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W.S. (initials representing plaintiff)	:	SUPREME COURT OF NEW JERSEY
	:	DOCKET NO.: 086633
	:	:
Plaintiff-Respondent	:	ON APPEAL FROM:
	:	SUPERIOR COURT OF NEW JERSEY
vs.	:	APPELLATE DIVISION
	:	DOCKET NO.: A-2066-20T1
DEREK HILDRETH,	:	:
	:	SAT BELOW:
Defendant	:	HON. CARMEN MESSANO, P.J.A.D
and	:	HON ALLISON E. ACCURSO, J.A.D.
	:	HON. LISA ROSE, J.A.D.
LAWRENCE TOWNSHIP SCHOOL DISTRICT	:	:
and MYRON L.POWELL ELEMENTARY	:	:
SCHOOL and its teachers,	:	:
directors, officers, employees,	:	:
agents, counselors, servants or	:	:
volunteers	:	:
	:	:
Defendants-Appellants	:	:

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The passing of L. 2019, c. 120 (Chapter 120), and L. 2019, c. 239 (Chapter 239) reflected the Legislature's action to statutorily acknowledge and address the trauma and emotional hardship suffered by victims of sexual assault and served the indisputable objective of permitting civil legal recourse for those victims who either had been, or otherwise would have been, rejected due to prior statutory restrictions. To accomplish this objective, the bills extensively broadened the statute of limitations for child and adult victims of sexual violence and sexual abuse and carved out a two-year window for victims who were either denied (or would have been denied) the right to prosecute their claims based on prior procedural restrictions.

To ensure universal access to civil justice for victims, the bills also retroactively expanded institutional liability under the Charitable Immunity Act, making subject organizations liable for mere negligence in hiring, retaining or supervising employees, agents or servants who perpetrate(d) sexual assault on a minor. To further level the playing field, the two-year statute of limitations for public entity defendants pursuant N.J.S.A. 59:8-8 was eliminated for sexual assault victims, along with the requirement to file a notice of tort claim. This change, the Senate Judiciary Committee explained, created a

“process of filing a lawsuit with service upon the liable public entity or entities . . . [which was] the same as when suing a private organization.” S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019) at 7. Accordingly, “[p]ublic entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse . . .” Ibid.

After passing L. 2019, c. 120 (Chapter 120), follow-up legislation L. 2019, c. 239 (Chapter 239) cemented the legislative objective, which Governor Murphy reiterated in his May 13, 2019 statement:

[L. 2019, c. 120 (Chapter 120)] inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. . . . I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified.

[Governor’s Statement to S. Comm. Substitute for S. 477 (May 13, 2019)].

The basis for the New Jersey State Bar Association (NJSBA) intervention lies at the heart of one of the organization’s principal missions: to promote equal access to the justice system for the public and fairness in its administration. While the underlying issue before this Court is one which, in the words of Governor Murphy, “has evoked strong passions on both sides,” Governor’s Statement to S. Comm. Substitute for S. 477

(May 13, 2019), the actual legal question is not so polarizing. In the face of the crystal-clear intent to pass a statute that opens the door to all victims of sexual assault to bring claims against entities, public and private, for civil redress: was there any legislative intent to deny a class of victims such as W.S. the right to proceed based upon prior tort claim notice requirements? Because such a denial would be entirely irreconcilable with the language of the statutes and the legislative history, and would further result in unsubstantiated denials of access to civil justice to otherwise similarly-situated victims, the answer must be no.

PROCEDURAL HISTORY AND STATEMENTS OF FACTS

The NJSBA relies upon the submitted facts and procedural histories provided by the parties as well as the Appellate Division in its underlying Dec. 21, 2021 published opinion.

LEGAL ARGUMENT

In denying Defendant-Appellant's motion to dismiss for Plaintiff-Respondent's failure to timely file a notice of tort claim, the trial court relied on the provisions of P.L. 2019 c. 120 that relieve sexual assault claimants from, among other burdens, complying with the procedural notice provisions in Chapter 8 of the Tort Claims Act, N.J.S.A. 59:8-3(b), since Plaintiff-Respondent's complaint had been filed after the Dec. 1, 2019 effectivity date of P.L. 2019 c. 120. The trial court did not find retroactivity of the statutory amendment eliminating the requirement to file a notice of claim in P.L. 2019 c. 120 §8. Yet, because Plaintiff-Respondent's cause of action had not yet been finally adjudicated or dismissed, it was revived in the two-year window opened by the statute. Defendant-Appellant challenges this ruling. At issue remains whether the challenged provision, P.L. 2019 c. 120, §8, is prospective only or should be given retroactive effect.

