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PLEASE REPLY TO
ATLANTIC COUNTY OFFICE

November 10, 2016

Via Hand Delivery

Direct Filing/Law Division
Cape May County Superior Court
9 North Main Street
Cape May Court House, New Jersey 08210

Re: Sandra Smith, Individually and as Executrix of the Estate of her late husband, George Bradley Smith v. City of North Wildwood, County of Cape May, State of New Jersey, John Doe, Mary Doe, ABC Partnerships, and XYZ Corporations
Docket Number: CMP-L-331-14

Brandy Smith, by her guardian ad litem, Sandra Smith v. City of North Wildwood, County of Cape May, State of New Jersey, John Doe (1-5) fictitious names, Mary Doe (1-5) fictitious names, and XYZ Corporation (1-5) fictitious names
Docket Number: CMP-L-324-16

Dear Sir/Madam:

Re: Sandra Smith, Individually and as Executrix of the Estate of her late husband, George Bradley Smith v. City of North Wildwood, County of Cape May, State of New Jersey, John Doe, Mary Doe, ABC Partnerships, and XYZ Corporations
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Docket Number: CMP-L-324-16

We enclose for filing an original and one (1) copy of an Opposition to Plaintiff's Motion to Amend on behalf of Defendant, City of North Wildwood.

Please return a filed copy in the self-addressed, stamped envelope provided, charging any applicable filing fee to this Law Firm's Account Number 140568.

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Re: Sandra Smith, Individually and as Executrix of the Estate of her late husband, George Bradley Smith v. City of North Wildwood, County of Cape May, State of New Jersey, John Doe, Mary Doe, ABC Partnerships, and XYZ Corporations
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Docket Number: CMP-L-324-16

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cc: ***With copy of enclosure via Hand Delivery to:***
Paul R. D'Amato, Esquire
Attorney for Plaintiff

Joseph C. Grassi, Esquire
Co-Counsel for Plaintiff

With a copy of enclosure via electronic delivery and Overnight Delivery (tracking #8100-2411-3757) to:
Brian Hunkins, Esquire
Deputy Attorney General
Attorney for Defendant, State of New Jersey
Brian.hunkins@dol.lps.state.nj.us

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Attorney for Defendant, City of North Wildwood

SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HER LATE HUSBAND, GEORGE BRADLEY SMITH, Plaintiff, v. CITY OF NORTH WILDWOOD, COUNTY OF CAPE MAY, STATE OF NEW JERSEY, JOHN DOE, MARY DOES, ABC PARTNERSHIPS, and XYZ CORPORATIONS, Defendants. --- BRANDY SMITH, by her guardian ad litem, SANDRA SMITH, Plaintiff v. CITY OF NORTH WILDWOOD, COUNTY OF CAPE MAY, STATE OF NEW JERSEY, JOHN DOE (1-5) fictitious names, MARY DOE (1-5) fictitious names, ABC PARTNERSHIPS (1-5) fictitious names, and XYZ CORPORATION (1-5) fictitious names, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-331-14 CPM-L-324-16 Civil Action **OPPOSITION TO PLAINTIFF'S MOTION TO AMEND ON BEHALF OF DEFENDANT CITY OF NORTH WILDWOOD**

On the Brief:
A. Michael Barker, Esquire
Greg DiLorenzo, Esquire

Table of Contents

Table of Citations

I. PREAMBLE

Plaintiff in the above-captioned matter (hereinafter sometimes referred to as "Sandra Smith") filed a Complaint on July 23, 2014[1] alleging, in pertinent part, that the City of North Wildwood (hereinafter sometimes referred to as the "NWW") is responsible for the death of George Bradley Smith (hereinafter sometimes referred to as "Brad Smith") by creating a dangerous condition and failing to warn or protect against a known dangerous condition, and/or the City of North Wildwood was negligent in the supervision of the subject premises. On August 4, 2016, Brandy Smith, the minor daughter of Sandra Smith, filed a separate Complaint against the City of North Wildwood, and at the same time filed a motion to consolidate her case, Docket CPM-L-324-16, with the previously filed case of Sandra Smith, et al v. City of North Wildwood, Docket CPM-L-331-14. This motion to consolidate was unopposed and was granted on October 20, 2016, with consolidation Ordered under Docket 331-14. From the inception of the Sandra Smith case, Paul D'Amato, Esquire has served as the attorney for the Plaintiff; and, on January 9, 2015, Joseph Grassi,

