.A. 59:10-3 would apply to every provision in chapter 10 of the [Act], except for N.J.S.A. 59:10-2.1." While the argument has an obvious appeal, we are convinced it is not correct.

As Justice Hoens explained in Marino v. Marino, "before undertaking an in pari materia analysis to discern legislative intent, the court must first decide whether the two statutes in question actually 'concern the same object.'" 200 N.J. 315, 330 (2009) (quoting 2B Sutherland on Statutory Construction §

51:3 (7th ed. 2008)). Particularly relevant to that question is "whether both statutes were included in one enactment . . . and whether they are 'designed to serve the same purpose and objective.'" Ibid. (quoting 2B Sutherland, § 51:3).

Applying those considerations here, we are satisfied an in pari materia analysis is unwarranted and would lead to a result not intended by the Legislature when it enacted N.J.S.A. 59:10-2.1 to -2.3. Besides not being included in the original 1972 enactment, the 1989 provisions for the reimbursement of an employee's costs of a successful criminal defense have a completely different purpose than the rest of chapters 10 and 10A of the Tort Claims Act, which as the Court made clear in its painstaking analysis of the history and structure of the Act in Chasin, was intended to compel the Attorney General to defend and indemnify State employees only in "civil actions seeking damages for tortious conduct." 159 N.J. at 428.

As we explained in Helduser, the indemnification promised in N.J.S.A. 59:10-1 to State employees defended by the Attorney General is limited to damages in civil cases only, as is the right to indemnification in N.J.S.A. 59:10-2 when the Attorney General has refused defense. 191 N.J. Super. at 502-03. Accordingly, the obligation of a State employee in N.J.S.A. 59:10-3 to notify the Attorney General within ten days of service of a

summons in order to permit the Attorney General to "assume exclusive control of the employee's representation," which like N.J.S.A. 59:10-1 and 10-2 predated the 1989 amendment, was likewise limited "to civil actions, not criminal actions." Id. at 504-05.

Indeed, we specifically noted in Helduser that "[t]he Attorney General could not control the defense of a state employee charged with a crime, particularly if the crime charged was the violation of New Jersey law," was evidence the Legislature intended the indemnification and defense provisions of chapter 10 and 10A to apply only to civil and not criminal actions. Id. at 504-05. Thus, contrary to the assertion of the State, there is nothing anomalous in "the notice requirement under N.J.S.A. 59:10-3 . . . apply[ing] to every provision in chapter 10 of the [Act], except for N.J.S.A. 59:10-2.1"; the Act was initially designed that way and after the 1989 amendment could not operate otherwise. See Edison v. Mezzacca, 147 N.J. Super. 9, 13-14 (App. Div. 1977) (noting reimbursement under N.J.S.A. 40A:14-155 of municipal police officers for the successful defense of disciplinary or criminal proceedings instituted by the municipality must include "the reasonable fees of counsel selected by the officer," because "the municipality could have no say in the choice of counsel to defend" charges it brought.).

It is not the failure to apply the notice requirement of N.J.S.A. 59:10-3 to criminal cases "that interrupt[s] the [Act's] consistent statutory scheme for indemnification of State employees," as the State contends, it was amending the chapter 10 indemnification provisions to permit reimbursement for the successful defense of a criminal action for which the Attorney General had no defense obligation under N.J.S.A. 59:10A-1. See Waldie v. State, 264 N.J. Super. 558, 562 (App. Div. 1993). Adding N.J.S.A. 59:10-2.1 to -2.3 to chapter 10 decoupled the Act's parallel defense and indemnification provisions in criminal actions.

That radical departure in the 1989 amendment from the design of the 1972 Act convinces us the provisions of N.J.S.A. 59:10-2.1 to -2.3 were intended to stand alone, and reimbursement under N.J.S.A. 59:10-2.1, which the statute mandates the State "shall" provide an employee for the costs of a successful defense, was not silently conditioned on an employee's compliance with the pre-existing notice requirement of N.J.S.A. 59:10-3, which we had years before decided applied only to civil cases. See Helduser, 191 N.J. Super. at 504-05. The Task Force comment to N.J.S.A. 59:10-3 reinforces our view. It explains indemnification was conditioned on notice and cooperation with the Attorney General "[i]n order to insure that the State's interest will be

adequately protected," which, of course, would be unnecessary in a criminal action, which does not expose the State to tort liability. 1972 Task Force Comment to N.J.S.A. 59:10-3.[5]

If we needed any further proof the Legislature did not condition reimbursement under N.J.S.A. 59:10-2.1 on compliance with the notice requirement of N.J.S.A. 59:10-3, we need only look to the remaining provisions of the 1989 amendment, N.J.S.A. 59:10-2.2 and 10-2.3.