I. Legislative intent is operative and supports retroactivity of P.L. 2019 c. 120, §8.

P.L. 2019 c. 120 was enacted on May 13, 2019, with an effective date of Dec. 1, 2019. P.L. 2019 c. 120 §10; N.J.S.A. 2A:14-2c. Plaintiff-Respondent filed the instant complaint in January 2020, after the new law was adopted and took effect.

Most significant for present purposes, the new law completely eliminates the notice requirements of the Act by amending N.J.S.A. 59:8-3 to add a new subsection (b), which states:

The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in Section 1 of P.L. 1992, c. 7 (C. 2A:30B-2), or sexual abuse as defined in Section 1 of P.L. 1992, c. 109 (C. 2A:61B-1).

[P.L. 2019, c. 120 §8; N.J.S.A. 59:8-3(b)].

This new law also greatly extends the statute of limitations for claims by minors of sexual assault, N.J.S.A. 2A:14-2a, and permits any action for sexual assault that was otherwise time-barred through application of the statute of limitations to be commenced within two years of Dec. 1, 2019. P.L. 2019, c. 120 §9; N.J.S.A. 2A:14-2b(a). Moreover, the new law eases the standards of liability to be applied to a public entity in cases involving claims of sexual abuse, removing any immunity otherwise granted under the Act. P.L. 2019, c. 120, §7, amended by P.L. 2019, c. 239, §1; N.J.S.A. 59:2-1.3(a) and (b).

While a general rule of statutory construction favors prospective application of new legislation, Nobega v. Edison Glen Assocs., 167 N.J. 520, 536 (2001), this principle is not to be applied mechanistically in every case. Johnson v. Roselle EZ

Quick, LLC, 226 N.J. 370, 386-87 (2016); see also Gibbons v. Gibbons, 86 N.J. 515, 552 (1981); Rothman v. Rothman, 65 N.J. 219, 224 (1974). Rather this Court has emphasized that “[w]hen considering whether a statute should be applied prospectively or retroactively, our quest is to ascertain the intention of the Legislature.” State v. Ventron Corp., 94 N.J. 473, 498 (1983). See also Johnson, supra, 226 N.J. at 386-87; Kruvant v. Mayor and Council of Cedar Grove Tp., 82 N.J. 435, 440 (1980).

Despite this clear directive, Defendant-Appellant essentially relies on the statutory wording “[t]he provisions of this amendatory and supplementary act . . . shall take effect on December 1, 2019”, arguing that this language admits of no other resolution than to apply the challenged provision, P.L. 2019, c. 120, §8, prospectively. In other words, Defendant-Appellant seeks a statutory interpretation that would maintain the tort notice of claim requirement for causes of action accruing before the Dec. 1, 2019 enactment. The statutory language, however, does not expressly or unambiguously state that Section 8’s elimination of the Act’s notice requirements applies only to claims filed after Dec. 1, 2019. In responding to Defendant-Appellant’s “strict construction” contention, this Court must not lose sight of the laudable objectives the new legislation was designed to achieve. That objective, the NJSBA submits,

would be defeated by denying Plaintiff-Respondent access to the courts to seek civil justice.

Left unsaid in Defendant-Appellant's strict "plain language" argument are certain propositions so deeply embedded in our jurisprudence of statutory construction that they rarely find expression, and certainly not in Defendant-Appellant's lexicon. First, in construing a statute, the goal of the court is to divine and effectuate the Legislature's intent. Division of Motor Vehicles v. Kleinert, 198 N.J. Super. 363, 369 (App. Div. 1985). The source of legislative intent is not limited to the language of the statute. No Illegal Points, Citizens for Driver's Rights, Inc. v. Florio, 264 N.J. Super. 318, 323 (App. Div.), certif. denied, 134 N.J. 479 (1993). In other words, in interpreting a statute, one should begin, though not end, with the words of the statute. Richard A. Posner, Statutory Interpretation in the Classroom and in the Courtroom, 50 U. Chi. L. Rev 800, 807 (Spring 1983). "In addition to the wording of the statute, the policy behind it and the legislative history and concepts of reasonableness, are essential aides in determining legislative intent." No Illegal Points, supra, 264 N.J. Super. at 323; see also N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972); Paramus Substantive Certification No. 47, 249 N.J. Super. 1, 8 (App. Div. 1991).

Second, "courts will enforce legislative intent even when it conflicts with the language of the statute." No Illegal Points, supra, 264 N.J. Super. at 323; N.J. Builders, supra, 60 N.J. at 338. "When all is said and done, the matter of statutory construction . . . will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the common sense of the situation." LaFage v. Jani, 166 N.J. 412, 431 (2001) (quoting Jersey City Chap. Prop. Owner's Protective Ass'n v. City Council, 55 N.J. 86, 100 (1969)).

