

HENRY OKIOGAH,

Plaintiff/Appellant,

vs.

NEW JERSEY TRANSIT, NEW JERSEY  
DEPARTMENT OF TRANSPORTATION,  
STATE OF NEW JERSEY

Defendants/Respondents

SUPREME COURT OF NEW  
JERSEY

SUPREME COURT DOCKET NO.  
0908856

On Appeal from Final Order Entered  
in the Superior Court, Law Division,  
Hudson County

*Sat Below:*

Honorable Kimberly Espinales-  
Maloney, J.S.C.

Hudson County Superior Court  
Docket No. HUD-L-395-24

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**AMENDED BRIEF ON BEHALF OF APPELLANT**

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## PRELIMINARY STATEMENT

Plaintiff/Appellant Henry Okiogah (“Appellant”) files this Brief in support of his appeal of the Trial Court’s decision to deny Appellant’s Motion to Deem Notices of Tort Claim Timely Filed or, in the alternative, for Leave to File Late Notices of Tort Claim (the “Motion”). This matter arises out of a significant personal injury in which the Appellant was hit as a pedestrian by a New Jersey Transit bus on May 11, 2023. The Trial Court improperly found that Appellant’s injuries did not constitute “extraordinary circumstances” to justify his filing of a late tort claim notice outside of the first 90 days from the date of the incident.

The Tort Claim Notice Act, and the notice provisions within, were enacted in order to regulate what had previously been a haphazard and arbitrary treatment of the rule of sovereign immunity. However, the notice provisions were never meant to act as a means of eliminating meritorious claims. There has always been an exception within the Act for situations where the very condition of the injured claimant makes it impractical to file a notice of claim within ninety (90) days. That exception can be squarely applied here. The facts before the Court present a scenario of justifiably late notice based primarily upon the significant injuries the claimant suffered during the weeks and months after being hit by a New Jersey Transit bus as a pedestrian.

In the first 90 days after the incident, the Appellant was hospitalized at Jersey City Medical Center and underwent significant rehabilitation in an effort to learn to walk again. From the crash, the Appellant had a multitude of injuries, including fractures of the right L5 transverse process and right sacrum, as well as fractures to the bilateral superior and inferior pubic rami. During the first 90 days, he was wheelchair bound and went through daily physical and occupational rehabilitation, while taking substantial opioid pain medication to deal with his injuries. Appellant remained in the hospital for two weeks, followed by several months of inpatient rehabilitation. During this time, his focus was on his rehabilitation and recovery from his significant injuries.

It is unreasonable to expect the Appellant to have been able to make decisions regarding a potential lawsuit during the first 90 days after the crash when he was recovering from his injuries. His physical condition alone presents extraordinary circumstances excusing a late filing. As a result, the filing of his claim within one year, as opposed to the ninety days, sufficiently fulfills the purpose and intent of the Act notice provisions. The Trial Court's determination that the Appellant's injuries did not meet the extraordinary circumstances standard, is inconsistent with both Appellate Division precedent and a long line of cases construing the notice provisions in favor of seriously injured claimants. The Trial Court's decision should be reversed on these grounds, as it is contrary to applicable law.

## PROCEDURAL HISTORY

On October 3, 2023, Plaintiff filed his initial Motion to Deem Notices of Tort Claim Timely Filed or, in the alternative, for Leave to File Late Notices of Tort Claim (Pa12). The application was opposed by the State of New Jersey, New Jersey Transit and the New Jersey Department of Transportation. On November 14, 2023, the Honorable Anthony D’Elia, J.S.C. heard oral argument and denied Plaintiff’s application without prejudice. (Pa18). In so doing, Judge D’Elia held that the Plaintiff’s medical records from his stay in Acclaim Rehabilitation & Care Center needed to be obtained. 1TR7:11-16.<sup>1</sup> Thereafter, he instructed that the motion should be re-filed with those records to determine whether the Plaintiff’s injuries constituted extraordinary circumstances to justify the filing of a tort claim notice outside of the 90-day window from the date of the incident. 1TR9:9-16.

