

Hazel Hamrick Lee v. Florence Brown, et al.: Reaffirming Tort Claims Act Absolute Immunity For Municipal Inspectors

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On February 21, 2018, the Supreme Court of New Jersey (the “Court”) issued its ruling in Hazel Hamrick Lee v. Florence Brown, et al. (078043), an appeal that asked the Court to determine whether the City of Paterson’s electrical inspector was subject to a qualified immunity analysis for “enforcing the law” under N.J.S.A. 59:3-3 or entitled to absolute immunity for his “failure to enforce any law” under N.J.S.A. 59:3-5 or -7 of the Torts Claims Act (“TCA”). Fortunately for the municipal defendants in that action – the City of Paterson (“City”) and its electrical inspector (“Inspector”) – the Court disagreed with the rulings below and held that the Inspector and the City were entitled to absolute immunity under the absolute immunity analysis of Bombace v. City of Newark, 125 N.J. 361 (1991).

The Hazel Hamrick Lee opinion is important for municipalities and their inspectors for two reasons. On the one hand, municipalities and their inspectors can take comfort in the fact that the Court applied the TCA’s absolutely immunity provisions to the municipal defendants through its “critical causative conduct” test as articulated in Bombace. Had the Court decided otherwise, then the TCA’s absolute immunity provisions would have effectively been abrogated for municipal inspectors. On the other hand, however, the Hazel Hamrick Lee opinion is a perfect example of what potential liability municipalities and their inspectors may face should they fail or refuse to adhere to and follow their own reporting policies and procedures. To avoid such exposure, municipalities need to ensure that they have in place policies and procedures for reporting municipal violations and safeguards that compel inspectors to comply with whatever policies and procedures that are in place. This article summarizes the Hazel Hamrick Lee opinion and discusses these two (2) important points in more detail.

The Hazel Hamrick Lee matter arose out of an unfortunate fire on June 30, 2010, that took the lives of four residents and injured several others. The four estates and the injured persons sued the City, the Inspector, several other City employees, the homeowner and others. Discovery revealed that after being notified of improper wiring by the City’s Fire Department, the Inspector visited the residence, determined that the wiring did not comply with building code and advised the homeowner that the condition was extremely dangerous. The owner was issued a notice of violation the next day; but never responded. Almost four months later, the Inspector returned to reinspect the residence. Upon arriving, the homeowner told the Inspector that she had not corrected the problem. Instead of issuing another notice, the Inspector told the homeowner to repair the

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wiring in two (2) weeks and notify him when the electrician arrived. In his report, the Inspector indicated that he had reinspect the wiring, when he fact he had not.

It was undisputed in the case that if the violation had constituted an imminent hazard, the City could have terminated electric service to the house. City policy and procedure required the Inspector to notify his direct supervisor who would ultimately determine whether to shut off power to the home. The Inspector, however, failed to notify his direct supervisor because of a conflict between the two that occurred on a previous occasion when the Inspector recommended a shut-off. On June 30, 2010, the faulty wiring caused the fatal fire.

Before the trial court and Appellate Division, the plaintiffs argued that the Inspector was subject to qualified immunity, as opposed to absolutely immune, because a jury could find that the Inspector knew from his reinspection that the improper wiring constituted an imminent hazard but failed to act in good faith in seeking to shut off power to the home. In other words, the plaintiffs did not “contend that [the Inspector] failed to act; rather, they contend[ed] that in acting to enforce the law, [the Inspector] did not act in good faith.”² The trial court and the Appellate Division agreed.

The Court reversed. Relying on Bombace, the Court held that the “critical causative conduct in this case was [the Inspector’s] failure to contact [his direct supervisor] and secure an emergency power shut-off or to seek relief in court, not any affirmative action to enforce the law.”³ Therefore, it was the Inspector’s “omission, not any action taken by him, [that] allowed the problem to linger.”⁴ In other words, according to the Court, the critical causative conduct that led to the fire was the faulty wiring and not the Inspector’s lack of corrective action.

The Court’s holding in Hazel Hamrick Lee is important because the Court reaffirmed the “critical causative conduct” test as articulated in Bombace. In Bombace, the Court determined that a “failure to enforce a law” under the TCA meant non-action or a failure to act.⁵ To make that determination, the Court crafted the “critical causative conduct” test which asks “whether the critical causative conduct by government employees consists of non-action or the failure to act with respect to the enforcement of the law.”⁶ The Court also held that “conduct in a sequence of events will not convert a subsequent non-action or failure to act into affirmative acts governed by the good-faith immunity” of the TCA.⁷

The fundamental flaw in the analytical framework taken by the plaintiffs, trial court and the Appellate Division was that they all failed to identify the affirmative act of the Inspector that subjected him to qualified immunity. Had the Court adopted this analytical framework, then the TCA’s absolute immunity provisions would have effectively been abrogated for municipal inspectors. Under such approach, to defeat a claim for absolute immunity and get to a jury on a qualified immunity question, a plaintiff would only have to allege that the inspector took the

² Hazel Hamrick Lee v. Florence Brown, et al. A-4391-14T2, *16 (App. Div. June 30, 2016).

³ Hazel Hamrick Lee v. Florence Brown, et al. (078043), Slip Op. at 22 (Feb. 21, 2018).

⁴ Ibid. (emphasis in original).

⁵ Bombace v. City of Newark, 125 N.J. 361, 367-68 (1991).

⁶ Id. at 373.

⁷ Id. at 371.

affirmative act of conducting an inspection, recognized a dangerous condition and then acted in bad faith to subject. The triggering event would therefore always be the act of conducting an inspection. Such an analysis is inherently flawed though because it assumes that the act of inspecting is the basis for liability, without truly taking into account the gravamen of a plaintiff's claim against a municipal inspector. This assumption in effect forecloses the municipal inspector's ability to avail him or herself to an absolute immunity defense and renders that provision of the TCA meaningless. The Bombace "critical causative conduct" test avoids this scenario because it forces the court to analyze the true basis of the claim against a municipal inspector and the proofs in support.

With the affirmance of the Bombace "critical causative conduct" test, the Hazel Hamrick Lee opinion makes it imperative that municipal and joint insurance fund attorneys, as well as risk managers and municipal litigation control groups, evaluate and determine the gravamen of the plaintiff's claims against their municipal inspectors. If the basis of the claim is an omission or non-action, then the municipal inspector is likely entitled to absolute immunity. In other words, if the plaintiff cannot identify an affirmative act other than the act of inspection as the basis for their claim against an inspector, then the defense of absolute immunity, if applicable, should prevail.

While municipalities and their inspectors can take comfort in the outcome of the Hazel Hamrick Lee opinion, they should not lose sight of the fact that the decision could have been different if the basis of the claim or triggering event against the Inspector had been his failure to abide by the City's rules and procedures for securing an emergency power shut-off. To avoid liability, municipalities must have in place not only policies and procedures for their municipal inspectors for reporting and following up on violations and code infractions, but also safeguards that ensure that their inspectors in fact correctly performing their job duties in compliance with these policies and procedures. In other words, under the right fact pattern, *ad hoc* enforcement may very well constitute enforcing the law in bad faith. Proper training, timely reporting requirements and rigorous oversight at the management level though should avoid such a scenario and keep municipalities and their inspectors free from liability for claims of enforcing the law in bad faith.