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ANTONIO CHAPARRO NIEVES A/K/A	:	SUPREME COURT OF NEW JERSEY
ANTHONY CHAPARRO,	:	Docket No. 082262
	:	
Plaintiff/Appellant,	:	CIVIL ACTION
	:	
v.	:	ON APPEAL FROM FINAL JUDGMENT
	:	OF APPELLATE DIVISION
	:	
OFFICE OF THE PUBLIC DEFENDER,	:	
PETER S. ADOLF, ESQ., JOHN	:	Docket No.: A-4475-17T4
DOES 1-20 AND ABC GOVERNMENT	:	
AGENCIES 1-10,	:	Sat Below:
	:	Hon. Carmen H. Alvarez, P.J.A.D.
	:	Hon. William E. Nugent, J.A.D.
Defendants/Respondents.	:	Hon. Hany Mawla, J.A.D.

BRIEF OF AMICUS CURIAE NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

In this case, the Court is asked to determine if an attorney acting on behalf of the government to represent a private client in a litigated matter, where representation is provided as a constitutional right, is entitled to the protections afforded by N.J.S.A. 59:1-1 et seq., the Tort Claims Act (TCA), when sued for legal malpractice.

The specific claim in this case arises from a mistaken conviction in which the later exonerated plaintiff served twelve years in prison, a fate allegedly resulting from, *inter alia*, ineffective assistance of counsel Peter S. Adolf.¹ While the defendant in this matter was a Deputy Public Defender employed as a full-time public employee of the State of New Jersey, the New Jersey State Bar Association (NJSBA) asserts that the decision in this matter should apply to all attorneys similarly engaged by the state to provide representation to fulfill the state's constitutional responsibilities.

The NJSBA submits that, contrary to plaintiff's assertions, he must meet the "procedural requirements" of the Tort Claims Act. Rogers v. Cape May County Office of the Public Defender, 208 N.J. 414 (2011). While the NJSBA takes no position on whether plaintiff

¹Plaintiff Antonio Chaparro Nieves having demonstrated mistaken conviction and imprisonment by "clear and convincing evidence" has been compensated under the Mistaken Imprisonment Act, N.J.S.A. 52:4C-1, et seq. Damages awarded under the Act are capped at \$50,000 per year of incarceration, plus certain non-monetary relief, and counsel fees. N.J.S.A. 52:4C-5 a and b.

has actually met those procedural requirements, it asserts that the qualified immunity and indemnification afforded to lawyers under the Tort Claims Act is an important guarantee of the availability and independence of counsel who provide constitutionally mandated representation to those who cannot afford counsel, whether a lawyer is acting as a direct employee of the state, as a pool attorney hired through a state agency, or on a *pro bono* basis assigned by the Court. For that reason, the NJSBA urges that the decision below on the applicability of the Tort Claims Act to legal malpractice actions be affirmed, and that the Court clarify that the Act's protections extend to all attorneys providing representation on behalf of the State, including those assigned through the use of a rotating list of attorneys established pursuant to the Court opinion in Madden v. Delran, 126 N.J. 591 (1992) (the "Madden List").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The NJSBA relies upon the Statement of Facts and Procedural History as provided by the parties.

LEGAL ARGUMENT

I. Public Defenders - Whether Full-Time or "Pool" Attorneys - are State Employees Engaged in Public Service Who are and Should be Covered by the Tort Claims Act's Limitations of Liability and Indemnification by the State.

The Tort Claims Act (TCA) provides certain limitations on the liability of public entities and their employees for activities undertaken in the name of the government and for the public good. N.J.S.A. 59:1-2; N.J.S.A. 59:2-1. The Act's limitations apply to employees of the state, as well as other governmental units, when the employee is acting within the scope of their employment duties. N.J.S.A. 59:1-3.