And finally, when "a literal application of the language used would lead to results incompatible with the legislative design," courts are obligated "to give effect to the obvious purpose of the Legislature," Marshall v. Klebanov, 188 N.J. 23, 37 (2006) (internal quotations omitted), so that the "spirit of the law will control the letter." N.J. Builders, Owners and Managers Ass'n, supra, 60 N.J. at 338. Stated somewhat differently, "[a] statute must be interpreted sensibly, rather than literally, with the purpose and reason for the Legislation being controlling." Henry v. Shopper's World, 200 N.J. Super. 14, 18 (App. Div. 1985).

Considered in its entirety, the amendatory and supplementary legislation at issue here is designed to

ameliorate the often harsh and unjust results flowing from an overly strict adherence to the law's technical, procedural requirements for sexual assault victims. For instance, P.L. 2019, c. 120 greatly extends the statute of limitations for this class of claimant; widely expands the group; permits a two-year window to file sexual assault claims that had been previously barred by the statute of limitations; and relieves these claimants from complying with the procedural notice provisions in Chapter 8 of the Tort Claims Act.

Moreover, while the law took effect on Dec. 1, 2019, its legislative history and express language clearly demonstrate that the statute has operative effect before its stated effective date. Consider that all of the following have retroactive effect: the extension of the statute of limitations period for minor and adult victims of sexual assault, N.J.S.A. 2A:14-2a; the two-year window immediately following the law's effective date for lawsuits alleging acts of sexual abuse occurring prior to the new law's effective date that would otherwise be time barred, N.J.S.A. 2A:14-26b(a); and the elimination of the Act's tort claims immunities, P.L. 2019 c. 239 §2.

On this score, Defendant-Appellant seeks to distinguish Section 8, contrasting the lack of explicit language in the statute applying pipeline retroactivity to the Act's notice of

claim requirement. However, given that the aforementioned ameliorative provisions of the law reach back to tortious conduct occurring as long as decades ago, thereby encompassing claims arising well before the law's effective date and otherwise time-barred, it would be utterly incongruous to argue that the Legislature's intention to capture such stale causes of action does not extend to claims filed within the applicable statute of limitations period but lacking strict adherence to a procedural notice rule. In fact, Defendant-Appellant conceded before the Appellate Division that the new law undeniably provides victims of sexual abuse broader rights regarding statute of limitations. Nevertheless, they argued that those rights only began after Dec. 1, 2019, with the notice of claim requirement before Dec. 1, 2019 continuing as mandatory as it had been prior to the legislation, effectively precluding much of the relief provided by the statute.

Defendant-Appellant's attempted distinction must fail. Indeed, Plaintiff-Respondent filed his complaint in January 2020, after the statute became effective on Dec. 1, 2019. At that point in time, Plaintiff-Respondent fell squarely into the statute's two-year window for filing a claim that has not been fully adjudicated on its merits. Failure to relieve this victim, and many others similarly situated, from compliance with the Act's 90-day time requirement would nullify the two-year window

of relief that the statute granted to victims whose cases had not been fully adjudicated or dismissed, or who were otherwise potentially time-barred. It would also mean that every action filed against a public entity after the Dec. 1, 2019 effective date for alleged sexual misconduct preceding that date would be barred if a notice of claim had not been timely filed. The express elimination of the tort claims notice requirement would not take effect for these victims; moreover, other victims, like the plaintiff in R.A. v. W. Essex Reg'l Sch. Bd. of Educ., 2021 N.J. Super. Unpub. LEXIS 1951 (Da136), whose cases were filed prior to the Dec. 1, 2019 effective date but whose cases were pending and not fully adjudicated as of that date, would also be subject to dismissal if unable to meet the prior strict tort claims notice requirements - the very requirements that this statute sought to eliminate, alleviating the burden and leveling the playing field for victims of sexual abuse. Indeed, the only victims of abuse who would be guaranteed the benefit of the elimination of the tort claims notice requirement would be those who were abused after Dec. 1, 2019. Each and every other victim would be required to endure the very analysis that this statute expressly aimed to eliminate. Such an interpretation not only fails to follow clear legislative intent, defeating the central objective of the statute, it places courts in a position where

each must continue to perform problematic claims accrual analysis despite a statute that promised its cessation.¹

In light of the legislative intent as well as the express language of the statute logically interpreted with its operation and how it will affect a population of sexual assault victims' access to our courts, P.L. 2019 c. 120, §8 must be given retroactive applicability.

II. The "time of the decision" principle supports retroactive application of P.L. 2019 c. 120, §8.

Application of P.L. 2019, c. 120 §8 to the matter at hand is also supported by the "time of decision" principle, which states that "an appellate court on direct review will apply the statute in effect at time of its decision" Kruvant, supra, 82 N.J. at 440. An early pronouncement of the principle is found in United States v. Schooner Peggy, 5 U.S. 103 (1801), wherein Chief Justice Marshall explained:

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

[5 U.S. at 110].