On January 31, 2024, the Plaintiff filed a renewed Motion to Deem Notices of Tort Claim Timely Filed or, in the alternative, for Leave to File Late Notices of Tort Claim after all of the relevant medical records were obtained and produced to defense counsel and the Trial Court. (Pa20). The application was again opposed by the State of New Jersey, New Jersey Transit and the New Jersey Department of Transportation. On March 15, 2024, the Honorable Kimberly Espinales-Maloney,

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<sup>1</sup> Oral Argument was held before the Honorable Anthony D’Elia, J.S.C. on November 14, 2023.

J.S.C. heard oral argument on Plaintiff's renewed motion, and on March 20, 2024. See e.g. 2TR.<sup>2</sup> The Court entered an Order and Memorandum of Decision denying the Plaintiff's motion with prejudice. (Pa27). In so doing, Judge Espinales-Maloney held that the Plaintiff's medical circumstances did not constitute extraordinary circumstances to justify extending the time to file a tort claim notice. Therefore, Appellant appeals from the Trial Court's Order.

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<sup>2</sup> Oral Argument was held before the Honorable Kimberly Espinales-Maloney, J.S.C. on March 20, 2024.

## STATEMENT OF FACTS

This is an action for personal injuries arising from a motor vehicle crash that occurred on May 11, 2023. (Pa1). At that time, plaintiff, Henry Okiogah was crossing the street in Jersey City, New Jersey when he was struck by a New Jersey Transit bus as a pedestrian. (Id.). He was thereafter transported to Jersey City Medical Center on May 11, 2023 and hospitalized. (Pa36). Mr. Okiogah arrived at the hospital with full spinal immobilization in place and was disoriented. (Pa45). Imaging revealed the presence of a right frontoparietal subdural hematoma, a frontal extra-axial lesion, acute fractures involving the right L5 transverse process and right sacrum, and fractures of the bilateral superior and inferior pubic rami. (Pa47). Mr. Okiogah was subsequently admitted to the telemetry unit for further management and remained in the hospital until May 24, 2023. (Pa101, Pa36).

During his time at the hospital, it was noted that Mr. Okiogah had pain in his pelvis and down his left leg. (Pa89). He required the use of a rolling walker and was only able to ambulate a couple steps at a time. (Pa97). The plan was for Mr. Okiogah to be discharged to a sub-acute rehab facility to undergo gait training, functional transfer training, patient/family training, compensatory technique education, lower extremity strengthening/range of motion and bed mobility. (Pa96).

On May 24, 2023, Mr. Okiogah was transferred to Acclaim Rehabilitation & Care Center. (Pa108). At this time, he was wheelchair bound, and had ulcers on the

bilateral lower extremities. (Pa110). He complained of pain in his pelvis and in the right thigh area where he was hit by the bus. (Pa110). During his stay at Acclaim, Mr. Okiogah was provided oxycodone every 6 hours for acute pain management. (Pa113). He was also taking propranolol for a traumatic brain injury and Eliquis for his deep vein thrombosis. (Pa123). Mr. Okiogah was noted to have wounds on the bilateral lower extremities. (Pa119). His rehabilitation plan included 5-7 days of physical therapy for ambulation/transfer training, as well as occupational therapy for activities of daily living and cognitive education. (Pa119).

Due to his injuries, Mr. Okiogah required several months of treatment, physical therapy and rehabilitation in order to learn how to walk again. Mr. Okiogah remained in Acclaim rehabilitation facility until September 13, 2023. (Pa128). As a result of being hit by a bus, Mr. Okiogah suffered severe and permanent injuries that have impacted his physical and mental state.

On September 26, 2023, after four grueling months of rehabilitation and learning to walk again, Appellant sought legal counsel to discuss claims against New Jersey Transit. (Pa16). At the time, Mr. Okiogah was informed that a Notice of Tort Claim needed to be filed. (Pa17). Until that time Mr. Okiogah had no knowledge of the 90-day limit for tort claims. (*Id.*). As such, on October 2, 2023, a Notice of Claim was filed on his behalf. (Pa4). This Notice was filed within a year from the original date of the occurrence. The underlying motion practice then followed. It remains

Appellant's position that Judge Espinales-Maloney's decision is manifestly unjust and patently incorrect given the standards for extraordinary circumstances set forth in recent Appellant Division cases. Therefore, Appellant appeals from the Trial Court's Order.