Defendant Peter S. Adolf at the time of his alleged breaches of professional duties was an Assistant Deputy Public Defender employed full-time by the Office of the Public Defender (OPD), an agency of the State of New Jersey. The OPD is a statutory agency through which the state heeds in part the constitutional mandate to provide indigent defendants in criminal cases with "effective assistance of counsel." McMann v. Richardson, 397 U.S. 759 (1971).

In his effort to avoid the strictures of the Tort Claims Act, plaintiff's Petition for Certification misreads certain language selected from a controlling case - an opinion of Judge Villanueva in DelBridge v. Office of the Public Defender, 238 N.J. Super. 288 (Law Div. 1989). Plaintiff isolates language inaccurately

attributed to the Pennsylvania Supreme Court to support his argument that defendant Adolf should be treated as a private actor:

Once the appointment of a public defender in a given case is made, his public or state function ceases, and thereafter, he functions purely as a private attorney concerned with servicing his client; thus, he ought to be subject to liability for tortious conduct. (Petition for Cert. at 12)

The quote relied on by plaintiff, however, is a paraphrase of a holding found in a volume of the American Law Reports, which found its way into Judge Villanueva's discussion of the reasoning of the Pennsylvania Supreme Court. See 6 A.L.R.4th 774 (originally published in 1981). Despite its inclusion in the opinion, it is not the holding of Judge Villanueva or of the Appellate Division panel, which affirmed substantially for the reasons stated in the opinion below.

Contrary to plaintiff's assertion, the "private" nature of the attorney-client relationship of a public defender to his/her client is refuted by the broad public purpose of the OPD. Effective assistance of counsel is, of course, a constitutional guarantee - rooted in the Sixth Amendment to the Constitution of the United States and in the due process principles of New Jersey's 1947 Constitution, as definitively construed by this Court. See McMann, 397 U.S. 759; In re adoption of J.E.V. 226 N.J. 90, 104-106 (2016); N.J. Const., art. I, par. 1 (stating "[a]ll persons are by nature free and independent, and have certain natural and unalienable

rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.") The Public Defender is charged with effectuating those constitutional rights, specifically by providing for the legal representation of any indigent defendant who is formally charged with the commission of an indictable offense. N.J.S.A. 2A:158A-5. The private attorney-client relationship is carved out by statute (N.J.S.A. 2A:158A-12), but it does not affect the public purpose of the office itself, as plainly set forth in the statute requiring annual report:

The Office of the Public Defender shall report annually to the Legislature, the Governor and the Supreme Court. Such report. . . may indicate, recommendations for statutory changes, including changes in the criminal law or changes in court rules, all as may be appropriate to the improvement of the system of criminal justice, the control of crime, the rehabilitation of offenders, and other related objectives.

N.J.S.A. 2A:158A-22.

The categorization of a public defender as full-time professional staff or pool counsel does not affect the nature of the employment as "public" rather than private. Whether full-time professional staff or "pool counsel", public defenders carry out the same public purpose when so employed. The Legislature has made clear that in order to carry out its statutory and constitutional responsibilities the OPD must allocate its resources:

To achieve a proper balance between the services to be provided pursuant to this act and the efficiency of the operation as a whole, as well as to stimulate the continual development of professional experience and interest in the administration of criminal justice, the Public Defender shall divide the case workload of the office between the professional staff and the trial pool or pools. In any case where the matter involved requires some special experience or skill not available on the professional staff, the Public Defender shall engage counsel on a case basis, and shall assign a suitable member of the staff to the extent feasible to assist counsel so engaged. Counsel shall also be engaged on a case basis whenever needed to meet case load demands, or to provide independent counsel to multiple defendants whose interests may be in conflict.