[1]The Certification of Attorney Gifford in support of Plaintiff's motion to amend states the Complaint was originally filed July 22, 2014, which is inaccurate. See, Exhibit 1.

Esquire, entered an appearance as co-counsel for Plaintiff with Mr. D'Amato. Additionally, under Docket CMP-L-324-16, Mr. Grassi entered an appearance for the Plaintiff, Brandy Smith.

After Plaintiff's discovery concluded on September 30, 2016, and after NWW filed its Motion for Summary Judgment on September 30, 2016, Attorney D'Amato, on behalf of the Plaintiff filed a motion on October 28, 2016, seeking leave to file an Amended Complaint to allege negligent supervision claims against NWW Lifeguard, Captain Joseph Cavalier, and NWW Lifeguard, Lieutenant David Lindsay. Plaintiff's Motion for Leave to Amend should be denied because, even if Plaintiff's application were to be granted, the new claims are not legally cognizable so the Futility Doctrine applies. As will be explained in Section III (C) of this Brief, Plaintiff has not pled any facts which establish that either Cavalier or Lindsay engaged in supervision, as defined by the New Jersey Tort Claim Act (hereinafter sometimes referred to as the "NJTCA") and supporting case law, which requires more than a showing of general supervision or policing. Plaintiff's proposed amendments to include negligent supervision claims against two new individual defendants are essentially allegations that the proposed new defendants were negligent because they *failed to provide supervision*

at Inlet Beach. Such claims are not negligent supervision claims, they are failure to supervise claims couched in terms of negligent supervision to try to avoid the NJTCA, which provides that neither public entities nor public employees can be liable for a *failure to supervise.* (See, NJTCA 59:2-7 and NJTCA 59:3-11).

In addition to the Futility Doctrine barring Plaintiff's Motion to Amend at this time, Plaintiff's Motion should also be denied because Plaintiff did not act with due diligence in making the Motion, and Plaintiff cannot establish that, if the Motion was granted, it would not result in a delay or complication of the case. Plaintiff's justification for the delay in filing the Motion to Amend is that the Plaintiff recently reviewed the deposition transcripts of Cavalier and Lindsay, which were concluded in February 2016. This purported justification is disingenuous. In actuality, Plaintiff is only now attempting to amend the Complaint in order to avoid filing an opposition to the NWW's Motion for Summary Judgment. Plaintiff so maneuvers in an attempt to avoid the impact of the NWW's legal arguments under the NJTCA, citing NJCTA 59:2-7 NJTCA 59:3-11 which provide that neither a public entity nor a public employee can be liable for a failure to supervise.

It is quite clear that Plaintiff only realized the deficiencies of her case following a review of the NWW's Motion for Summary Judgment, not because of some delayed review of eight-month-old deposition transcripts.

If Plaintiff's proposed amendment were to be considered permissible, notwithstanding the Futility Doctrine, then the proposed amendment should nevertheless be denied because:

1. Plaintiff failed to diligently prosecute;

2. it would cause an unjustified and undue delay that would, in turn,

3. it would result in additional and unnecessary expenditure of public funds and interruption of governmental activity, and

4. it would have a prejudicial impact on the proposed defendants, Cavalier and Lindsay, who have not had the opportunity to participate in 22 other depositions completed over the last 2 years.