## LEGAL ARGUMENT

### POINT I: THE SUBJECT ORDER IS A FINAL JUDGMENT AND SUBJECT TO REVIEW UNDER THE ABUSE OF DISCRETION STANDARD (Pa27).

The Court in Moon v. Warrenhaven Nursing Home, 182 N.J. 507, 516-18 (2005) recommended the list of appealable orders as final include orders deciding Motions for Leave to File a Notice of Tort Claim against a public entity pursuant to N.J.S.A. 59:8-9. Although the granting of such an Order had always been considered interlocutory, for reasons of public policy it was recommended that the rule be changed.

As such, Rule 2:2-3(b)(7) now states, in relevant part that an order granting or denying motions to extend the time to file a notice of claim pursuant to N.J.S.A. 59:8-9 is appealable as of right. Accordingly, pursuant to Rule 2:2-3(b)(7), the Trial Court's Order denying the Plaintiff's motion for late tort claim notice should be considered a final judgment appealable as of right.

#### A. The Court Should Review the Trial Court's Order as its Discretion was Clearly Abused (Pa27)

The decision to grant or deny permission to file a late notice "within the one-year period is a matter left to the sound discretion of the trial court, and will be sustained on appeal in the absence of a showing of an abuse thereof." Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 146 (1988). "Furthermore, a reviewing court is to 'examine more carefully cases in which permission to file a late claim has been

denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, and any doubts which may exist should be resolved in favor of the application.” Mendez v. South Jersey Transp. Auth., 416 N.J. Super. 525, 532-33 (App. Div. 2010) (*emphasis added*) (quoting Lowe v. Zarghami, 158 N.J. 606, 629 (1999)).

Here, it is respectfully submitted that the Trial Court abused its discretion by failing to follow the clear precedent of the Appellate Division in finding that the Appellant’s injuries did not constitute extraordinary circumstances to justify his submission of a tort claim notice outside of the 90-day window from the date of incident. Furthermore, the Trial Court failed to resolve any doubts in favor of the Appellant. It is respectfully requested that this case should be heard on its merits to prevent grave injustice befalling the Appellant.

**POINT II: THE TRIAL COURT IMPROPERLY FOUND THAT APPELLANT’S INJURIES WERE NOT SUFFICIENTLY SEVERE OR DEBILITATING TO JUSTIFY THE LATE FILING OF THE NOTICE OF CLAIM (Pa32-33).**

Pursuant to the Tort Claims Act, a public entity is entitled to notice of a claim against it within ninety days of the accrual of the cause of action. N.J.S.A. 59:8-3, 8-8. Failure to file within this ninety-day period is not fatal. Upon application, under liberally-interpreted circumstances, a Court may permit filing of a claim up to a year from the date of accrual, provided the public entity has not been substantially prejudiced. These applications are made upon motion supported by affidavits “based

upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances” justifying the late filing. Id.

In 1994, the Legislature amended the Tort Claims Act to require a showing of “extraordinary circumstances,” an admittedly more demanding standard than the prior standard. Despite this change, the Supreme Court held the Tort Claims Act is not intended to act as a “trap for the unwary.” Lowe, 158 N.J. at 629. The goal is to ensure “wherever possible cases may be heard on the merits and any doubts which may exist are to be solved in favor of the application.” Id.

The standard of “extraordinary circumstances” has never been defined by the Supreme Court or the Legislature. However, Lowe, supra counsels the imprecision of the “extraordinary circumstances” standard requires each case be determined on their unique facts. To determine if extraordinary circumstances exist, “a judge must consider the collective impact of the circumstances offered as reasons for the delay.” R.L. v. State-Operated Sch. Dist., 387 N.J. Super. 331, 341 (App. Div. 2006). Extraordinary circumstances can be found based on the severity of a party’s injuries. Maher v. Cnt’y of Mercer, 384 N.J. Super. 182, 183 (App. Div. 2006).

Physical or mental conditions can qualify as extraordinary circumstances if the medical condition is severe, debilitating or uncommon. See D.D. v. UMDNJ, 213 N.J. 130, 150 (2013) (holding a medical condition can meet the “severe or debilitating” standard to permit filing of a late notice of claim).

In Maher, supra, the plaintiff suffered a burn to her arm that advanced into a staph infection. This occurred during the pendency of an unrelated litigation and her illness was communicated to that attorney via plaintiff's adult daughter while plaintiff was in the hospital. Id. at 185. After release from the hospital, she remained in poor health. Id. at 189-90. The Court held plaintiff's condition satisfied extraordinary circumstances to permit filing after ninety days and found no evidence of prejudice to the defendant.