N.J.S.A. 2A:158A-9 (Emphasis added)

As the state points out in its supplemental brief, the TCA's primary source of public entity liability is found in N.J.S.A. 59:2-2(a). The legislative history to the Act may be found in a comment to the statute contained in a report by an Attorney General Task Force on Sovereign Immunity issued in 1972. See Report of the Attorney General's Task Force on Sovereign Immunity (1972), <https://dspace.njstatelib.org/xmlui/handle/10929/18680>. That Task Force was charged with studying New Jersey's governmental immunity provisions, examining the experience of other states, and making recommendations for an equitable and economical abolition of the State's traditional sovereign immunity from suit. Id. at 1. Today's TCA is based primarily on the recommendations contained in that report, which explains in a comment to N.J.S.A. 59:2-2 that "[a]

public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." Task Force Report at 211.

The scope of liability for breaches of professional duty like other tortious acts committed within the scope and course of professional employment may be substantial, as may the costs of defense. It is therefore noteworthy that state employees are guaranteed defense and indemnification for tort claims for the harmful consequences proximately caused by tortious acts or omissions within in the scope of their State employment.

Plaintiff's mistaken reading of the Tort Claims Act would render ineffective the indemnification provisions of N.J.S.A. 59:10-1, which requires the state to indemnify only those employees for whom the Attorney General defends under the Tort Claims Act. Plaintiff's reading would leave state employee defendants like Adolf undefended and uninsured, defeating the statutory purpose of qualifying sovereign immunity while accepting tort liability within specified limits.

A. Tort Claims Act coverage of legal malpractice claims by exonerated plaintiffs is a settled question.

This Court has firmly stated that the claim of one in the position of the exonerated plaintiff here is governed by the terms

of the Tort Claims Act. In Rogers, 208 N.J. 414, the court defined the term "exoneration" in order to determine the accrual date of the exonerated plaintiff. In an opinion by Justice Long, the Court ruled:

Claims for damages against defendants – a public entity and a public employee – are subject to the provisions of the Tort Claims Act. See N.J.S.A. 59:10-1 to 12-3. "[T]he Act establishes the procedures by which claims may be brought," Beauchamp v. Amedio, 164 N.J. 111, 116, 751 A.2d 1047 (2000), including a mandatory pre-suit notification of claim.

Rogers, 208 N.J. at 420.

Despite the plainly binding Rogers precedent, plaintiff asserts that criminal defense lawyers are purely "private" actors because they owe a duty of care to the client and that "a public defender is adverse to the State's interests while representing a criminal defendant." (Petition for Cert. at 2.) But the fact that an attorney is adverse to a public entity or the state itself does not make the public defender adverse to the sovereign - the interests of which is to administer justice. See, i.e., RPC 3.8 Special Responsibilities of a Prosecutor.

As noted above, in his effort to avoid the strictures of the Tort Claims Act, the plaintiff's Petition for Certification misuses certain language selected from a controlling case, DelBridge v. Office of the Public Defender, 238 N.J. Super. 288 (Law Div. 1989) and noted by the trial judge. While Judge

Villanueva held that the pool counsel "did not have immunity under the Torts Claims Act for legal malpractice, conspiracy or other intentional misconduct," he did not hold that the TCA, which provides certain limitations on lawsuits as opposed to complete immunity, was not applicable to the Office of the Public Defender or pool counsel. Id. at 292. Rejecting the OPD's argument that public defenders have "absolute immunity" from damages claims, Judge Villanueva affirmed the applicability of the Tort Claims Act:

The court holds that both the law guardian program and its law guardian have absolute immunity from suit because they are court officers exercising judicial functions. Designated (pool) attorneys have immunity from suit except for legal malpractice, conspiracy or other intentional misconduct. They are "public employees" subject to provisions of the Tort Claims Act, and therefore, entitled to indemnification by the State.

Id. at 293.

Addressing the OPD's claim of absolute immunity, Judge Villanueva surveyed authority from other states. He quoted language from the case summary included in a volume of the American Law Reports referencing the Pennsylvania Supreme Court case in connection with assertions of immunity of public defenders to malpractice actions. See 6 A.L.R.4th 774 (originally published in 1981). That language, however, was not part of Judge Villanueva's ultimate holding.