Accordingly, for the reasons stated below, Plaintiff's Motion for Leave to Amend the Complaint to add negligent supervision claims against two new Defendants, Cavalier and Lindsay, at this late stage of the litigation should be denied because:

1. the proposed amendments would be futile;

2. Plaintiff failed to diligently prosecute within the Court Ordered discovery deadlines when Plaintiff had ample time and ample information to do so; and,

3. if the amendment is granted it would delay the case and unduly prejudice NWW, and Joseph Cavalier, and David Lindsay.

II. BRIEF STATEMENT OF MATERIAL FACTS

1. On or about July 23, 2014, Sandra Smith, as Executrix of the Estate of George Bradley Smith, through her Attorney Paul R. D'Amato, Esquire, filed a Complaint against the City of North Wildwood. (Exhibit 1, Sandra Smith Complaint). The Sandra Smith case was initially before Judge Christopher Gibson, but then because of a conflict arising from the entry of appearance by Attorney Joseph Grassi, Esquire, it was transferred to Judge Marczyk on or before the Case Management Order of July 31, 2015. (See, Exhibit 12, 7/31/15 Case Management Order; and, Exhibit 15, January 9, 2015 Entry of Appearance by Joseph Grassi, Esquire).

2. Plaintiff initiated an investigation into this case as early as August 10, 2012. Attorney Grassi was present at an investigative site inspection as early as August 28, 2014. (Exhibit 14, Report of investigator Lou DiJoseph).

3. Attorney Grassi entered a formal appearance on behalf of Plaintiffs on or about January 9, 2015. (Exhibit 15 – Entry of Appearance).

4. The deposition of the proposed new defendant Joseph Anthony Cavalier was taken on February 9, 2016. Attorney Grassi was also present. (Exhibit 2, Deposition of Joseph Anthony Cavalier)[2].

5. The deposition of the proposed new defendant David Lindsay was taken on February 18, 2016. (Exhibit 3, Deposition of David Lindsay).

6. The present and controlling Case Management Order was entered on July 22, 2016. (Exhibit 4, July 22, 2016 Case Management Order).

7. On or about August 4, 2016, Attorney Grassi filed a Complaint on behalf of Brandy Smith, a minor. (Exhibit 5, Filed Complaint of Brandy Smith).

8. On or about August 4, 2016, Attorney Grassi filed a Motion to Consolidate the Brandy Smith (CPM-L-324-16) case with the Sandra Smith case (CPM-L-331-14). (Exhibit 6, Motion to Consolidate with supporting Certification).

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[2] The Certification of Attorney Gifford states that Cavalier's deposition was taken on February 16, 2016 and Lindsay's was taken on March 2, 2016, but both statement are inaccurate.

9. The Motion to Consolidate had an original return date of August 19, 2016. (Exhibit 6, Motion for Consolidation with supporting Certification).

10. On September 30, 2016, which was the close of Plaintiff's factual discovery under the July 22, 2016 Case Management Order, (Exhibit 4), NWW filed a Motion for Summary Judgment seeking to dismiss both the Sandra Smith and Brandy Smith Complaints indicating it was anticipated the unopposed Motion to Consolidate would be granted. (Exhibit 7, First Page of Filed Motion for Summary Judgment).

11. October 17, 2016, the NWW received by mail Brandy Smith's Notice of Motion for Leave to File an Amended Complaint. (Exhibit 8, Motion for Leave to Amend).

12. On October 20, 2016, Brandy Smith's motion to consolidate was granted by Judge John C. Porto. (Exhibit 9, Order granting Motion to Consolidate).

13. On October 26, 2016, the NWW filed its opposition to Brandy Smith's Motion for Leave to File an Amended Complaint. (Exhibit 10, Filed page of Opposition Brief).

14. Approximately twenty-four (24) depositions have been taken in the present case. (Exhibit 11, screen shot of list of deposition transcripts).

15. The discovery schedule in the present case was amended on July 31, 2015, December 4, 2015, and July 22, 2016. (Exhibit 12, Exhibit 13, and Exhibit 4).