In R.L., supra, plaintiff was a high school student who contracted HIV from the band director at his school. Plaintiff reported the conduct to his aunt (His legal guardian). After learning of the conduct, his guardian sent him to live with his adult sister for a period of time before returning to the guardian. Id. at 335. Following his diagnosis, plaintiff was "very distressed," cried every day, and rarely left his home. Id. at 336. It was noted Plaintiff "felt like he was going to have a nervous breakdown and was preoccupied with thoughts of death." Id. The Appellate Division found no abuse of discretion in the Trial Court finding of extraordinary circumstances. Id. at 341. The Court opined "similar reasons, when offered individually, were inadequate, a judge must consider the collective impact of the circumstances offered as reasons for the delay." Id.

In Mendez v. South Jersey Transp. Auth., 416 N.J. Super. 525 (App. Div. 2010), the plaintiffs' car struck a snow removal truck owned by a public entity.

Plaintiffs in this matter were the driver and his minor passenger; the minor's claims brought through his guardian ad litem. Id. at 529. The Appellate Division found extraordinary circumstances where the plaintiffs were rendered unconscious for a period of time at the crash scene, spent time in hospitals and rehabilitation facilities, and continued to suffer negative effects. Id. at 533-34. The Court cited to the instruction in R.L. that a “judge must consider the collective impact of the circumstances offered as reasons for the delay.” R.L., supra at 341.

Finally, in Jeffrey v. State, 468 N.J. Super. 52 (App. Div. 2021), the Appellant demonstrated extraordinary circumstances to justify the filing of a late notice of claim. Similar to the instant case, the Appellant had been in a motor vehicle crash that left him with significant injuries and months of rehabilitation and treatment. Id. at 54, 56. The Appellate Division noted that clearly, the “plaintiff’s emotional state was, at the very least, extremely delicate and highly fragile” and that “it would thus be beyond insensitive to impose a duty on plaintiff to seek legal advice through surrogates composed of family members or friends, during this life-altering adjustment period.” Id. at 58. The Appellate Division also noted that the “Supreme Court has emphasized the need to examine ‘more carefully cases in which permission to file a late claim has been denied than those in which it has been granted, to the end that wherever possible cases may be heard on their merits, *and any doubts which may exist should be resolved in favor of the application.*’” Id.

In the present case, the Appellant has made clear that his injuries were significant. He sustained life-altering injuries when he was hit by a bus, which left him with a multitude of fractures requiring him to learn to walk again. He also suffered a subdural hematoma and cranial lesion, and took medication for a traumatic brain injury. He was participating daily in physical and occupational rehabilitation with specific goals of learning how to function and re-learning activities of daily living. He required the use of daily oxycodone to cope with his pain and was wheelchair bound in the hospital and for much of his stay at Acclaim Rehabilitation. Throughout the first 90 days of his treatment, it is uncontroverted that the Appellant was coming to terms with his new life. It is self-evident that seeking an attorney to investigate the legal intricacies of a potential lawsuit was not among his most pressing concerns during these emotionally difficult times. Upon his release on September 13, 2023, the claimant promptly sought legal counsel and a tort claim notice was filed.

In light of this, the Trial Court abused its discretion by failing to fairly evaluate the totality of the circumstances surrounding the Appellant in addition to his debilitation condition from the crash. In reaching her determination, Judge Espinales-Maloney relied on medical records from Acclaim Rehabilitation demonstrating that Plaintiff was not cognitively impaired, and was alert, oriented and verbally responsive. She held that the “Plaintiff was not cognitively impaired to

the point of being unable to make a telephone call to an attorney or reaching out to another individual outside the facility to search for an attorney on his behalf.” (Pa.). However, the fact that the plaintiff could communicate is immaterial. If the test was one of communication, then only an injury that results in a debilitating mental condition - such as a coma or loss of memory - could relieve a plaintiff of their obligation to file a notice of claim. This is clearly not the intention of the Tort Claims Act. Furthermore, this does not negate the fact that the Plaintiff was recovering from a significant injury after being hit by a bus.

Regardless of whether the Appellant was able to speak or understand, he was still learning to walk again as is evidenced by his daily physical and occupational therapy, and his focus was undoubtedly on his medical rehabilitation. His injuries were significant enough to disrupt his lifestyle and his normal daily activities. He was forced into a medical emergency which necessitated four months of hospitalization and rehabilitation, none of which was by his own choosing.