¹ Many of these analyses in the context of sexual assault involve the complication of trauma suppression, where the actual sexual misconduct occurred many decades earlier. See State in the Interest of K.A.W., 104 N.J. 112, 118-19 (1986); see also State v. S.J.C., 471 N.J. Super. 608, fn. 10 (App. Div. Apr. 28, 2022).

See also Pizzo Manten Group v. Tp. Of Randolph, 137 N.J. 216, 235 (1994); Phillips v. Curiale, 128 N.J. 608, 615 (1992); Bradley v. School Bd. Of Richmond, 416 U.S. 696, 711 (1974); Thorpe v. Hous. Auth. Of Durham, 393 U.S. 268, 281 (1969).

Under this principle, courts will apply the law as it exists at the time that the case or appeal is decided. See e.g., State Dep't of Env't'l Prot. v. Ventron, 94 N.J. 473, 498 (1983) ("Under the 'time of decision' rule, when legislation affecting a cause is amended while the matter is on appeal, an appellate court should apply the statute in effect at the time of its decision."); In re Petition of South Lakewood Water Co., 61 N.J. 230, 248 (1972); In re Protest of Costal Permit Program Rules, 354 N.J. Super. 293, 333 (App. Div. 2002); Walker v. N.J. Dep't of Insts. & Agencies, 147 N.J. Super. 485, 489 (App. Div. 1977). "The purpose of the principle is to effectuate the current policy declared by the legislative body - a policy which presumably is in the public interest." Kruvant, supra, 82 N.J. at 440. By applying the presently effective statute to all cases in the courts after the statute's effective date, this Court will advance the legislative intent, commensurate with the goals and objectives of the NJSBA.

To be sure, there are two recognized exceptions to the "time of decision" principle, namely when its application "would

result in manifest injustice or there is statutory direction or legislative history to the contrary.” Bradley, supra, 416 U.S. at 711. However, neither of these pertain to this case. As noted, there is no explicit language or clear direction in the new law that Section 8 should be applied only prospectively. Moreover, no party to the NJSBA’s knowledge has identified any manifest injustice suffered - much less substantive right significantly and adversely impaired - by Section 8’s retroactive application to Plaintiff-Respondent.

III. P.L. 2019 c. 120, §8 is a procedural rule which further supports its application.

Section 8 of P.L. 2019 c. 120, which eliminates the notice requirement of Chapter 8 of the Act, is a rule of procedure. A procedural rule is in general deemed applicable to actions pending on its effective date as well as those instituted thereafter. Busik v. Levine, 63 N.J. 351, 360-61, appeal dismissed, 414 U.S. 106 (1973). This provision does not change settled law related to substantive rights, which if it did would ordinarily warrant prospective application. Phillips, supra, 128 N.J. at 617; Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 95 (1990); see also Johnson, supra, 226 N.J. at 387. Indeed, it cannot be denied that Section 8 of P.L. 2019 c. 120 addresses the Act’s procedural requirements by eliminating the notice provisions relative to bringing a sexual abuse lawsuit against public

entities. They are now subject to the new extended limitations periods for victims of abuse and sexual violence as detailed in Section 2 of the new law. See S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019).

Interestingly enough, although statutes that change settled law relating to substantive rights are generally prospective only, Section 2 of P.L. 2019 c. 239, which addresses the substantive liability of a public entity by changing the legal standards to be imposed therein, applies those liability provisions retroactively to cases filed prior to Dec. 1, 2019. P.L. 2019, c. 239, §2 (“any cause of action filed prior to that effective date that has not yet been finally adjudicated or dismissed by a court as of that effective date.”) If such a substantive rule of law has been given retroactive effect, then *a fortiori*, Section 8 which simply addresses a procedural rule, should be afforded the same treatment.

CONCLUSION

The NJSBA submits that our justice system cannot and should not disregard the available evidence of the Legislature's intent merely to preserve strict legal principles of statutory construction. See, State v. Bey, 112 N.J. 45, 100 (1988) (rejecting State's argument that legislative intent is unimportant "so long as its choice of language brings the instant facts within the reach of the statute"). When primary regard is given to the fundamental purpose of which P.L. 2019 c. 120 was enacted, it is abundantly clear that Section 8 thereof must be applied to preserve Plaintiff-Respondent's cause of action, as well as those of other victims of sexual abuse and sexual violence to whom the statute was clearly intended to apply. To allow otherwise would expressly exclude certain victims from the benefits of the statute, a result that is not supported by the legislative history or the language of the statute.

Respectfully submitted,

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