III. LEGAL ARGUMENT

A. Standard of Review

N.J. Ct. R. 4:9-1 provides that a party may amend its pleadings after responsive pleadings are served, but only by consent or by leave of Court. "[T]he granting of a motion to file an amended complaint always rests in the court's sound discretion." Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998). "In exercising its discretion, the court should consider whether the non-moving party will be prejudiced and whether granting permission to amend would be futile." Murray v. Plainfield Rescue Squad, 418 N.J. Super. 574, 591 (App. Div. 2011), citing, Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006).

"[A]lthough such motions are ordinarily afforded liberal treatment, the factual situation in each case must guide the court's discretion,

particularly where the motion is to add new claims or new parties late in the litigation. Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997). Decisions on motions for leave to amend "must be made 'in light of the factual situation existing at the time each motion is made'." Notte at 501, quoting, Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997). "More specifically, 'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted'." Id. at 501-02, quoting, Interchange State Bank, supra., at 256-57.

B. Plaintiff's Newly Proposed Claims Are Unsustainable As A Matter Of Law And, Therefore, Would Be Futile

Under the NJTCA, NJSA 59:3-11 provides that "[a] public employee ***is not*** liable for ***the failure*** to provide supervision of public recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility." (Emphasis added). Similarly, § 59:2-7 provides, in part, that "[a] public entity ***is not*** liable ***for failure*** to provide supervision of public recreational facilities

[....]" (Emphasis added). § 59:2-7 does not provide for negligent supervision liability against a public entity, nor does any provision of the NJTCA. Accordingly, public entities cannot be held directly liable for negligent supervision, only public employees can be directly held liable for negligent supervision, but not for the *failure to supervise*.

Plaintiff attempts to establish:

1. that Cavalier and Lindsay undertook supervision of the Inlet Beach, which Plaintiff must first establish in order to assert a cognizable claim against Cavalier and Lindsay; and,

2. that they did so negligently.

However, Plaintiff's pleadings are insufficient to establish that Cavalier and Lindsay undertook supervision of the Inlet Beach. To the contrary, Plaintiff's proposed amended complaint repeatedly acknowledges that the Inlet Beach was not supervised. It is apparent that Plaintiff's negligent supervision theory is premised upon the notion that NWW, Cavalier, and Lindsay were negligent because they did not provide supervision at the Inlet Beach, which is not a legally cognizable claim.

"To establish liability based on negligent supervision, a plaintiff must show that an injury was sustained (1) at a public recreational facility; (2) that a public employee ***undertook supervision*** of a public recreational

facility, and (3) that the employee was negligent in supervision of the public recreational facility." Sharra v. City of Atlantic City, 199 N.J. Super. 535, 539 (App. Div. 1985) (Emphasis added). Under NJSA 59:3-11, the determination of whether supervision was assumed is a "question of law, albeit fact sensitive, since it undergirds the presence or absence of immunity under the statute." Burroughs v. City of Atl. City, 234 N.J. Super. 208, 221 (App. Div. 1989). Supervision under NJSA 59:3-11 is distinguished from general supervision. In Sharra, the Court held that "any supervision by Atlantic City over the boardwalk is no more than a ***general overall supervision***, much the same as supervision of activities on public streets and sidewalks." Sharra at 540.

In Burroughs, the plaintiff argued that the defendants undertook supervision because they patrolled the subject beach and warned bathers to only swim in the protected areas. The Court held, ***"[a]t best, plaintiff's proofs in this case establish only general supervision and policing by the lifeguards.*** The lifeguards' warnings to sunbathers on beach #2 and #3, and plaintiff's group in particular, can be reasonably viewed only as communications which both limited and defined the scope of their

supervisory undertaking. [...] Thus, we conclude the supervision was not undertaken within the meaning of NJSA 59:3-11. Burroughs at 222.