Plaintiff further misreads the Pennsylvania high court in Reese v. Danforth, 486 Pa. 479 (1979), which - without the benefit

of a tort claims act² - rejected the argument of Lancaster County that its public defender was entitled to common law sovereign immunity. The Pennsylvania high court reasoned that the public defender was subject to a malpractice action because their representation was "akin to the role of the privately employed attorney." The plaintiff's reliance on the Pennsylvania court's language is misplaced because unlike the Pennsylvania court at that time, New Jersey has the benefit of its Tort Claims Act, which grants specified exceptions to the general rule of sovereign immunity. That argument is well developed in the state's supplemental brief.

This court should therefore affirm that it is settled law that legal malpractice claims against public defenders (both "pool counsel" and staff attorneys) are subject to the qualified immunity of the Tort Claims Act. The enabling statute (N.J.S.A. 2A:158A-9) makes clear that both staff and pool attorneys are carrying out a public function and serve at the bidding of a constitutional branch of government as commanded by the due process clause of the state's 1947 Constitution, as construed by this Court. The grave responsibilities assumed by the OPD professional staff and pool

²After Reese was decided Pennsylvania adopted a tort claims act with a "verbal threshold" limiting damages in claims against public entities. 42 Pa.C.S.A. § 8553 Limitations on Damages (1980).

attorneys who handle the vast majority of indictable offenses warrants that there be an effective remedy in the event of negligent or otherwise wrongful conduct of a public defender as counsel or employer. That remedy is afforded by the Tort Claims Act.

II. Similarly-Situated Counsel Representing Private Clients on Behalf of the State, Including Those Appointed from the "Madden List," Should also Enjoy the Protections Afforded by the Tort Claims Act.

As noted above, the Tort Claims Act provides certain limitations on the liability of public entities and their employees for activities undertaken in the name of the government and for the public good. N.J.S.A. 59:1-2; N.J.S.A. 59:1-3; N.J.S.A. 59:2-1. "Employee" is defined to include "an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not include an independent contractor." N.J.S.A. 59:1-3. Therefore, any attorney engaged by the state to provide constitutionally mandated representation would fall under the category of "employee" and should be afforded the Act's protections, including those attorneys mandated by the Judiciary to provide representation where state funding is not available or forthcoming.

This point is particularly crucial for the Court to clarify, as there is a trend toward increased reliance on appointed *pro bono* counsel to fulfill the government's role in ensuring indigent litigants' constitutionally mandated right to representation. Faced with legislative inaction in cases involving termination of parental rights, determinations leading to a listing on the child abuse registry, and driver's license suspensions, the Court has turned to mandatory representation assignments through use of a

rotating list of attorneys established pursuant to the Court opinion in Madden v. Delran, 126 N.J. 591 (1992) (the "Madden List").

Three years ago, in a notable "civil Gideon" case, this Court held that an indigent parent whose rights a private adoption agency sought to terminate was entitled to notice and to appointed counsel. In re Adoption of J.E.V., 226 N.J. 90 (2016). But the Court felt its remedial hands to be tied, noting:

Office of Parental Representation in the Public Defender's Office has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. **[But] Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act. See Crist [v. DYFS]³, supra, 135 N.J. Super. at 575-76, 343 A.2d 815; see also Pasqua [v. Council]⁴, supra, 186 N.J. at 153, 892 A.2d 663."** [emphasis added]

Id. at 113.

The J.E.V. Court decided not to exercise its powers to order compensation of assigned counsel [cf. State v. Rush, 46 N.J. 399 (1966)]. The J.E.V. court expressed its hope that the legislature would respond, to wit:

In the past, as we noted in Pasqua, 186 N.J. 127 (2006), "the Legislature has acted responsibly" and provided counsel for the poor when the Constitution so requires for example, after Crist, enacting

³ Crist v. Div. of Youth and Family Services, 128 N.J. Super. 573 (App. Div. 1975) (finding a right to counsel in parental right termination cases).