First, the Legislature in N.J.S.A. 59:10-2.2 required "[a] claim for reimbursement shall be filed within the time and in the manner provided for claims for damage or injury under chapter 8 of Title 59 of the New Jersey Statutes," thereby expressly conditioning reimbursement on the timely filing of a tort claim notice under N.J.S.A. 59:8-8, "except where the procedure prescribed in that chapter is inconsistent with the nature of a claim resulting from a criminal action." That tells us two things: the Legislature was well

[5] We do not suggest that State employees charged with criminal offenses not give notice to the Attorney General or request defense, which the Attorney General is authorized to provide, "if he [or she] concludes that such representation is in the best interest of the State." N.J.S.A. 59:10A-3. The Attorney General has historically assumed the criminal defense of some employees. See Helduser, 191 N.J. Super. at 500 n.9. We hold only that reimbursement for criminal defense costs under N.J.S.A. 59:10-2.1 is not conditioned on notice to the Attorney General under N.J.S.A. 59:10-3.

aware of its ability to condition reimbursement under N.J.S.A. 59:10-2.2 on another section of the Tort Claims Act and was mindful doing so might require some adjustment given "the nature of a claim resulting from a criminal action." N.J.S.A. 59:10-2.2.[6]

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[6] It might likewise suggest the reason a tort claim notice is required of employees seeking reimbursement for the successful defense of criminal charges is because the Legislature did not intend N.J.S.A. 59:10-3 to apply in a criminal case, meaning the tort claim notice would be the Attorney General's first notice of the criminal charges, as it was here. See Prado v. State, 186 N.J. 413, 426 (2006) (explaining representation by the Attorney General in a civil suit is triggered by the employee's request for representation, the denial of which may be appealed to this court, where it will be heard on an accelerated basis). If the Attorney General assumes an employee's defense in a civil case upon notice under N.J.S.A. 59:10-3, the State is obligated to indemnify the employee pursuant to N.J.S.A. 59:10-1. The employee incurs no fees for defense, and thus the issue of reimbursement never arises. See Helduser, 191 N.J. Super. at 502 (explaining N.J.S.A. 59:10-1 could not have been intended to apply in a criminal case because if the Attorney General assumed the defense, the employee would not incur defense costs and even if defense was denied, in no event would the criminal proceedings ever result "in a judgment or settlement requiring indemnification"). If the Attorney General declines defense in a civil case and the employee's appeal to this court is rejected, the employee may still recover his defense costs under N.J.S.A. 59:10-2, see Prado, 186 N.J. at 427 n.8, an option not available to employees charged with criminal offenses, Helduser, 191 N.J. Super. at 511 (holding "N.J.S.A. 59:10-2 does not authorize indemnification against counsel fees and costs incurred in defending against criminal charges when the Attorney General does not provide for the employee's defense"). Thus, whether the Attorney General defends or declines defense in a civil case, the Attorney General will necessarily be aware of the employee's claim, making a tort claim notice unnecessary. Not so in a criminal case if, in the 1989 amendment, the Legislature shared the view we expressed in Helduser that N.J.S.A. 59:10-3 is

Because the Legislature in N.J.S.A. 59:10-2.1 did not note reimbursement was conditioned on compliance with N.J.S.A. 59:10-3, as it did with chapter 8, we must assume the omission was deliberate. See O'Connell v. State, 171 N.J. 484, 488 (2002) (noting "[a] court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language"). See also Waldie, 265 N.J. Super. at 562 (noting "[w]hat the Legislature omits courts will not supply"). Moreover, forcing compliance with N.J.S.A. 59:10-3 in a criminal case would make the employee vulnerable to the Attorney General's assumption of "exclusive control" of the employee's criminal defense contrary to our observation in Helduser, over five years before the 1989 amendment, that "[t]he Attorney General could not control the defense of a state employee charged with a crime," especially one charged under our criminal laws, 191 N.J. Super. at 505. See DiProspero v. Penn, 183 N.J. 477, 494 (2005) (noting "'the Legislature is presumed to be aware of judicial construction of its enactments'" (quoting N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 195 n.6 (2002))). As the Legislature was obviously

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only "appropriate to civil actions, not criminal actions." Id. at 504-05. Although the logic of the design is persuasive, the legislative history is silent on the point.

sensitive to the different "nature of a claim resulting from a criminal action," we deem it unlikely it would have required State employees to submit to the Attorney General's "exclusive control" of their defense to criminal charges under N.J.S.A. 59:10-3 to be entitled to reimbursement under N.J.S.A. 59:10-2.1.

Moreover, in N.J.S.A. 59:10-2.3, the Legislature, notwithstanding it made claims for reimbursement in N.J.S.A. 59:10-2.2 subject to the strict time limits of chapter 8, made the 1989 amendment retroactive to claims arising before its April 24, 1989 effective date, provided they were "filed within two years after the dismissal or final disposition of the criminal action referred to in [N.J.S.A. 59:10-2.1]." There would appear little point in expressly allowing reimbursement for claims predating the 1989 amendment if such claims were subject to forfeiture sub silentio under N.J.S.A. 59:10-3 based on the defendant-employee's failure to have provided the Attorney General a copy of the criminal summons within ten calendar days of its service years before.

In sum, we do not construe N.J.S.A. 59:10-2.1 to condition a State employee's reimbursement for the costs of a successful criminal defense on compliance with N.J.S.A. 59:10-3. Accordingly, we reverse the January 3, 2020 order denying plaintiff's claim for reimbursement and remand for the trial

court to determine and award a reasonable fee for his successful defense of the municipal court charge in accordance with Rule 4:42-9(a)(8) and RPC 1.5(a).[7] We do not retain jurisdiction.

Reversed and remanded.

[7] Plaintiff has not offered any authority to support his claim for fees and costs incurred in this action, and we are aware of none. The statute limits reimbursement to the "cost of defending the [criminal] action, including reasonable attorney's fees and costs of trial and appeals." N.J.S.A. 59:10-2.1. Any award shall be limited accordingly.