Plaintiff's proposed Amended Complaint alleges Cavalier and Lindsay "held supervisor positions on the North Wildwood Beach Patrol." (Plaintiff's Proposed Amended Complaint, pg. 7, para. 7). Plaintiff seems to be confusing the job description of "supervisor" with the legal definition of "supervision" under the New Jersey Tort Claims Act and the Sharra line of cases outlined above. Being a "supervisor" does not mean that either individual assumed supervision over the location in which the incident occurred. Even Plaintiff acknowledges on several occasions that the Inlet Beach was an "unprotected" beach. (See, Plaintiff's Proposed Amended Complaint, pg. 15, para. 24). By common logic, "unprotected" means not supervised. Supervision cannot be established if Plaintiff acknowledges that the Inlet Beach was "unprotected." One cannot be negligent in the supervision of the Inlet Beach if it is not supervised in the first place. Plaintiff is alleging a failure to supervise claim rather than a negligent supervision claim. As explained above, NJSA 59:3-11 provides in part that "[a] public employee ***is not*** liable for ***the failure*** to provide supervision of public recreational facilities." (Emphasis added). It is undisputed that the

beach in question had no lifeguards and was not supervised. Accordingly, Plaintiff is unable to allege a legally cognizable claim of negligent supervision.

The, Proposed Amended Complaint includes quotations from the depositions of Cavalier and Lindsay, purported to establish supervision. Plaintiff places reliance on the fact that the lifeguards monitored the radio to be alerted to people in distress at the Inlet Beach:

> Q: Okay. Typically, how would your lifeguards be alerted to the fact that they had to effectuate a rescue off of Moore's Beach and the Inlet Beach?
>
> Cavalier: Police Department, we would monitor the police radio. The police would get a call, somebody's in distress, Moore's or the Inlet, and we would respond.

(See, Plaintiff's Proposed Amended Complaint, pgs. 15-16, para. 24. See also, pgs. 20-21, para. 32 – quote from Lindsay's deposition). As the cases of Sharra and Burroughs make clear, evidence of "general supervision" or "policing" does not meet the elements to establish "supervision" under the New Jersey Tort Claims Act. At most, Plaintiff cites only to testimony describing general supervision or policing, but not supervision as required under the New Jersey Tort Claim Act. Id.

Moreover, the general theme of Plaintiff's proposed Amended Complaint is that the NWW, Cavalier, and Lindsay have known for a long time that the Inlet Beach was dangerous and they failed to warn of the dangers and/or failed to have lifeguards present at that location. A failure to station lifeguards at the Inlet Beach, and a failure to warn at the Inlet Beach, is a failure to supervise claim from which the NWW, Cavalier, and Lindsay are immune, as explained above.

Furthermore, Plaintiff's Proposed Amended Complaint acknowledges that the "protected" beaches are determined by city resolution (pg. 12, para. 17), not a decision made by either Cavalier or Lindsay. Under the New Jersey Tort Claims Act, public entities and public employees are immune from discretionary acts:

> **NJSA 59:3-2. Discretionary activities:**
>
> a. A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him;
>
> b. A public employee is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
>
> c. A public employee is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of

personnel and, in general, the provision of adequate governmental services;

d. A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable.

NJSA 59:2-3. Discretionary activities:

a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;

b. A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

c. A public entity is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.

"Only 'high-level policy decisions' are considered worthy of protection as discretionary activities. High-level policy decisions involving a failure to act may be challenged only upon a showing of 'palpable unreasonableness'." Dix Bros. v. State, 182 N.J. Super. 268, 270 (Super. Ct. 1981). "High-level policy decisions classified as discretionary acts involve planning, and are distinct from ministerial acts, which pertain merely to operations and which are not immunized." Id. at 271 (Internal citation omitted). As evidenced by Plaintiff's proposed Amended Complaint, the decisions not to protect the Inlet Beach are decisions that come from City Council by way resolution, which are high level, discretionary, policy making decisions. Neither Cavalier nor Lindsay even had the authority to do what Plaintiff alleges should have been done, and even if they did, they would be immune from those decisions anyway.

In conclusion, the Plaintiff's Motion to Amend should be denied as futile, because the NWW, Cavalier, and Lindsay are protected by the immunity of failure to supervise and the immunity for discretionary activity.