⁴ Pasqua v. Council, 186 N.J. 127 (2006) (prohibiting coercive incarceration for indigent child support obligors unless state-funded counsel can be provided).

N.J.S.A. 30:4C-15.4(a), which directs judges to appoint the Office of the Public Defender to represent indigent parents in termination of parental rights cases under Title 30.

J.E.V., 226 N.J. at 113.

The court therefore decided that it would not order compensation, concluding that it had "no choice but to turn to private counsel for assistance," inviting "volunteer organizations to offer their services, as *pro bono* attorneys have done in other areas." Id. (citing In re Op. No. 17-2012 of Advisory Comm. on Prof'l Ethics, 220 N.J. 468, 469 (2014)). "Until the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution. See Madden v. Delran, 126 N.J. 591, 605-06 (1992)." Id.

The trial court and the Appellate Division have followed suit. In Division of Children and Families v. L.O., ___ N.J. Super. ___ (App. Div. 2019), the Appellate Division found that the defendant mother faced a "consequence of magnitude" in a proceeding which placed her on the Child Abuse Registry pursuant to N.J.S.A. 9:6-8.11. While the NJSBA argued in its *amicus* brief that the "state should be required to provide funded representation" rather than "default to mandatory *pro bono* assignments using the Madden list," the Appellate Division stated:

[W]e will expand current *pro bono* counsel's able assistance to the proceedings that follow at the administrative level. In other similar matters,

absent the alternatives suggested in J.E.V., we forthwith commend to ALJs the utilization of the Madden list to secure counsel for parents and guardians similarly situated.

Id. (slip op. at 28).

At the trial level, in Kavadas v. Martinez, the Honorable Mary C. Jacobson, A.J.S.C., stayed the State's system of instituting automatic driver's license suspensions in cases where a child support-related warrant is issued, noting the lack of due process attendant to such suspensions without affording child support obligors the right to representation and an opportunity for a hearing. While the Legislature, in response, is considering a measure that provides for a hearing process, it **makes no provision for appointment of counsel for indigent child support obligors.** (See S3424/A5061 of 2018-2019 legislative session). Absent legislated funding of the Office of the Public Defender or other agency, Judge Jacobson has ruled, with familiar cautions that it is "less than ideal," each Assignment Judge will be required to assign counsel using the "Madden List." Kavadas, No. L1004-15 (Law Div. Dec. 7, 2018) (slip op. at 178)⁵.

There is no evidence in the cases noted above, where a right of representation has been identified, that funding for representation will be forthcoming. Therefore, assigned and

⁵ The full 187 opinion can be accessed at <https://images.law.com/contrib/content/uploads/documents/399/19514/davis.pdf>.

uncompensated *pro bono* private counsel will be pressed into service by the Judiciary to fulfill the state's responsibility. They will serve society, as well as their individual clients, at the government's behest, just like the Public Defender in this matter. These lawyers should not be in a less advantageous position because they are required to provide a service *pro bono* instead of being hired to do so by the State. There is no, nor should there be, any distinction between these lawyers and any other government lawyer for the purpose of Tort Claims Act applicability, to a state defense and state indemnification.

The NJSBA therefore urges this Court to make clear that the Tort Claims Act extends to all counsel representing private clients on behalf of the government, including public defenders, pool attorneys and "Madden List" counsel, in the same manner and to the same extent it extends to any other government attorney acting on behalf of the State and within the scope of their employment.

CONCLUSION

For the reasons noted above, the NJSBA urges the Court to confirm that individuals seeking to bring legal malpractice actions against attorneys employed by the State to represent private clients, such as public defenders, pool attorneys and attorneys assigned through the "Madden List", must meet the procedural requirements of the Tort Claims Act, and that such attorneys are entitled to the lawsuit limitations, State defense and State indemnification provided under the Act.

Respectfully,

New Jersey State Bar Association

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Dated: 8/30/19