It is respectfully submitted that the Trial Court failed to consider the fragile mental state of the Appellant following a life-altering incident. Through the severe and debilitating injuries sustained, and the intensive treatment received through, and beyond, the 90 days following the crash, it is respectfully submitted that the Appellant has met his burden of showing that extraordinary circumstances exist.

**POINT III: THE TRIAL COURT'S RELIANCE ON THE ABILITY OF THE PLAINTIFF'S FRIENDS AND FAMILY TO FILE A TORT CLAIM NOTICE ON HIS BEHALF WAS IMPROPER (Pa33-34).**

In the Trial Court's Memorandum of Decision denying the Appellant's motion, reliance was improperly placed on the Appellant's ability to have a friend or family member seek out legal counsel on his behalf. Specifically, during his stay in the rehabilitation facility, there are medical records indicating that the Appellant was visited by a girlfriend. Judge Espinales-Maloney held that the Appellant had a person from outside the medical facility who could have assisted him with an effort to seek legal counsel. This reasoning was incorrect for several reasons.

First, there was no indication that any of the individuals assisting the Appellant had been appointed as a legal guardian. Thus, those individuals were under no legal obligation to file a notice of claim on behalf of the Appellant.

Second, there is no rule, statute or case that stands for the proposition that the ability of a third party to contact a lawyer on a plaintiff's behalf functions as a check on the extraordinary circumstances. To do so would functionally mean that no plaintiff could ever meet the extraordinary circumstances standard because someone could always file on the plaintiff's behalf.

Third, the fact that the plaintiff could communicate is immaterial. As set forth previously, if the test was one of communication, then defendant's position would be that only an injury that results in a debilitating mental condition such as a coma

or loss of memory could relieve plaintiff's obligation to file a notice of claim. This result runs afoul of the aforementioned case law.

Fourth, the Trial Court's reasoning creates a disincentive for family and friends to help when individuals are recovering from injuries for fear that they are taking on additional legal obligations if plaintiff were to ask. It would not legally bind the person to do so and would create an untenable position if no one around the plaintiff is willing to assist the plaintiff in contact a lawyer.

Effectively, the Trial Court erred like the motion judge in Jeffrey, supra, by imposing a duty on the Plaintiff to use his girlfriend as a surrogate to reach out to an attorney. As noted in Jeffrey, supra, "it would thus be beyond insensitive to impose a duty on plaintiff to seek legal advice through surrogates composed of family members or friends, during this life-altering adjustment period." Id. at 58. Similarly, just because the Appellant's girlfriend visited him during his stay at the rehabilitation facility, this should not be used as a sword against him for not filing a tort claim notice within the first 90 days of his injury.

**POINT IV: THERE IS NO PREJUDICE TO DEFENDANTS (Pa30).**

Finally, there is no proof to justify a claim of undue or substantial prejudice on behalf of the Defendants. It is well recognized that delay alone does not give rise to an assumption of prejudice. Kleinke v. Ocean City, 147 N.J. Super. 575, 581 (App. Div. 1977). Here, all of the relevant records have been maintained and are equally

available to the Defendants, if not more so. Since presumably a state employee drove the New Jersey Transit Bus that hit the Appellant, there is no reason why the Defendants would have suffered any delay in interviewing the individual and investigating the matter. There is also no evidence to suggest that information pertaining to the crash is unavailable to the Defendants. Therefore, there exists no prejudice to the Defendants should the Court grant the requested relief.

### CONCLUSION

It is clear that Appellant had severe and debilitating injuries that prevented him from filing timely Tort Claim Notices during the “relevant period” he was unable to perform rudimentary tasks. Further, Appellant operated within the proper diligent framework when he met with counsel a year and a half before the expiration of the statute of limitations for a traditional personal injury claim. Once the possibility of public entity involvement became known, Appellant acted as diligently as possible under the circumstances. Therefore, it is respectfully requested this Court enter an Order reversing the Trial Court’s Order.

Respectfully Submitted,

*s/Robert J. Banas*

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Dated: May 21, 2024

Pursuant to R. 2:12-7(a), the Petition represents a substantial question and is filed in good faith and not for purposes of delay.

*s/Robert J. Banas*  
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Dated: July 10, 2025