C. Plaintiff's Motion To Amend Should Be Denied Because Plaintiff Did Not Act With Due Diligence, And If Plaintiff's Motion Is Granted, It Would Cause Undue Delay And Complications

The original Complaint in this case was filed on July 23, 2014, more than two years prior to the filing of the present motion. Plaintiff initiated an investigation into this case as early as August 10, 2014 with private detective Lou DiJoseph. (R. 2). The deposition of Joseph Cavalier was taken on February 9, 2016, and the deposition of David Lindsay was taken on February 18, 2016. (R. 3-4).

The NWW Motion for Summary Judgment, in part, argued that Plaintiffs' claims for negligence against NWW are not legally cognizable because under the New Jersey Tort Claims Act, there is no provision that provides for direct liability against a public entity for negligent supervision, nor can a public entity be held vicariously liable for negligent supervision where no employee has been found liable or even named as a defendant pursuant to §59:2-2(b).

At this late stage in the litigation, over two years after the original Complaint was filed, over eight months after the depositions of Cavalier and Lindsay, despite the Case Management Order of July 22, 2016, and after Defendant NWW has filed its dispositive Motion for Summary

Judgment, Plaintiff seeks leave to add parties in an attempt to avoid deficiencies highlighted by NWW's Motion for Summary Judgment. See, e.g., Embrey v. State, 2009 N.J. Super. Unpub. LEXIS 2097, at *40 (App. Div. Aug. 4, 2009)[3] (finding no error in the lower court's denial of the plaintiff's motion to amend that was asserted after the close of discovery in response the defendants' motions for summary judgment). Here, Plaintiff's application to amend the Complaint should be denied because:

1. it would be an exercise in futility; and,
2. Plaintiff failed to exercise due diligence; and,
3. Plaintiff's proposed amendments would cause the trial to be unduly delayed and complicated.

Cf. State Dept. of Envtl. Prot. v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 396 (App. Div. 1995) ("[I]f a claim does not arise until after a complaint has been filed, leave to amend to add that claim should be granted as of course *so long as the moving party has exercised due diligence* ***and*** *the amendment will not cause the trial to be unduly delayed or complicated.*") (Emphasis added).

[3] Unpublished case attached as Exhibit 16.

Plaintiff is attempting now to amend her pleadings rather than file an opposition to the NWW's Motion for Summary Judgment. If Plaintiff can simply avoid the dispositive motion by amending her pleadings after the close of discovery and after the reading about the deficiencies of the original Complaint in NWW's Motion for Summary Judgment, then Plaintiff would be permitted to act contrary to the Case Management Order to take an advantage, and to disadvantage NWW, which complied with the Case Management Order. NWW made a strategic and economic decision, after over two years of costly litigation with twenty-four depositions taken, with reliance on this Court's July 22, 2016, Case Management Order, to file a Motion for Summary Judgment at the close of Plaintiff's discovery. NWW had no reason to conclude that any new evidence produced in remaining discovery would justify any new claims or the addition of new defendants, and NWW was correct. The purported "new" evidence now being used by Plaintiff to justify the amendments was seven months old at the time of the close of Plaintiff's discovery, and approximately eight months old at the time Plaintiff filed the present Motion to Amend, which was nearly a month beyond the close of Plaintiff's discovery. Plaintiff is now attempting to use NWW's Motion for Summary Judgment to take an

advantage, and to disadvantage NWW. It is quite clear that deficiencies in the Plaintiff's case were only realized by Plaintiff following a review of NWW's Motion for Summary Judgment, not because of some delayed review of a seven or eight-month-old deposition transcript.

Moreover, after over two years of litigation and several amended case management orders, adding two additional defendants targeted by a new liability theory (under NJSA 59:3-11) would require additional extensions of the discovery period. Mr. Cavalier and Mr. Lindsay may require legal representation, they may move to serve their own written discovery, they may be required to answer written discovery, and they may even move to depose witnesses that have been previously deposed. So far, approximately twenty-four (24) depositions have been taken in the original case. (R. 11). Plaintiff argues that a review of the deposition testimony of Cavalier and Lindsay gives rise to a claim of negligent supervision. The deposition of Cavalier was taken on February 9, 2016 and the deposition of Lindsay was taken on February 18, 2016. (See, R. 3-4). Now, nearly a month after NWW filed its motion for summary judgment, eight months after the Cavalier and Lindsay depositions were concluded, and well over two years since Plaintiff filed her Complaint, Plaintiff took notice of these two deposition

transcripts and wants to now pursue a claim of negligent supervision against two new Defendants. Plaintiff's lack of diligence in naming employees as defendants would also unduly delay the litigation and, in turn, would unduly prejudice NWW by requiring additional and unnecessary expenditures of public funds and interruption of governmental activity.

Furthermore, during the deposition of Lindsay, Attorney D'Amato states, in preface to a question, "[a]nd nobody's blaming you please, think about this whole thing." (Plaintiff's Proposed Amended Complaint, pg. 25). Lindsay may argue that Attorney D'Amato told him that he is not being blamed for the incident in order to put him at ease, and to tell him that he was not, or would not, be a defendant. Plaintiff's proposed amendment would result in Lindsay proclaiming prejudice.

Leave to amend should only be granted "so long as the moving party has exercised due diligence **and** the amendment will not cause the trial to be unduly delayed or complicated." *Cf.* State, Dept. of Envtl. Prot., supra. (Emphasis added). Moreover, "although such motions are ordinarily afforded liberal treatment, *the factual situation* in each case must guide the court's discretion, ***particularly where the motion is to add new***

claims or new parties late in the litigation." Bonczek, supra., see also, Notte, supra., (decisions on motions for leave to amend "must be made 'in light of the factual situation existing at the time each motion is made' "). All of the factors outlined above provide a sound basis for this Court to deny Sandra Smiths motion to amend.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Leave to Amend the Complaint should be denied.

Respectfully submitted,

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Dated: November 10, 2016

A. Michael Barker, Esquire
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Attorney for Defendant, City of North Wildwood

SANDRA SMITH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF HER LATE HUSBAND, GEORGE BRADLEY SMITH,
Plaintiff,
v.

CITY OF NORTH WILDWOOD, COUNTY OF CAPE MAY, STATE OF NEW JERSEY, JOHN DOE, MARY DOES, ABC PARTNERSHIPS, and XYZ CORPORATIONS,
Defendants.

BRANDY SMITH, by her guardian ad litem, SANDRA SMITH,
Plaintiff
v.

CITY OF NORTH WILDWOOD, COUNTY OF CAPE MAY, STATE OF NEW JERSEY, JOHN DOE (1-5) fictitious names, MARY DOE (1-5) fictitious names, ABC PARTNERSHIPS (1-5) fictitious names, and XYZ CORPORATION (1-5) fictitious names,
Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO. CPM-L-331-14
CPM-L-324-16

Civil Action

CERTIFICATION OF AUTHENTICITY OF EXHIBITS

I, A. Michael Barker, Esquire, of full age, hereby certify and state follows:

1. I am an attorney-at-law licensed to practice in the State of New Jersey, the Senior Partner with the Law Offices of Barker, Gelfand & James.

I am the attorney entrusted with the handling of this matter on behalf of the Defendant, City of North Wildwood, and as such, I am fully familiar with the facts set forth herein.

2. I certify that, pursuant to Rule 1:6-6, the Exhibits attached in support of Defendant's Opposition to Plaintiff's Motion to Amend, are true and accurate copies of any reports, facts, and information exchanged in discovery; and, they are part of the record in this matter.

3. I make this Certification in support of the Defendant's Opposition to Plaintiff's Motion to Amend.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

BARKER, GELFAND & JAMES
a Professional Corporation

By: A. Michael Barker
A. Michael Barker, Esquire

Dated: November 10, 2016